Consultation Paper
Civil & Family Rule Reform
Application Process:

Supreme Court Civil Rule 8-1 and Supreme Court Family Rule 10-6
How to Bring and Respond to Applications

1. Introduction

The purpose of this Consultation Paper is to present various models for reform of the application process under Supreme Court Civil Rule 8-1 and Supreme Court Family Rule 10-6. The application process is under review to evaluate satisfaction with the significant change in process that occurred with the 2010 amendments. For ease of reference, the Civil Rules are referred to throughout this document, and former Supreme Court Civil Rules 44 and 51A are attached as an appendix to the document.

This paper examines three potential options regarding the sequence for filing and serving application materials:

1. File → Serve (Current Model)
2. Serve → File
3. File → Serve or Serve → File (similar to former Civil Rules 44 and 51A)

It also sets out additional considerations for the content of the Notice of Application, Notice of Hearing and other materials related to the application, including the following options:

1. Single detailed Notice of Application (Current Model)
2. Two stage Notice of Application (similar to former Civil Rules 44 and 51A)

The Attorney General's Supreme Court Rules Committee does not endorse any particular model at this time but invites comments from the bar, litigants and members of the public about the specific ideas presented below.

2. Sequence for Filing and Serving Application Materials

File →Serve (Current Model)

- Existing model under Supreme Court Civil Rule 8-1 and Supreme Court Family Rule 10-6.
- The Notice of Application and supporting material is filed, including a date for the appearance.
- A hearing is scheduled.

- The application respondent is served with the filed Notice and supporting material within a specified time limit before the date set for the hearing of the application.
- A person who is served and wishes to respond must do so within a specified time limit by filing and serving an Application Response.
- Applications can be rescheduled or adjourned generally by consent of all parties.
- The application hearing can be reset by requisition and with notice to the application respondent within a specified time limit before the date set for hearing.

Considerations

- All material must be prepared up front before the application is filed or provided to the other party. The process is front-end loaded and parties may become emotionally and financially invested.
- Costs for filing the application must be paid up-front regardless of whether a hearing is required.
- Investment of time and legal resources to prepare and file materials on issues that may not be opposed.
- Provides firm timelines, unilaterally set by the applicant.
- A hearing is always scheduled. Administrative burden to set and re-set applications that may not proceed.
- Application materials filed with the court become public record.
- Encourages litigants to be selective about what matters they bring applications for.

Serve → File

- The applicant would serve an unfiled Notice of Application and supporting material on the application respondent without indicating a date for the appearance.
- A person who is served and wishes to respond must do so within a specified time limit by serving the applicant with an unfiled Application Response.
- If a hearing is required, the applicant wishing to set the application for a hearing must serve a notice of hearing of application within a specified time limit before the date set for hearing.
- To set the hearing, the applicant must file the Notice of Hearing, the original Notice of Application (if not already filed), and a document indicating the relief that is to be sought at the hearing.

Considerations

- Allows parties to avoid payment of filing fees if the application does not proceed to a hearing.
- Allows parties an opportunity to discuss and agree upon a hearing date and time estimate.
- Need for adjournments and cancellations may be reduced.
- Fewer applications and materials filed will reduce the administrative burden on registry staff.
- For applications that do not proceed to hearing, materials remain private between parties.
- May be misused as a threat causing an increase in delivery and exchange of materials between parties.
- Allowing parties the opportunity to discuss and agree upon a hearing date may build in a stall tactic if a responding party delays or refuses to provide dates or an estimate.

- The unfiled document may be perceived as a draft that does not need to be actioned upon.

File →Serve or Serve →File (similar to former Rules 44 and 51A)

- This option allows a party to choose between Option 1 and Option 2. The applicant would have the option of filing then serving (Option 1) **or** serving then filing (Option 2) the Notice of Application and supporting materials.
- If the Notice of Application is being filed before being served, the date and time of hearing would be set out in the Form, and the documents must be served on the application respondent within a specified time limit before the date set for hearing of the application.
- The application respondent would have a specified time limit to serve an Application Response and supporting materials, and must first file the documents only if the Notice of Application was filed before being served.
- If the documents were served before being filed, the applicant wishing to set the application for a hearing must serve a notice of hearing of application within a specified time limit before the date set for hearing. To set the hearing, the applicant must file the Notice of Hearing, original Notice of Application (if not already filed), and a document indicating the relief that is to be sought at the hearing.
- All parties would be required to file their own materials with the court if the application is proceeding to a hearing by a specified time limit before the hearing.

Considerations

- Allows parties discretion to choose the option that is preferable for their particular issue.
- Allows parties flexibility to avoid up-front payment of filing fees if they believe a hearing may not be required.
- May provide flexibility for timelines.
- Fewer applications and materials filed will reduce the administrative burden on registry staff.
- For applications that do not proceed to hearing and are not filed, materials remain private between parties.
- Optional processes may create confusion for litigants, particularly those who are self-represented.
- The unfiled document may be perceived as a draft that does not need to be actioned upon.
- May be misused as a threat causing an increase in delivery and exchange of materials between parties.

3. Requirements for the Notice of Application, Notice of Hearing and Other Materials Related to the Application

This section sets out additional considerations for the content of the Notice of Application, Notice of Hearing and other materials related to the application, including the following options:

1. Single detailed Notice of Application (current model under SCCR Rule 8-1 and SCRF Rule 10-6)

2. Two stage Notice of Application (similar to former Rules 44 and 51A)

The Committee is interested in receiving feedback on ways that the procedure could be improved to make it more accessible and in line with the object of the rules to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Current Model – SCCR Rule 8-1 and SCFR Rule 10-6

The current model requires that the Notice of Application set out the full details of the facts, law, affidavits to be relied upon and orders sought. The maximum length for the Notice of Application is 10 pages. This is the only material that is prepared by a party.

Considerations

- Use of existing Form 32/Form F31 results in front-end loading of time and legal resources to prepare detailed application materials.
- Applicants must prepare detailed submissions before they have seen affidavit material that the application respondent relies on to oppose the application.
- The application respondent has the benefit of knowing the full argument before preparing their response.
- Unnecessarily complex and legally intensive process for self-represented litigants to manage if the application is unopposed.

Previous Model – former Rule 44 and 51A

- The Motion (Notice of Application) would set out the orders sought, a brief legal basis (rule or enactment relied upon), affidavit and other material to be relied on and the time estimate for the application.
- The Application Response would identify which items of relief sought are consented to, unopposed and opposed, provide a point form legal basis, and identify material to be relied on.
- The Notice of Hearing would then confirm which items of relief sought are consented to, unopposed and opposed and include a new time estimate.
- The parties would also be required to complete an Outline if the matter was to proceed to a hearing that detailed the relief sought at the hearing, and a more developed factual and legal basis for the relief that is sought.

Considerations

- Investment of time and legal resources to prepare at the front-end is reduced.
- Less detail in the Notice of Application may make it harder for an application respondent to respond and decide what affidavit evidence is needed to oppose an application.
- Adds an additional step for both parties to prepare more detailed materials if the matter is not resolved.

- Simpler initial application material could lead to more applications being threatened / initial materials delivered. If less time and resources are needed to threaten an application then presumably the threat will be used more often.
- Longer time to get contested matters to hearing as there are additional steps and document exchanges required prior to the hearing date.
- Complex and legally intensive process for self-represented litigants to manage if the application is opposed.

Appendix 1: Supreme Court Rules, BC Reg 221/90 in force to June 30, 2010

Rule 44 — Interlocutory Application

[en. B.C. Reg. 367/2000, Sch. s. 4.]

How interlocutory application must be brought

(1) If an application in a proceeding is authorized to be made to the court, it must be made by interlocutory application.

Interlocutory application by consent or if notice not required

(2) An interlocutory application referred to in Rule 41 (16), (16.1) or (16.3) may be made in accordance with that rule.

Notice of motion

(3) Subject to subrule (2), a party wishing to bring an interlocutory application must file a notice of motion in Form 55 at or before the time at which the notice of hearing is filed under Rule 51A.

More than one matter may be included

(4) A party may include, in one application, claims for relief in respect of more than one matter.

Service or delivery

(5) Unless these rules provide otherwise, the applicant must deliver to each party of record and must serve on each other person, other than a party, who may be affected by the order sought

(a) a copy of the notice of motion,

(b) a copy of each affidavit in support of the application that has not already been filed and served, and

(c) any notice that the applicant is required to give under Rule 18A (6).

Response

(6) A person who receives documents under subrule (5) and who wishes to receive notice of the time and date of the hearing of the application or who wishes to respond to it must deliver to the applicant 2 copies, and to every other party of record one copy, of

(a) a response in Form 124,

(b) each affidavit that has not already been filed and served on which the respondent intends to rely, and

(c) any notice that that person is required to give under Rule 18A (6).

Address for delivery

(6.1) A person referred to in subrule (6) who has not yet provided an address for delivery in the proceeding must include an address for delivery in any response delivered under subrule (6), and Rules 4 (7) to (10) and 69 (17) to (19) apply

Time for response

(7) A person who wishes to receive notice of the time and date of the hearing of the application or who wishes to respond must deliver the documents referred to in subrule (6),

(a) if the application is for final judgment under Rule 18A, on or before the 11th day after the delivery of the notice of motion, or

(b) in any other case,

(i) if the person is a party, on or before the 8th day after the later of

(A) the last date fixed for entry of appearance, and

(B) the date on which the notice of motion was delivered to the party, or

(ii) if the person is not a party, on or before the 8th day after the date on which the notice of motion was served on the person.

Reply by applicant

(8) An applicant who wishes to respond to any document provided under subrule (6) must, no later than the date on which the notice of hearing is delivered to the respondent in accordance with Rule 51A, deliver any affidavits in reply to each person who delivered a response under subrule (6).

No additional affidavits

(9) Unless all parties of record consent or the court otherwise orders, a party must not deliver any affidavits additional to those delivered under subrules (5), (6) and (8).

Place of hearing of application

(10) The application may be heard at

(a) the place ordered by the registrar under subrule (14),

(b) if an order is not made under subrule (14), the place on which all parties of record have agreed, or

(c) if paragraphs (a) and (b) do not apply, a place at which the court normally sits in the judicial district in which the proceeding was commenced.

Place of hearing must be stated

(11) The applicant must state on the notice of motion the place at which the application will be heard.

If more than one place

(12) If there is more than one place within the judicial district referred to in subrule (10) (c) at which the court normally sits, the applicant may name, as the place for hearing, any of those places.

If place of hearing is a place other than that at which the proceeding was commenced

(13) If, under subrule (12), the applicant names a place other than the place at which the proceeding was commenced, the court may, if the court considers that it was unreasonable to have made the motion returnable at that other place, make a special order as to costs and may

(a) order that the application be heard at some other place,

(b) dismiss the application, or

(c) hear the application.

Place of hearing of motion with leave of registrar

(14) If any registrar is satisfied that, due to urgency or the convenience of the parties, an application should be heard at a place outside of the judicial district in which the proceeding was commenced, the registrar may, without notice, grant leave for the applicant to do either or both of the following:

(a) file the notice of motion in some other judicial district;

(b) name as the place of hearing a place in that other judicial district.

Notice of motion must be endorsed to reflect grant of leave

(15) If the registrar grants leave under subrule (14), he or she must endorse the notice of motion accordingly.

If place of hearing is a place chosen with leave of the registrar

(16) If, in respect of an application for which leave was granted under subrule (14), the court at the hearing of the application considers that the application should not be heard at that place, the court may make a special order as to costs and may

(a) order that the application be heard at some other place,

(b) dismiss the application, or

(c) hear the application.

Transfer of file

(17) If a procedure authorized by subrule (12) or (14) is followed,

(a) the original registry must, if practicable, transfer the file to the registry where the hearing is to take place, and

(b) after the disposition of the application, the registry at which the disposition took place must return the file to the original registry.

Forwarding of materials if transfer of file impracticable

(18) If it is not practicable to transfer the file in the manner contemplated by subrule (17) (a), the registry at the place where the application is disposed of must, after the disposition, forward to the original registry

(a) all documents filed in relation to the application in the registry at the place where the application was disposed of, and

(b) any order made in that application.

Rule 51A — Setting Down Applications for Hearing

[en. B.C. Reg. 367/2000, Sch. s. 5.]

Application of this rule

(1) This rule applies to originating and interlocutory applications.

Definitions

(2) In this rule:

"applicant" means a person bringing an originating and interlocutory application;

"court day" means a day on which the registry is open;

"respondent" means a person who has delivered a response in Form 124.

Setting application for hearing

(3) An applicant wishing to set an application down for hearing must file

(a) 2 copies of a notice of hearing in Form 126,

(b) the original notice of motion, if not already filed, and

(c) 2 copies of one of the following documents setting out or marked up in such a way as to indicate the relief that is to be sought at the hearing:

(i) a requisition;

(ii) the notice of motion or the claim for relief in the petition, as the case may be.

When notice of hearing must be filed

(4) Except as provided for by subrule (12) (f), a notice of hearing must be filed,

(a) in the case of an application without notice or an application to be made by consent, at any time before the hearing of the application, and

(b) in any other case, at any time before noon on the day before the date set for the hearing of the application.

Date and time of hearing

(5) The hearing must be set for 9:45 a.m. on a date on which the court holds chambers or at such other time or date as has been fixed by the court or a registrar.

Date and time if hearing time more than 2 hours

(6) If the application is estimated to take more than 2 hours, the date and time of hearing must be fixed by the registrar.

Notice of hearing to be delivered to respondents

(7) The notice of hearing, whether filed or unfiled, must be delivered to each respondent in accordance with subrule (8) unless the application is to be made without notice or is to be made by consent.

Time for delivery of notice of hearing

(8) The applicant must deliver the notice of hearing to each respondent,

(a) if the applicant or any respondent has estimated that the time required for the hearing of the application will be more than 30 minutes, at least 7 clear days before the date set for the hearing, or

(b) in any other case, at least 2 clear days before the date set for the hearing.

Documents to be filed with the notice of hearing if application is without notice

(9) If the application is to be made without notice, the applicant must file, with the notice of hearing, the original of every affidavit, and of every other document, that

(a) has not already been filed in the proceeding, and

(b) is to be referred to at the hearing.

Documents to be filed with the notice of hearing if application is by consent, unopposed or estimated to take not more than 30 minutes

(10) If the application is to be made by consent, will be unopposed, or will be opposed but is not estimated by the applicant or by any respondent to take more than 30 minutes, the applicant must file, with the notice of hearing and other documents referred to in subrule (3),

(a) the original of every affidavit, and of every other document, that

(i) is delivered by the applicant to a respondent with respect to the application, and

(ii) is to be referred to at the hearing, and

(b) a copy of every response, affidavit and other document that

(i) was delivered by a respondent to the applicant with respect to the application, and

(ii) is to be referred to at the hearing.

Documents to be filed by respondent if application is opposed

(11) If the application will be opposed, each respondent must, before the hearing commences, file the original of every affidavit, and of every other document, that

(a) was delivered by that respondent to the applicant with respect to the application, and

(b) is to be referred to at the hearing by that respondent.

Procedure if the application is estimated to take more than 30 minutes

(12) If the application will be opposed and the applicant or any respondent has estimated that the time required for the hearing of the application will be more than 30 minutes,

(a) the applicant and each respondent must prepare an outline in Form 125 and

(i) the applicant must deliver the applicant's outline to each respondent with or after delivery of the applicant's reply affidavits and at least 7 days before the date set for the hearing, and

(ii) each respondent must deliver that respondent's outline to the applicant and to each other respondent at least 2 days before the date set for the hearing,

(b) the applicant must compile a chambers record in a ring binder or in some other form of secure binding,

(c) the chambers record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:

(i) a title page bearing the style of proceeding and the names of counsel;

(ii) an index;

(iii) a copy of the applicant's outline;

(iv) a copy of the outline of each respondent;

(v) a copy of the petition or notice of motion, as the case may be;

(vi) a copy of each response in Form 124;

(vii) a copy of every affidavit, and of every other document other than a written argument, that is to be referred to at the hearing,

(d) the chambers record may contain any of the following:

(i) a draft order;

(ii) a written argument;

(iii) a list of authorities;

(iv) a draft bill of costs,

(e) the chambers records must not contain

(i) affidavits of service,

(ii) copies of authorities, including case law, legislation, legal articles or excerpts from text books, or

(iii) any other documents unless they are included with the consent of all the parties.

(f) the applicant must file, with the notice of hearing and other documents referred to in subrule (3), between 9:00 a.m. on the second court day before, and noon on the day before, the date set for the hearing, or within any other time period set by the Chief Justice by practice direction in relation to the registry in which the filing must occur,

(i) the original of every affidavit, and of every other document, that

(A) was delivered by the applicant to a respondent with respect to the application, and

(B) is to be referred to at the hearing, and

(ii) the chambers record, and

(g) the applicant must deliver a copy of the chambers record index to each respondent by noon of the court day before the date set for the hearing.

If respondent's application is to be heard at the hearing

(13) If a respondent intends to bring on an application for hearing at the same time as the applicant's application and the applications together are estimated by any party to take more than 30

minutes to hear, subrule (12) applies and the parties must, so far as is possible, prepare and file a joint chambers record and agree to a date for the hearing of both applications.

Chambers record to be returned

(14) Subject to the direction of the judge or master in chambers, the registrar's clerk must return the chambers record to the applicant

(a) at the conclusion of the hearing, or

(b) if the hearing of the application is adjourned to a date later than the following court day, after that adjournment.

Chambers record to be refiled

(15) If the chambers record has been returned to the applicant under subrule (14) (b), the applicant must refile the chambers record between 9:00 a.m. on the second court day before, and noon on the day before, the new date set for the hearing of the application.

Filing amended chambers record

(16) If any additional affidavits are filed and delivered under Rule 10 (8) or 44 (9), the applicant must file an amended chambers record containing those affidavits.

Court file need not be brought to chambers

(17) The court file need not be brought into chambers unless

(a) the judge or master hearing the application requests it, or

(b) a party requisitions the court file, by noon on the court day before the date set for the hearing of the application, by filing a requisition to that effect.

Respondent may apply for directions

(18) If the applicant does not set an application down for hearing within a reasonable time after a respondent has requested the applicant to do so, a respondent may apply by requisition on 2 days notice for directions.