

# Consultation Paper

## Civil and Family Rule Reform

### Access to Family Law Files:

*Supreme Court Family Rule 22-8*

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#### 1. Introduction

The purpose of this Consultation Paper is to present various options for reform of access to family law files under Supreme Court Family Rule 22-8. The ability to access family law files is under review by the Supreme Court Civil and Family Rules Committee. For ease of reference, Supreme Court Family Rule 22-8 is attached as an appendix to this document.

This paper examines three potential options regarding the ability to access family law files:

- A. Change Rule 22-8 to restrict access to the entirety of family law files to parties and their lawyers
- B. Change Rule 22-8 to restrict access to reports relating to children to parties and their lawyers
- C. Do not change Rule 22-8

The Supreme Court Civil and Family Rules Committee does not endorse any particular option at this time, but invites comments from the bar, litigants, and members of the public about the specific options presented below.

#### 2. Background

Currently, under Rule 22-8 (1) (a), a party, a person authorized in writing by a party or party's lawyer, and any lawyer, even if they are not a party's lawyer, can access a family law file from the court registry without a court order.

Family law files often include sensitive information with respect to children who are not parties to the litigation and who have privacy rights in relation to their personal information. Protection of children and their privacy is an important factor when considering restricting access to court files.

The protection of the privacy of children and other sensitive information must be balanced with the open court principle. The open court principle promotes access to court proceedings for participants, the media and the public. It requires that court proceedings are presumptively open and accessible to the public. The open court principle encourages public confidence in the justice system.

Concerns have been raised with respect to the privacy interests of children and the potential for inappropriate use of sensitive information within documents such as affidavits and other materials filed in family litigation that discuss the private information of children, including reports prepared under s. 211 of the *Family Law Act*, other views of the child reports, medical reports of the children of the parties, and supervised parenting time/contact reports (“reports relating to children”). Risk of misuse of information in family law files can extend beyond children’s issues and can include other sensitive information.

Sealing orders can restrict access to family law files when they are applied for, but the requirement to make an application for a sealing order can be a barrier to access to justice, and many families do not have knowledge or resources to do so. Alternatively, a person whose access is restricted would be required to make an application to the court for access to a family law file or documents within a family law file. This too can be a barrier to access to justice.

### 3. Options

#### A. Change Rule 22-8 to Restrict Access to the entirety of Family Law Files to parties and their lawyers

- Change Rule 22-8 (1) (a) to restrict access to family law files to only: the parties and their lawyers, lawyers for children, and persons authorized by a party or their lawyer.

#### Considerations

- This option provides access to only those persons directly involved in the file.
- Others would not have access to the sensitive information in family law files relating to children or financial information of the parties without a court order.

- The focus of this option, on restricting who can access information rather than restricting the information that can be accessed, protects the privacy interests of the children, including the private information of children in affidavits and other materials beyond formal reports relating to children.
- This option also has the effect of restricting access to aspects of family files that do not engage these privacy interests. This option has a greater impact on the open court principle compared to the other options.
- This option requires an additional step for a lawyer, who is not a lawyer of a party, to access a family law file for legitimate reasons such as:
  - Review of pleadings and other documents to assist in resolving a different proceeding;
  - Use of affidavits for cross examination in a different proceeding;
  - Review of a file by duty counsel assisting a party but not on record as their lawyer;
  - Review of a file by a lawyer if a party is looking to switch counsel without yet going on the record; and
  - Defending a lawyer who has been sued for negligence in a family proceeding.
- This option will still allow lawyers or others who believe they have a legitimate reason for accessing the file to make an application to the court to gain access. Although, requiring applications may add to the time and costs of proceedings.
- Additional restrictions around access to family law files may help encourage full disclosure by the parties involved because it reduces concern that people other than the parties and their lawyers will be able to access the information. Conversely, additional restrictions might also discourage full disclosure by the parties involved because it may increase confidence that any inaccuracies will have a more limited audience, and not be available, without a court order, to other parties or the CRA for the purposes of cross examination.
- Additional restrictions around access to family law files may help encourage settlement of interim and final issues. Parties who resolve their interim and final matters by consent without contested chambers hearings or trials maintain privacy much like files that are settled by consent before a court proceeding is commenced.

- This option allows for greater protection of information relating to children that may be contained in affidavits in addition to the reports. This option also avoids the practical difficulties of creating rules to restrict access to specific documents and avoids the risk of leaving out documents that may contain the same type of information that the protected documents include.

## B. Change Rule 22-8 to Restrict Access to Reports Relating to Children to parties and their lawyers

- Rule 22-8 (1) (a) would remain unchanged and provide that any lawyer may have access to the family law file, but a further rule would be added to restrict access to reports relating to children who are not parties, to only parties, lawyers for the parties, lawyers for children or persons authorized by a party or a party's lawyer.

### Considerations

- The proposed option restricts access to specific formal reports relating to children and the sensitive information they contain relating to children who are not parties to the litigation.
- This option partially protects the privacy of children who are third parties to the litigation while minimally impacting the open court principle by allowing broader access to information in the court file not contained within specified documents. However, it does not restrict access to information about children which is included and discussed in other documents such as affidavits and attachments other than the original report itself.
- This option prevents persons who are not directly involved in the file from having access to the sensitive information in reports relating to children. People seeking access to the reports relating to children would be required to make an application to the court.
- This option presents a practical and logistical difficulty for parties and the Registry to ensure that reports that fall under the rule are not attached to or included within affidavits that contain information other than the report itself. Reports can be attached to or included within various affidavits and separating them from the rest of the file may be a difficult process and possibly outside the role of Registry staff.

### C. Do not change Rule 22-8

- Continue to allow the following people to access family law files without a court order:
  - A lawyer, whether or not a lawyer of a party,
  - A party,
  - A person authorized in writing by a party or party's lawyer.

#### Considerations

- This option maintains the status quo.
- It impacts the open court principle less than the other two options because it allows any lawyer to search the entirety of a family file but restricts everyone else from having access.
- This option minimally protects the privacy interests of children who are not parties because it allows lawyers – and in theory their clients – who are not directly involved in the proceedings to access sensitive information about children.

## Appendix 1: Supreme Court Family Rules, BC Reg 169/2009

### Rule 22-8 — Searches

#### Search of files

- (1) Unless the court otherwise orders,
  - (a) no person, other than the following, may search a registry file in respect of a family law case:
    - (i) a lawyer, whether or not a lawyer of a party;
    - (ii) a party;
    - (iii) a person authorized in writing by a party;
    - (iv) a person authorized in writing by a party's lawyer, and
  - (b) no person, other than the following, may search a registry file in respect of a proceeding under the *Child, Family and Community Service Act*:
    - (i) a party's lawyer;
    - (ii) a party;
    - (iii) a person authorized in writing by a party;
    - (iv) a person authorized in writing by a party's lawyer.

#### Electronic court docket information available

- (2) Despite any other power the registrar may have to compile and retain information, the registrar may compile and retain an index, in electronic format or otherwise, that contains the following information respecting proceedings referred to in subrule (1):
  - (a) the parties as identified in the style of proceeding;
  - (b) the case file number as set out in the style of proceeding;
  - (c) the category or type of the proceeding;
  - (d) the date the proceeding was started.

### **Access to information**

- (3) Unless the court otherwise orders, any person may, in respect of a proceeding referred to in subrule (1), have access to the information retained in the registry under subrule (2) about that proceeding.

### **Limitation**

- (4) Nothing in this rule requires the registrar to provide access to information in any form or format other than the form and format in which that information is available in the registry at the time that the request for access is made.

### **Search of exhibits**

- (5) The exhibits produced at the trial or hearing of a proceeding referred to in subrule (1) must be sealed by the registrar in a secure manner and, unless the court otherwise orders, no person other than a party's lawyer, a party or a person authorized by a party or by a party's lawyer may search the exhibits.

### **Search of agreements**

- (6) Unless the court otherwise orders, no person other than a party, a party's lawyer, a person authorized in writing by a party or a person authorized in writing by a party's lawyer may search a separation agreement filed under section 122 of the *Family Relations Act*.