

B.C. RULES OF COURT*

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Sommaire

Faire des recherches sur les règles des tribunaux prend du temps et s'avère parfois frustrant. Le présent article s'attarde sur les règles de la Cour supérieure de la Colombie-Britannique en faisant leur historique et en donnant des conseils pratiques pour la recherche. Bien qu'il ne soit pas exhaustif, il devrait servir de point de départ aux nouveaux chercheurs, tout en portant à l'attention des chercheurs plus expérimentés des sources d'information moins connues.

The Honourable Lloyd G. McKenzie, Q.C. said: "The Marquis of Queensbury devised rules to allow gloved combat in the ring to stop short of slaughter. The Marquis did not turn his hand to rules of court, but over the centuries many other hands have been turned to creating an elaborate set of rules designed to assure that counsel stay away from one another's throats."¹ The purpose of the current rules of the Supreme Court of B.C. is "to secure the just, speedy and inexpensive determination of every proceeding on its merits."² The court rules regulate and govern the conduct of matters in court; they lay out the practices and procedures to be followed and ensure that all parties are working within the same system.

Court rules are found within the inherent jurisdiction of the court. Every court has control and jurisdiction over its own processes and procedures, even inferior courts which are limited by statute.³ If no written rule exists to cover a procedural matter, a relevant rule may sometimes be found within common law. A practice direction may also be issued by the Chief Justice if a gap or need is seen to exist. Practice directions, while also developing out of the inherent jurisdiction of the court, do not have the same force of law as a

statute or a regulation; however, litigants and practitioners are expected to comply with them.⁴

Section 92(14) of the *Constitution Act, 1867* (*British North America Act, 1867*, (U.K.) 30 & 31 Vict., c. 3) made each province responsible for its own administration of justice, including the constitution, maintenance and organization of courts, both criminal and civil and "... including Procedure in Civil Matters in those Courts." The courts were then established under provincial legislation. The current acts governing the courts in B.C. are:

Court of Appeal Act, R.S.B.C. 1996, c. 77

Provincial Court Act, R.S.B.C. 1996, c. 379

Small Claims Act, R.S.B.C. 1996, c. 430

Supreme Court Act, R.S.B.C. 1996, c. 443.

The *Court Rules Act*, R.S.B.C. 1996, c.80, s. 1 gives the Lieutenant Governor in Council the authority to make rules by regulation. While the court rules are procedural rather than substantive law, they deal with some matters, such as evidence, which would appear to be beyond their power. Despite being subordinate legislation, they have the force of statutory law and are not considered *ultra vires* when dealing with non procedural matters.⁵

DEVELOPMENT OF THE COURTS IN BRITISH COLUMBIA

Two Separate Colonies

There were originally two colonies in B.C., the first being the Colony of Vancouver's Island [sic] established in 1849. *An Act to Provide for the Administration of Justice in Vancouver's Island* (U.K.), 12 & 13 Vict., c. 48 allowed the colony to constitute its own courts. While there were earlier lower courts,⁶ the first civil superior court, the Supreme Court of Civil Justice of the Colony of Vancouver's Island, was not established until 1856.⁷ The first Chief Justice was David Cameron, who was appointed in 1853. He was a brother-

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¹ Lloyd McKenzie, "Fun in the Forum" in Jack Giles, ed., *The Splendor of the Law: Allan McEachern: A Tribute to a Life in the Law: An Anthology of Essays* (Toronto: Dundurn Group, 2001) 179 at 187.

² B.C. Supreme Court Rules, r. 1(5).

³ Peter Fraser and John W. Horn, *The Conduct of Civil Litigation in British Columbia*, looseleaf (Butterworths, Martham, ©1978) at 32.

⁴ John C. Bouck, Gordon Turriff & Janice R. Dillon, eds., *British Columbia Annual Practice 2002* (Aurora: Canada Law Book, 2002) at CA-69.

⁵ John W. Horn, "Statutory Force of the Rules of Court," (1978) 36:3 *The Advocate* 223 at 224.

⁶ David M.L. Farr, "The Organization of the Judicial System in the Colonies of Vancouver Island and British Columbia, 1849-1871," (1967) 3:1 *U. B. C. L. Rev* 1 at 5.

⁷ Jesse F. Gouge, "Civil Procedure in the Superior Courts: The British Columbia Illustration 1849-1880," (1979) 13:2 *U. B. C. L. Rev.* 338 at 340.

in-law of Governor James Douglas, and his appointment caused some questions as he had no formal legal training.

In 1858, the Colony of British Columbia was established by *An Act to Provide for the Government of British Columbia* (U.K.), 21 & 22 Vict., c. 99, which was proclaimed November 19, 1858. This new colony, while not including Vancouver Island, otherwise comprised the majority of what is B.C. today. James Douglas became governor of both colonies. On June 8, 1859 Governor Douglas enacted the Supreme Court of Civil Justice of British Columbia, to be presided over by Judge Matthew Baillie Begbie.⁸

Union of the Colonies

In 1866 the colonies merged under the *British Columbia Act* (U.K.), 29 & 30 Vict., c. 67 but the two separate court systems continued until the *Courts Merger Ordinance 1870*, R.S.B.C. 1871, No. 135. This was due to an oversight in the act merging the two colonies, which made no mention of the provision of the administration of justice in the new united colony.⁹ Not surprisingly, Chief Justice Needham on Vancouver Island and Judge Begbie on the mainland had different opinions on the supremacy of the two courts. Due to the confusion and the dispute between the two judges, it was not until the *Supreme Courts Ordinance, 1869*, R.S.B.C. 1871, No. 112 that the future of the two courts was decided. While establishing the Supreme Court of Vancouver Island, with Chief Justice Needham as its judge and the Supreme Court of the Mainland of British Columbia with Begbie appointed as Chief Justice, the ordinance called for a merger of the two courts upon the death or resignation of either Chief Justice, and the formation of a new Supreme Court of British Columbia, with jurisdiction over the entire colony.¹⁰ In 1870, Chief Justice Needham resigned his position and Matthew Begbie became the Chief Justice of British Columbia.

Confederation

On July 20, 1871 the United Colony of British Columbia joined Confederation and the *British North America Act* gave the province legislative power over the administration of justice, thus allowing the Supreme Court of B. C. to continue on as it had prior to Confederation.

HISTORY OF THE RULES

Pre-Confederation Rules of Court

The rules, like the statutory and common law of B. C., originated in England and were imported to the colonies. During the mid-19th century, England began a reform of its judicial system, starting with the *Common Law Procedure Act, 1852* (U.K.), 15 & 16 Vict. c.76 sometimes also referred to as “the 1852 English Act.”¹¹ It was considered a revolutionary piece of legislation and not only reformed civil procedure and increased the judicial remedies available to litigants but also simplified forms and eliminated ancient technicalities.¹²

The earliest known rules of civil procedure in British Columbia were the 1857 *Rules and Manner of Proceedings of the Supreme Court of Civil Justice for Vancouver's Island*.¹³ Chief Justice Cameron was responsible for their creation, though due to the similarities, it is thought that they were based upon the 1852 English Act and also the *Common Law Procedure Act, 1854* (U.K.), 17 & 18 Vict. c. 125.¹⁴ Often referred to as the 1857 Rules, they were amended on April 26, 1858 and April 3, 1860 by order of Chief Justice Cameron.¹⁵

When the mainland colony and its courts were created, rather than develop new rules of procedure, Judge Begbie adopted the 1857 Rules of the Colony of Vancouver Island.¹⁶ The 1857 Rules were published by the government in 1858, and have the distinction of being the first book to be printed on Vancouver Island.¹⁷ On March 21, 1877, the *Divorce and Matrimonial Causes Rules* were created by order of the Supreme Court.¹⁸

The “Old” Rules of Court (1880-1976)

From 1880 onwards, the rules were officially printed by the government printer and are relatively easy to track down. The *Supreme Court Rules, 1880* which came into force November 15, 1880, were the first rules not made by the judiciary. They were made pursuant to the *Judicature Act, S.B.C. 1879, c. 12, s. 17*, which gave the Lieutenant Governor in Council the authority to make court rules. As with the earlier rules, they were for the most part, copies of the English rules, as was clearly stated in the preamble: “The Rules being almost wholly copies or modifications of the English Rules, up to and including some of those of 1880, the English

⁸ *Proclamation Declaring the Constitution of the Supreme Court of Civil Justice of British Columbia*, June 8, 1859, R.S.B.C. 1871, No. 28.

⁹ Farr, *supra*, note 6 at 24.

¹⁰ Farr, *ibid* at 25-26.

¹¹ Gouge, *supra*, note 7 at 350.

¹² *Ibid* at 351.

¹³ *Ibid* at 352.

¹⁴ *Ibid*.

¹⁵ *Ibid* at 359-360.

¹⁶ *Ibid* at 361.

¹⁷ F.W. Howay, *British Columbia: From the Earliest Times to the Present*, vol. 2. (Vancouver: S.J. Clarke Publishing Company, 1914) at 659. We have been unable to locate a complete copy of the 1857 *Rules and Manner of Proceedings of the Supreme Court of Civil Justice for Vancouver's Island*.

¹⁸ *Sheppard v. Sheppard*, (1908) 13 B.C.R. 486 at 490. We have not been able to locate a copy of the 1877 *Divorce and Matrimonial Causes Rules*. However, on page 493 of this decision Judge Martin says that Order LXVIII of the Supreme Court Rules of 1890 is “... nearly word for word the *Divorce and Matrimonial Rules* passed by the judges in 1877.”

subdivisions of Orders and Rules thereafter have been followed as closely as possible.” In 1883, England revised their rules, primarily in terms of the language and the ordering¹⁹ and B.C. followed suit, revising their rules in the 1890s, although they were not completed and brought into force until January 1, 1893. The *Supreme Court Rules*, 1890 were again primarily copied from the English Rules and indicated this in a preamble similar to that of the 1880 Rules. At the same time, however, new provisions were borrowed from Ontario, marking the first step of independence away from the English Rules.²⁰ These were followed by:

<i>Supreme Court Rules</i> , 1906 ²¹	In force May 1, 1906
<i>Supreme Court Rules</i> , 1925	In force September 1, 1925
<i>Supreme Court Rules</i> , 1943	In force July 2, 1943
<i>Supreme Court Rules</i> , 1961 ²²	In force January 1, 1961

Despite these various revisions there were no major changes up until, and including, the *Supreme Court Rules*, 1943, and the rules remained essentially the same as the English Rules of 1883.²³ The 1961 revision saw the first major step away from the English Rules. They still formed the basis for the B.C. Rules, but there were many new provisions which were either local in origin or were adopted from other Canadian or even American jurisdictions.²⁴ The 1961 Rules were amended but not entirely revised in 1970, and in 1972 a consolidated looseleaf version was published by the Queen's Printer.

From 1880 onward, each published volume included the rules, appendices with forms, a general index and for the most part, the applicable order-in-council or enabling legislation. The old rules were divided into Orders and Rules. Each Order had a title and was comprised of individual rules, numbered consecutively within that Order. Marginal rule numbers were also assigned to each rule, with consecutive numbering for the whole document, starting at 1 and often numbering into the hundreds. Historical notes appeared at the end of each rule in the form of numbers in brackets, with M.R. referring to the marginal rule in the previous revision of the B.C. rules and E.R. referring to the corresponding English rule.

The “New” Rules (1976)

In 1972 *A Proposal for the Reform of the British Columbia Supreme Court Rules*²⁵ was published, which led to the formation of a Rules Revision Committee in 1973. Due to a lengthy, ongoing consultation process it was not until 1976 that the final version of the new rules was complete. The purpose of the revision was to “...streamline the rules..., to eliminate unnecessary procedures, to accommodate the realities of present practice and to write it all in clean prose.”²⁶ In reference to a particularly problematic Order and Rule number and the need to eliminate archaic or obscure references, Peter Fraser wryly commented: “In deciding whether to retain, delete or amend this, we first had to figure out what it meant.”²⁷

The *Supreme Court Rules*, 1976,²⁸ which came into force February 1, 1977, still retained parts of the English Rules, but contained many new provisions. The 1976 revision includes both the Marginal and English Rule numbers but also has parenthetical references indicating if a rule is “New.” In recognition of the need for ongoing revision, the Rules Committee became a permanent body, appointed by the Attorney General, in consultation with the Chief Justice.²⁹

Researching The Rules 1880-1976

The best known sources from this period are the books by Kowarsky and Stephens. Their first book was *British Columbia Practice*, published in 1968; it is essentially a compilation of annotations for the Supreme Court Rules. Two supplements were added later, so that the annotations cover from the beginning of the Supreme Court in B.C. to 1977. The unreported cases referred to in this text were collected together in a three volume set called *British Columbia Practice: Rules of Practice* (abbreviated R.P.) Their second book, *British Columbia Practice: Court of Appeal*, appeared in 1972 and contains annotations for the Court of Appeal Rules from the beginning of the Court of Appeal in B.C. to 1971. It also contains a paper by Judge Alfred Watts on the origin of the Court of Appeal in B.C. The text is accompanied by a two volume set of unreported decisions called *British Columbia Practice Court of Appeal Unreported Cases Known as Appeal*

¹⁹ Darrell W. Roberts, “History of the Rules of Court” in John C. Bouck, Gordon Turriff & Janice R. Dillon, eds., *British Columbia Annual Practice 1988* (Vancouver: Western Legal Publications, 1988) at xii.

²⁰ *Ibid* at xiii.

²¹ The BCCLS also has a 1912 consolidation of the 1906 Rules.

²² The BCCLS also has a 1972 and 1975 consolidation of the 1961 Rules.

²³ *Supra*, note 19 at xiii.

²⁴ *Ibid*.

²⁵ John C. Bouck and Darrell W. Roberts, *A Proposal for the Reform of the British Columbia Supreme Court Rules, 1961* (Vancouver: Foundation for Legal Research in Canada, 1972).

²⁶ Peter Fraser, “The New Rules of Court: The Background,” (1976) 34:2 *The Advocate* 117 at 119.

²⁷ *Ibid* at 118.

²⁸ The BCCLS also has a 1989 consolidation of the 1976 Rules.

²⁹ *Supra*, note 19 at xix.

Rules Precedents (abbreviated A.R.P.) (Only a few copies of the R.P.s and A.R.P.s were produced by the authors and donated to courthouse libraries.³⁰) A second edition of *British Columbia Practice: Court of Appeal* by Lazare and Fisher was published in 1978.

Another important source is the *British Columbia Reports*, published by the Law Society of B.C. It includes cases from 1867 to 1947 which can be accessed under the headings "courts" and "practice" in the digest volumes. *Power's Western Practice Digest* is also a very useful source for this time period. It contains digests of cases from the western provinces organized by subject. The first edition was published in 1921, the second in 1953 and the third in 1977. The third edition has two supplements which contain digests of cases up to 1993. The practice volumes of the *Canadian Abridgement* are also a useful source for older case law as well as current material.

In 1943 the Vancouver Bar Association began publishing *The Advocate* which contains articles about the court rules and copies of practice directions. *The Advocate* is still published today and remains a good research source.

The Current Rules in British Columbia

The Supreme Court Rules have undergone one complete revision since 1976, with the *Supreme Court Rules*, 1990 coming into force September 1, 1990. The Supreme Court Rules Revision Committee which meets regularly, receives submissions from the legal community and drafts amendments. The proposed amendments are approved by the Chief Justice and then offered for consideration of the Lieutenant Governor in Council. A list of the members of the Supreme Court Rules Committee can be found in *British Columbia Annual Practice*. The B.C. Court of Appeal also has a Rules Committee though amendments are made less frequently. The Provincial Court of British Columbia has no ongoing committee; however, the Chief Judge can strike a committee as needed.³¹

The current B.C. rules are as follows:

Court of Appeal Rules, B.C. Reg. 297/2001

Divorce Rules, B.C. Reg. 421/75

Family Relations Act Rules and Regulations, B.C. Reg. 141/79

Patients Property Act Rules, B.C. Reg. 311/76

Provincial Court (Adult Guardianship) Rules, B.C. Reg. 30/2001

Provincial Court (Family) Rules, B.C. Reg. 417/98

Provincial Court (Child, Family and Community Service Act) Rules, B.C. Reg. 533/95

Official Reporters Regulation, B.C. Reg. 222/84

Small Claims Rules, B.C. Reg. 261/93

Supreme Court Rules, B.C. Reg. 221/90

Criminal Rules of the Supreme Court of B.C. SI/97-140

B.C. Rules of Practice Respecting Reduction in the Number of Years of Imprisonment without Eligibility for Parole SOR/97-569

Provincial Court of B.C. Criminal Caseload Management Rules SI/99-104

Finding the Current Rules

The current rules can be found in a number of publications in various forms. In official form, they are published by the Queen's Printer, in an unconsolidated state, in the *British Columbia Gazette, Part II*.³² Occasionally, as in the case of the 1976 Rules, they are exempted from publication.³³ The rules are also published by the Queen's Printer in an unofficial form in two looseleaf publications, the *Consolidated Regulations of British Columbia* and *British Columbia Rules of Court and Related Enactments*.

Since 1988, the Supreme Court Rules have been published annually in *British Columbia Annual Practice*, in a bound, annotated form. Commonly known as 'the White Book,' this is the version most lawyers favour. It also includes practice directions and related acts and provides an annual snapshot of the rules throughout the years. In 1997 Canada Law Book began publishing the criminal rules in a separate volume, *British Columbia Annual Criminal Practice*. It has a similar format to the *British Columbia Annual Practice* and a new edition is published each year.

Electronic versions of the court rules are also available. B.C.'s Supreme Court and Court of Appeal rules can be found on the Internet at the British Columbia Superior Courts website at <<http://www.courts.gov.bc.ca/>> along with current practice directions. Some Provincial Court rules and applicable practice directions can be found on the lower court's website at <<http://www.provincialcourt.bc.ca/>>. The Queen's Printer provides both free (<<http://www.qp.gov.bc.ca/statreg/>>) and pay (QP LegalEze at <<http://www.qplegaleze.ca/>>) access to the rules via the *Consolidated Regulations of British Columbia*. All of these sources vary in their currency. In addition to the Internet, there are commercial electronic versions such as those on QuickLaw and Lexis and Canada Law Book's *B.C. Statute Service*.

Updating and Tracing Changes

Updating the current rules is relatively easy. The B.C. Superior Courts' website usually incorporates amendments into their version of the rules on the day they come into force. Most major amendments do not come into force on deposit, so they are often available in print before they come

³⁰ H.A. Stephens. "Letter to the Editor," (1973) 31:4 *The Advocate* at 252.

³¹ Gordon Turriff, "Why Are There Rules of Court?" *News & Views of Civil Justice Reform* (Fall 2002) 15 at 17-18.

³² Rules made under provincial enactments are contained in *B.C. Gazette, Part II*; the federal rules that apply to British Columbia can be found in the *Canada Gazette, Part II*.

³³ Exempt from publication under Order in Council 1627, dated May 27, 1976. Amendments to the 1976 Supreme Court Rules, B.C. Regs. 634/76, 635/76 and 517/79 were also exempted. BCCLS has copies of these regulations.

into force. Check the *Regulations Bulletin* < <http://www.qp.gov.bc.ca/statreg/bulletin/> > for recent amendments.

Tracing the history of the rules is not as easy. The sources used depend on the time period that is of interest. The index in the *Consolidated Regulations of British Columbia* lists amendments to the current rules only. For example, it lists amendments to the Supreme Court Rules from 1990 to the present. The B.C. Courthouse Library has prepared a table of amendments from the 1970s to the present, which will be on the library's website <<http://www.bccls.bc.ca>> in the new year. To go back further in time use the historical notes and tables of concordance in consolidations of the rules and the annual indexes in the *B.C. Gazette Part II* back to 1958 and in the *B.C. Gazette* before 1958.

Researching the Current Rules

One of the most often used sources is *The Conduct of Civil Litigation in British Columbia* by Fraser and Horn, which focuses on the Supreme Court of B.C. and is organized by subject. It discusses the rules and includes references to case law and commentary. The other main source is *British Columbia Practice*, 2nd edition by McLachlin and Taylor. This set takes over where Kowarsky and Stephens left off and is organized by rule and also includes commentary and references to cases.

In addition to the annotated paper sources already mentioned, there are a number of other commercial publications which are quite useful for noting up court rules. *The Rules Citor for the B.C. Supreme Court Rules*, a two volume work which spanned 1977-1987 and 1988-1995; it was continued by the *British Columbia Court Rules Citor* which covers from 1988 to date. There is also *Rules Judicially Considered*, originally a part of the *Canadian Abridgment*. Law reports are also very useful for noting-up; the indexes to various subject and regional law reports such as *Carswell's Practice Cases* and *British Columbia Law Reports* contain sections for "Rules Considered."

Like everything in life the court rules do not operate in isolation. The following B.C. statutes may come into play:

Class Proceedings Act, R.S.B.C. 1996, c. 50
Court Order Enforcement Act, R.S.B.C. 1996, c. 78
Court Order Interest Act, R.S.B.C. 1996, c. 79
Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Evidence Act, R.S.B.C. 1996, c. 124
Family Relations Act, R.S.B.C. 1996, c. 128
Interpretation Act, R.S.B.C., 1996 c. 238
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241
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Law and Equity Act, R.S.B.C. 1996, c. 253
Limitation Act, R.S.B.C. 1996, c. 266
Negligence Act, R.S.B.C. 1996, c. 333.

The court rules in other Canadian jurisdictions and in England may be the same or very similar to those in B.C., so authorities from other jurisdictions may be useful.

The British Columbia Supreme Court Rules have a long

and interesting history, which could easily fill many more pages. Hopefully, this brief look at them will provide researchers with a starting point for locating and researching both old and new court rules.

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