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British Columbia
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Submission to:

RULES REVISION COMMITTEE

PROPOSED FAMILY RULES OF THE BC SUPREME COURT

Prepared by

Legal Services Society of British Columbia

January 2009

The Legal Services Society welcomes the opportunity to provide comments on the proposed family rules of procedure. It is hoped that these comments and recommendations will be helpful in drafting rules that are useful and practical for those who require access to the Supreme Court of BC.

The Legal Services Society of BC is the non-profit organization that offers legal aid services, which range from legal information to advice and representation. Our mandate is to help people resolve their legal problems and facilitate access to justice, with priority given to low-income British Columbians.

Clients may receive one or more services to help them resolve their legal problems. Our services include:

- legal information provided by legal information outreach workers and LawLINE staff, and through print materials and the Web, such as the family law website;
- legal advice and referrals provided by LawLINE staff, duty counsel, and advice counsel;
- advice services for advocates serving clients (CASL);
- circuit court duty counsel services limited to criminal and family law;
- the Brydges Line, a 24-hour telephone advice services for detainees; and
- legal representation referrals to private bar lawyers or staff lawyers for criminal, immigration, and family cases (eligibility for which is assessed through an intake process).

GENERAL COMMENTS:

Our comments are from the perspective of a provider of legal services to poor and low income British Columbians with family law problems involving children. Our clients face multiple challenges. Many are non English speaking, belong to a cultural minority, have physical and/or mental health issues, are traumatized due to domestic violence, are involved in high conflict family disputes, or have children with special needs. All these clients need speedy relief to stabilize the family situation, including restraining orders, custody/access and the settlement of financial arrangements. Property issues can be very complex, due to an underlying power imbalance between the parties, offshore property, or unreported income and assets. Our clients are overwhelmed by their life circumstances. They need a court process that is understandable and makes it easy for them to tell their story and obtain just relief.

Many Supreme Court litigants are not eligible for legal aid services or if eligible exhaust the services and are forced to proceed unrepresented. We have legal information and short advice services, such as duty counsel, to assist unrepresented litigants however due to funding constraints these services are very limited. LSS strongly supports new Family Rules that are designed to make British Columbia's family courts more accessible and affordable. We agree with the Family Justice Working Group's recommendations to draft new Family Civil Rules that:

- promote a non-adversarial approach to the management of conflict,
- encourage early resolution,

- provide enhanced information and advice to parties at the beginning of the process, and
- allow for a more economical resolution of family matters.

The Legal Services Society strongly supports the objects of the proposed new rules to achieve speedy, just, and proportionate court proceedings. There is no question that simplified court rules will streamline the process for both lawyers and self-represented litigants, reducing the time and cost of litigation and improve access to justice.

While the proposed rules attempt to reduce the complexity of civil procedure and provide tools to help judges and court administration staff manage cases more efficiently, from our perspective, further changes are required if we are to succeed in making the litigation process simpler and more accessible to all litigants.

Cross-referencing to Civil Rules

Throughout the rules there are many instances of significant cross-referencing to the Civil Rules of Procedure and to other statutory sources. We believe the family rules should be enacted as a complete code of procedure with no references back to the Civil Rules and only minimal references to other statutes. Creating a single code of civil procedure would make the family rules more accessible to lay litigants. As well, over time the interpretation of the Civil Rules and Family Rules may diverge, given their different objectives, which would make the sharing of common rules even more confusing. We note that the proposed rules contain fewer cross-references than the concept draft; however, we believe there are still many instances of cross-referencing that should be eliminated.

Plain Language

The Family Justice Reform Working Group recommended that the Family Rules should be easy to understand and easy to use. In our view, this has not been achieved. Many of the draft rules are expressed in complex, unfamiliar language that could benefit from plain language editing. It would be helpful if the rules used simple, clear and direct words and avoided complex sentence structure. We believe words such as “discovery”; “requisition”; “allegation of default”; “relief”; “citation”; “material fact”; etc. should be avoided. Instead, plain language equivalents should be used.

Court Management/Court Resources

To ensure the rules work well, the court may wish to employ innovative case management systems to organize court files. We see this as an opportunity to use computer systems to reduce the need for repeated copying of documents and materials. Many self-represented litigants spend a great deal of time making copies of documents for court proceedings.

A computerized case management system could ensure all litigants, judges, and court staff are aware of the history of a case and are able to quickly access file materials.

In addition, we would like to see the court introduce a new system so that uncomplicated Court Orders can be readily produced by the clerk, at the time the Order is pronounced. Many lay litigants spend an enormous amount of time drafting court orders that are often bounced by the registry.

Mediation Training

We welcome the introduction of alternative dispute resolution processes in the proposed rules. We believe that judges and masters assigned to Judicial Case Conferences should be mediation specialists in family law. We recommend that these judges and masters have training in mediation skills and family dynamics, and the skills to screen for power, control, and abuse issues. In addition, we'd like to see mediation sessions conducted in mediation rooms not in court rooms. This will put participants at ease and encourage an open, relaxed exchange between parties.

Costs

We recommend that the rules allow the court to make orders for costs throughout the proceedings and not limit the making of cost awards at the conclusion of the matter. By allowing costs to be awarded throughout the matter, the court may encourage behaviour that is consistent with the objectives of the rules. Costs awarded at the end of the proceeding do not have the desired impact of altering behaviour.

In addition to awarding costs, the court should have other mechanisms available to ensure the objects of the rules are followed. For example, if the court finds an applicant abused court processes and the other party is not represented, a fine or penalty may be more appropriate than costs since an unrepresented litigant incurs minor costs.

Guide to the Rules

We recommend that a comprehensive plain language guide be produced to assist lay litigants with the new rules. We encourage the court to work with public legal education and information (PLEI) providers, such as ourselves, to develop a comprehensive public legal education plan. This should include the production of plain language guides, step-by-step guides to procedure and on line interactive forms completion. The Legal Services Society and other PLEI organizations can play a pivotal role in developing these materials.

More Funding for Supreme Court Duty Counsel

We see the need for litigants in Supreme Court to have increased access to legal information and advice services to help them to advance their case properly and arrive at a just, fair and early resolution of their family matters. Given LSS's limited financial resources, LSS is not able to serve all unrepresented Supreme Court litigants. LSS would welcome the opportunity to partner with the Supreme Court to provide an enhanced Supreme Court duty counsel project. For example, we believe that short legal advice services at, and before, JCCs may result in more matters resolving at this stage or may streamline future litigation.

SPECIFIC COMMENTS

PART 1 – INTERPRETATION

Rule 1-1 Interpretation

We recommend the term “definitions” instead of “interpretation” since it is more familiar to lay litigants.

We recommend that all definitions found in the rules be located in this section so they are easy to locate.

We recommend that terms used throughout the rules, such as “serve”; “personal service”; “ordinary service”; “ trial brief”;” “trial record”; etc. be defined in this section.

Rule 1-2 Citation and Application

We recommend that the terms “citation” and “application” be replaced with plain language terminology. Though it is common for citation and application sections to appear at the beginning of rules or statutes, we recommend that they appear at the end of the rules. In that way, the rules flow from definitions to objects.

Rule 1-3 Object of Rules

The objects as stated in the rules are a positive change. While we support the introduction of the notion of proportionality, we recommend that the list of factors be expanded to include a reference to conducting the case in ways that are proportionate to the family dynamics, recognizing power imbalances and violence where those situations exist. In addition the court should always balance the objective significance of the issues in the case and the amount of court resources required to resolve the issues In this way the court can insure matters that are not significant are not using up court resources..

We question how the courts will interpret “b) the family’s financial resources”. We propose that the rule be clarified to ensure that this is not applied in such a way as to limit access to the court by litigants of modest means.

Rule 1-4 Furthering the Object of the Rules

The duty on the court to further the object of the rules by actively managing family law cases gives judges and masters sweeping powers over process. This makes it all the more important that the rules be easy to understand and that legal information and advice services be available to unrepresented litigants at the outset and throughout the process.

We recommend that subsection (3) Duties of Parties, include cost consequences for a party not acting in accordance with the objectives of the rules. Having mechanisms that allow the court, during the course of a case, to make costs awards may influence a party's behaviour. Continuing to award costs at the conclusion of a matter loses the opportunity to enforce the objects of the rule at an early stage of the proceedings. In addition, for some litigants, who are abusing the court process and not acting in accordance with the objectives, it may be appropriate to allow a judge to put the litigant on a short leash; for example, to require the litigant to get court approval before a future application is permitted to proceed.

A significant number of our clients have experienced violence within the family and face an unequal power relationship with the other party. Sometimes they are faced with a party who uses the litigation process to exploit this power imbalance. These clients need to be protected by procedures that can identify these problems and properly address them.

PART 2 – JOINT APPLICATIONS

Under the current draft Rule 2-2, if one party to a joint application withdraws their application, the application continues and the withdrawing party can file a response or counterclaim.

We recommend that if one party to a joint application withdraws, the joint application should be discontinued and either party can file a new application. The remaining party should not be forced to continue with the relief in the joint application or amend the application. It would be simpler to dismiss the joint application and allow either party to start a fresh application.

We are concerned that as currently drafted the remaining party might be left with an application that they agreed to only in order to facilitate an agreement, but would not want to continue with it if the other party withdrew their support.

Part 3 – HOW TO START AND DEFEND A FAMILY LAW CASE

We recommend deleting the word "defend" in the title and replacing it with "respond to," as "defend" is not used in this rule.

We recommend that Rule 3 follow Rule 4. Rule 3 deals with the exceptions rather than the most common situations and would be better situated, as part of, and at the end of, Rule 4.

PART 4 – FAMILY LAW CASES COMMENCED BY FILING A NOTICE OF FAMILY CLAIM

Time limits

We note that the proposed rules now require a party to file and serve a response to a notice of family claim within 30 days. We believe the 30-day time limit is fair and an improvement over 30 days to file plus 21 days for service, as stated in the concept draft rules. A 30-day time limit is sufficient to allow a party to prepare and file a response and is also consistent with the rule for filing a financial statement in the Child Support Guidelines. Since a

response must include financial information, in certain circumstances, it is advantageous to make the time limits in the rules consistent with the Guidelines.

We recommend that the court registry be able to provide a convenient, free mechanism for a party to use to determine whether a Response has been filed. This would enable litigants to easily check to see if the other party filed a Response.

The rules should make it clear that a Judicial Case Conference may be requested at any time as long as the date for the conference is set at least 30 days after a party has filed their originating document. This would enable litigants, in emergency situations, to convene a Judicial Case Conference at the earliest possible opportunity.

PART 5 – FINANCIAL DISCLOSURE

Rule 4-5 (1) Interpretation

We recommend that the definitions found in this section be moved to the definition section in Part 1 (Interpretation).

Rule 4-5 Financial Disclosure

Currently there are multiple financial disclosure forms in use in family matters including Family Maintenance Enforcement Act forms, Provincial Court forms, and Supreme Court forms. It is not unusual for a litigant to complete several of these forms in the course of their family law matter.

We recommend that the forms be harmonized so that one form is used for all proceedings. If specific additional information is required in Supreme Court matters but not required for other purposes, the form could contain optional sections to be completed only in Supreme Court cases.

As the rule is currently drafted, it is difficult for a lay litigant to ascertain what financial information needs to be produced. To comply with this rule, a lay litigant would have to have to have an understanding of the Child Support Guidelines requirements regarding financial disclosure.

We recommend that references to the guidelines be deleted and a description of the circumstances where financial disclosure is required be used instead. We recommend the current rule specify more clearly who has to file what financial information. This maybe best expressed in a chart format.

PART 6 – SERVICE

We believe the terms “personal service,” “ordinary service,” and “service” are confusing for lay litigants, as they can appear interchangeable and the legal distinction between the terms may be lost.

We recommend the use of the terms “personal service” and “delivery” to reduce confusion about service requirements.

Where the word “serve” is used in the rules, we recommend using the term “personal service” or “delivery” so that the method of service is clear. A chart format may be helpful in articulating service requirements.

Rule 6-1

We question whether lay litigants will understand what is meant by an “accessible address within 30 kilometres of the registry” and recommend that this terminology be replaced with simpler language.

We recommend that the rule regarding personal service come before the rule on ordinary service. We are concerned that lay litigants will read the Rule 6-2 and assume service may be by ordinary service for all documents.

Rule 6-2(6) If no address for service is given

This sub-rule allows ordinary service of documents on a lawyer “acting for a party in a case.” We are concerned that this sub-rule may cause problems for parties using unbundled services and for the lawyer assisting them. A lawyer that may be assisting a party but not acting for them in the sense of being a solicitor of record, may end up being served with documents. The sub-rule makes no reference to a lawyer having been named in a claim, response, or counterclaim as solicitor for a party, or having been required to file a Notice of Appointment of Solicitor.

We recommend that the reference to a “lawyer acting for a party” be changed to “a lawyer who has provided his or her address as the address for service, and has not filed any document with the court cancelling that address for service”.

Rule 6-5 Service outside British Columbia

We are concerned that lay litigants will find this rule very confusing. Sub-rule (1) refers to three acts; The Court Jurisdiction and Proceedings Transfer Act, The Family Relations Act and the Divorce Act. We recommend that all cross-referencing be deleted and the circumstances when service outside BC without leave is permitted be articulated.

Use of both the terms “outside British Columbia” and “abroad” appear to be used interchangeably and may lead to confusion. If the terms are interchangeable we recommend that only one term be used.

In addition, we recommend that the service of documents for out of province parties be made by ordinary mail to the physical address for service provided by out of province parties *and* by such other means as email, postal box, or fax if they choose to provide such other addresses for service.

Rule 6-6 Proving service

This sub-rule requires that proof of "ordinary service" be provided by filing an Affidavit of Service or by the person filing a response. This requirement may present a challenge and added expense for lay litigants. We question whether an Affidavit of Service is necessary.

We recommend the rule be changed to read "Where required to be proved, service of any documents served by ordinary service is proved by filing an Affidavit of ordinary service or a written acknowledgment of receipt." In this way the court can decide if service must be proved. In many cases we anticipate proof will not be necessary.

PART 7 – AMENDMENTS OF DOCUMENTS AND CHANGES OF PARTIES

Rule 7-1 (4) Service of amended documents

We recommend that the rule regarding service of amended documents in subsection (4) be incorporated into Part 6 (Service) so that all issues regarding service are found in the same rule. Subsection 4 could say "for service of amended documents see Part 6 (specify sub-rule)."

PART 8– PROCEDURES FOR OBTAINING INFORMATION AND DOCUMENTS

We question whether lay litigants understand what is meant by the term "discovery." We believe that the term "disclosure of documents" is clearer and should be used throughout this part except where the reference is to a formal discovery hearing.

Rule 8-1 Discovery and Inspection of Documents

The draft rules limit discovery of documents to documents "which could prove or disprove a material fact." We are concerned that lay litigants will find it difficult to determine which documents *could* prove or disprove a material fact. They will not know what to disclose or what to ask for if presented with an inadequate List of Documents by an opposing party. Further, if the question of which facts are material changes with the dynamic facts of a family law case, it will be incumbent on the party wishing to prove the facts to make new demands for documents.

We recommend that the rule refer to documents that are "relevant and material" in resolving the matter. We think this plain language equivalent will be better understood by lay litigants.

In addition, we recommend that the court play an active role in assisting lay litigants in determining whether documentary discovery is in compliance with the rules at a given time in a lawsuit. This might occur through multiple trial management conferences. It might also be accomplished by the court providing information fact sheets setting out the types of documents that are commonly disclosed with respect to various issues.

Both parties are now required to deliver a List of Documents 28 days after service of the Response and Counterclaim. The need for a Demand for Discovery of Documents is removed. We believe that the demand was a useful mechanism since it put the opposing

party on clear notice. Without notice, we are concerned that respondents will be unaware of the requirement to deliver a list of documents and occurrences of non-compliance may increase.

If no demand is introduced we recommend the forms incorporate a clear notice to the party being served with a Claim, Response, or Counterclaim of their obligations to prepare and file both a List of Documents and Financial Statement. Without clear notice many self-represented litigants may overlook this obligation.

Rule 8-2 Examinations for Discovery

The draft rules limit examinations for discovery to 3 hours by right, 12 hours by consent, or whatever the court may allow on application.

We are concerned that this rule may be subject to abuse by obstructive parties. It is possible to exhaust three hours by providing non-responsive answers by a witness or by making multiple objections. To avoid further discovery, a party can refuse consent and force an application at which the nature of discovery questions can be probed, allowing the party to be examined a better chance to prepare. The only risk is costs, which in an action over significant assets will be a modest expense. We are concerned that the rule as drafted may result in a significant number of applications for more discovery time.

The time limitations as outlined in the rule may become a barrier to the delivery of unbundled services where counsel agrees to appear to conduct the discoveries only. If applications for more discovery time are frequent, the cost of the unbundled service will be increased more often than seems necessary.

We recommend that examinations for discovery by right be increased to 6 hours. We believe this will enable parties to have sufficient access to the discovery process and will result in fewer applications for more discovery time.

PART 9 – CONFERENCES AND MEDIATIONS

Rule 9-1 Judicial Case Conferences

We believe that the Judicial Case Conference is an important tool that can assist in achieving early resolution and more economical resolution of family matters. It is an important opportunity to promote non-adversarial approaches to conflict resolution. To make JCCs effective, it is imperative that judges and masters are trained in mediation skills and have a common understanding of the role of the JCC.

Unrepresented litigants often could benefit from independent legal advice when attending a JCC. We believe a duty counsel project designed to provide early legal information and advice could benefit litigants and the courts.

We are pleased to see that Subsections 16 (k), (r) and (u) from the concept draft have been deleted from the proposed rules. We do not think a judge at a JCC should have the power to make an interim order regarding custody as was available in the concept draft.

We recommend that the Rules allow for a party to attend a JCC by telephone or video conferencing.

Subsection 16 (e)

We support the inclusion of this subsection, which enables a judge or master to refer the parties to a Family Justice Counsellor. Many of our clients cannot afford private mediation services but do benefit from the free mediation services provided by Family Justice Counsellors. To make this section workable, we believe there will need to be increased funding for Family Justice Counsellor services. From our experience in provincial court, where Rule 5 requires the court clerk to refer an applicant and respondent to a family justice counsellor, the results have been positive. We see subsection (e) as providing a similar opportunity for parties to mediate an early resolution to their family law matters.

Rule 9-1(19) Other Judges or Masters May Hear Applications

We believe that it would be helpful, wherever practical, to have the same judge conduct all JCCs, and settlement conferences, but that a different judge be assigned to the trial or to contested motions.

Rule 9-2 Notice to Mediate

We are concerned that in some cases mandatory mediation is not viable particularly in family cases where the facts are often changing, the relationships between the parties are complex and very personal and there is a potential for power imbalance. We believe parties should not be forced into mediation of family disputes though mediation should be an available option. The rules should permit a party to opt out of mediation if they are not prepared to fully engage in the process.

If the rules continue to include mandatory mediation we believe that proposed rules should be modified.

For many of our clients the cost of mediation will be a barrier to using this form of dispute resolution. To make a full range of justice processes available to all litigants there needs to be increased funding of publicly funded mediation (such as family justice counsellors) or the capacity to charge clients for mediation on a sliding scale based on financial resources.

In addition, parties engaged in mediation need access to independent legal advice. Many litigants are not eligible for legal aid but cannot afford legal services. To make mediation work there is a need for more legal advice services for persons of modest means.

We are concerned that the mediation process may be used by one party to further a power imbalance and force the other party to participate in a process that may be against their

interests. To ensure this does not occur, mediators need to make use of the power provided to them in sub-rule 14.

Rule 9-2 (23) Other Exemptions

We recommend that additional criteria for non-attendance be added to subsection (a) to include a situation whereby one party is subject to a probation order or a term and condition of judicial interim release in a criminal matter includes a non-contact order with the other party.

A party should also be exempted from mediation where the other party has been convicted of an offence under the Criminal Code involving the other party or their children.

Rule 9-2 (27) Pre-mediation Exchange of Information

We believe that the requirement to serve a Statement of Facts and Issues prior to the mediation is not necessary. We are concerned that by reducing facts and issues to writing the parties may unnecessarily formulize positions early in the process prior to mediation. By reducing these matters to writing and sharing the written statements, the parties may become positional and debate the statements rather than focusing on interests and solutions.

We recommend that the mediator receive a copy of the notice of family claim, all schedules filed, the response and any counterclaims. During pre-mediation the mediator can canvas each parties understanding of the facts and issues.

Rule 9-2 (34) Allegation of Default

We believe the notion of default should be eliminated from this rule. We are concerned that the process of alleging default only serves to fuel the divisions between the parties and drive up the cost of litigation. We do not think it serves the objectives of the rules or assists in resolving family matters. If mediation is not successful we believe the remedy is simply to return to court and proceed with the family matter through other mechanisms.

PART 10 – OBTAINING ORDERS OTHER THAN AT TRIAL

Family law cases rely heavily on interim orders to stabalize the family's circumstances. Many cases never proceed to trial. We believe that in family cases the process to obtain orders, other than at trial, must be simple, clear, and easily accessible.

For unrepresented litigants, the current Part 9 is far too complex and document intensive. An application and an affidavit, followed by a response and an affidavit is all that should be required to set a matter down for a Chambers hearing. We believe the requirement for outlines and records should be eliminated.

We recommend that the rules applicable to the different circumstances be set out separately: without notice proceedings, interim applications, applications for summary trial,

and variation applications. With respect to the latter, we recommend that applications to vary be brought before the court by filing a simplified form and attending a mandatory JCC, before any affidavits are filed.

We recommend that parties have to file their material, setting a court date, before serving. Unrepresented litigants sometimes do not realize that unfiled documents given to them are of any consequence. While this is a significant departure from the court's current civil procedure, we believe this is consistent with the duty of active case management in Rule 1-4.

We believe that the rules regarding interlocutory proceedings should allow for flexibility particularly for unrepresented litigants The process should give greater allowance to evidence being given under oath and to have the same judge or master hear all applications.

In many locations in BC, the current Chambers practice is not amenable to court based unbundled legal advice through a duty counsel program. By the time a litigant gets to Chambers, all their material needs to be in order. If the court allowed more flexibility for lay litigants duty counsel could play a more meaningful role in Chambers matters.

PART 11 – PRE-TRIAL RESOLUTION PROCEDURES

These are largely unchanged from the existing rules. A positive change is that Notices to Admit will now be usable at interim applications as well as summary trial. While Notices to Admit are infrequently used in family litigation, they may become more popular, allowing for a shortening of proceedings. They may also become a popular unbundled service. Further, they force a litigant to organize a theory built upon material facts as part of the overall trial preparation.

This rule contains a number of references to the Supreme Court Civil Rules. We recommend that these references be deleted and the procedures that apply be articulated in the Family Rules even if they mirror the Civil Rules.

PART 12 – PROPERTY AND INJUNCTIONS

We have no comments on this section

PART 13 – TRIAL RULES

Rule 13-2 Setting a Family Law Case for Trial

Overall, we welcome these changes and believe they are a positive innovation in the rules. We support greater use of trial management processes in family law cases.

Having a requirement for the Notice of Trial to specify a trial management conference date is a positive addition.

Rule 13-2 (5)

We note that the proposed rule requires a party to promptly serve a Notice of Trial. We recommend that the rules specify a set number of days for service and not leave it to a party to determine what constitutes prompt service.

Rule 13-3 Trial Management Conference

Requiring a trial brief for trial management conferences is a positive requirement. Requiring the filing and service of the trial brief at least 7 days before the conference is an improvement over the 28 days found in the concept draft.

We believe that a trial management conference maybe more effective if scheduled 30 to 45 days before trial, not 14 to 28 days as set out in the proposed rules.

Rule 13-3(8) Orders at a Trial Management Conference

One matter that may become problematic is when the trial management judge also sits as the Trial Judge. Rule 13-3 (8) (n), which empowers the judge to deal with "any other matter that may aid in the resolution of the family law case" may cause some difficulties. Pre-trial conferences often turn into settlement conferences. Lay litigants will have difficulty being confident that a trial management judge who has heard disclosure at a settlement conference has fully disabused themselves of the information and remains impartial for trial.

We recommend that when a trial management judge is engaging in settlement discussions this be clearly identified and explained to lay litigants.

Rule 13-5 Trial Certificate

Subsection 13-5 (4)

We note that the proposed rule requires a party to promptly serve a trial certificate. We recommend that the rules specify a set number of days for service and not leave it to a party to determine what constitutes prompt service.

DIVISION 4 – COURT ORDERED REPORTS AND EXPERT WITNESS

Rule 13-8 Court Ordered Reports under Section 15 of the *Family Relations Act*

We believe that the approach to Section 15 reports as outlined in this rule is sound; however, we are concerned that the rule is not clear with regards to who is responsible for the costs of the expert. In particular, Rule 13-8(4) suggests that a party who notifies the expert to attend for cross-examination might not have to pay costs if it was necessary for the cross-examination to occur. This is different from the current practice, where a party serving a subpoena upon the Section 15 expert, must pay any professional fees associated with their attendance.

We recommend that Rule 13-8 clarify who must pay any professional fees required by an expert preparing a Section 15 report, or appearing in court.

Rule 13-9 Duty of Expert Witness

We believe that including a rule that sets out the requirement that expert witnesses are treated as officers of the court and are prohibited from being an advocate for any party or position of a party is a positive step. Given that this is a significant change, we note that it may require some time for this to be adopted by the community of experts in various disciplines.

Rule 13-10 and 13-11 Appointing Joint Expert Witnesses and Jointly Appointed Experts

We support the use of a joint expert on financial issues; however, given the adversarial nature of trial, and the long standing practice of using conflicting expert evidence, this rule may result in a large number of applications to settle a joint expert, or to appoint a further expert when one party dislikes the joint expert's report. Further, Rule 13-11 (1) requires the parties to settle various matters about the instructions to the expert. The resolving of issues may be beyond the capacity of lay litigants to address and may result in a number of court applications.

Rule 13-12(9) Jointly Appointed Experts

The requirement that parties must cooperate in providing evidence to an expert may be a further source of court applications and an increased cost barrier for low-income parties. Those parties who cannot afford an application to force better production of information to an expert may find themselves forced to explain a compromised report at trial, hoping the judge will draw negative inferences. This is a poor substitute for having all necessary facts before the expert and the court.

We recommend that disputes regarding the disclosure of information provided to an expert be settled through the case management process and that it not be dealt with by court applications.

PART 14 – COURT ORDERS AND THEIR ENFORCEMENT

We have no comments on this section

PART 15 – PETITION PROCEEDINGS

We have no comments on this section

PART 16 – OTHER PROCEDURES

We have no comments on this section

PART 17 – SPECIAL RULES FOR CERTAIN PARTIES

We have no comments on this section

PART 18 – GENERAL

We have no comments on this section

PART 19 – COURT AND REGISTRY MATTERS

We have no comments on this section

PART 20 – TRANSISTION

We have no comments on this section

APPENDIX A: FORMS

We welcome the new forms and hope the forms and instructions will be available online in a format that can easily be utilized by lay litigants.

Consideration should be given to adding a notice on forms advising litigants of legal aid services including duty counsel, and the services of Family Justice Counsellors and the new Justice Access Centres.

CONCLUSION

We believe that by adopting the above recommendations, the proposed new rules will achieve the objectives of the BC Justice Review Task Force and will improve access to justice for all members of society.

If you would like additional input or clarification of our views, please contact Rochelle Appleby, Senior Policy Analyst, Legal Services Society at 604-601-6055 or e-mail Rochelle.appleby@lss.bc.ca.