Introductory Concerns

Object of Rules

<u>**Rule 1-3**</u>
- just, speedy, and inexpensive determination of every proceeding on its merits
  - proportionality: balance the amount involved in proceeding, importance of disputed issues, complexity of the proceeding

Kim v. Lin: Proportionality is the overarching theme in the application of all other rules

Rule 1-3 contains the object of the civil rules, which is to ensure the just, speedy, and inexpensive determination of every action on its merits. The rules are meant to balance the amount involved in the proceeding, the importance of the disputed issues, and the complexity proceeding (2). Proportionality of these three considerations is the overarching lynchpin in the application of all rules (Kim). The thrust of proportionality is directed to steps and processes in the litigation itself (Stapleton). According McEachern CJ, there is an underlying tension in the entire court process because proportionality balance the two goals of litigation: to secure a just result through the adversarial process and to reduce cost and timeliness. Proportionality allows the court to tailor the process to each individual case because not every case will require the entirety of the tools that are available.

Professional Code

<u>**Chapter 2**</u>
- Canons of Legal Ethics
  - Duties to state, courts, client, other lawyers, oneself
  - Duty of integrity
  - Duty to uphold standards and reputation of legal profession

<u>**Chapter 5**</u>
- Lawyer as advocate: must represent client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect
  - 5.1-2: no abuse of process
  - 5.1-5: courteous and civil to tribunal and everyone else

Interpretation and Limitations

<u>**Rule 1-1**</u>
action: proceeding started by NCC

petition proceeding: proceeding started by petition

pleading: NCC, response to civil claim, reply, counterclaim, response to counterclaim, third party notice, response to third party notice

<u>**Rule 22-4**</u>
(2) court can order extension or truncation of time period, can also extend by consent
N.B: court will grant an extension if it is in the interests of justice
(4) if nothing has happened for a year, must serve notice—28 days later can proceed
(5) can apply for want of prosecution without (4), but should discharge professional responsibilities

Tung Wise v. Park Georgia Realty: applicant must support application for extension under 22-4 with evidence to justify the extension.

Indigent Status

Rule 20-5

(1) if court finds someone is receiving EI or otherwise impoverished, can order no fee payable to government unless claim/defence is nonexistent, scandalous/frivolous/vexatious, or abuse of process

(2) order applies to proceeding, any part of proceeding, specific period of time, one or more steps in proceeding

(3) apply though form 17, draft form 79, affidavit in form 80

Change of Lawyer

Rule 22-6

(1) party can change lawyers, engage a lawyer, or discharge lawyer

must give notice—before giving notice, other parties are entitled to presume status quo

(2) if lawyer is dead, missing, otherwise incapacitated, **or** no notice of change/intention—other parties on record can apply to court for declaration that lawyer is not on record anymore

(3) if lawyer has ceased to act but client has not given notice, lawyer can apply for declaration—>(9)would only do this if there is an objection intention to withdraw

(4) lawyer can also serve notice of intention to withdraw in form 114

(5) if served party in (4) objects, must file notice of objection within **7 days of service**

(6) if no objection, can file notice of withdrawal—>(7) ceases to be lawyer

Professional Code Chapter 3.7

- 3.7-1: cannot withdraw without good cause (serious loss of confidence 3.7-2, non-payment of fees 3.7-3) and on reasonable notice
- 3.7-7: must withdraw if discharged, client instructs lawyer to do illegal thing, lawyer is incompetent
- 3.7-8: must minimize expense and avoid prejudice to client, try to reasonably find another lawyer
    - notify client in writing with reasons, client should seek new counsel promptly

Non-Compliance

Rule 22-7

(1) most failures to comply will be treated as irregularities and will not result in nullification

(tools to ensure compliance with rules)

(2) can set aside whole proceeding, any order, dismiss proceeding and pronounce judgment

International Forest Products Ltd. v. Moody: strict, rigid application of the rules is not in keeping with the rules of proportionality of rule 1-3.

Nayyar v. Performance Realty Ltd.: court looks at degree of negligence and whether there is **intent** not to comply with the rules

Cheal v. Douglass: dismissal is draconian, matter should be heard on its merits if it is just to do so

Parties may be subject to non-compliance penalties, but most failures to meet the requirements of the rules will be regarded as irregularities and not sufficient grounds to dismiss the case entirely. This is because rigid application of the rules is not in keeping with the proportionality rules of 1-3 (Moody). Dismissal of a case is a draconian measure, and most cases should generally be heard on their merits (Cheal). If a judge is considering dismissal, he or she must look to the degree of negligence whether the party showed true intent not to comply with the rules (Nayyar).

Want of Prosecution

Rule 22-4

(4) if you haven't advanced a proceeding in one year, must give notice before proceeding

Party opposing the side that has not advanced a proceeding can apply for dismissal (satisfy Gemex test)

Gemex Developments Corp v. Sekora: test for want of prosecution
1. Has there been inordinate delay?—shockingly long
2. Is the delay inexcusable?—is there no reasonable excuse for the delay?
3. Has the delay caused serious prejudice, or is it likely to cause serious prejudice?—ie witnesses have died, moved away, litigation has tied up assets
4. Does the balance of justice require dismissal?—**onus on applicant**

JURISDICTION

CJPTA
- s 3 jurisdiction simpliciter/territorial competence
  - even if BC has TC, may be FNC
  - include facts in NCC that justify BC as the forum conveniens

COMMENCING PROCEEDINGS

GENERAL LIMITATION PERIODS—LIMITATION ACT

s 6(1) : basic limitation period of 2 years after reasonable discovery

s 8 LA: grounds for discovery (subject to (9)-(11) rules for infants and mentally disabled—>discovery is on first day person or should have known:
- they suffered injury, damage, or loss,
- damages was caused or contributed to by someone's act or omission,
- D caused the act or omission AND
- there is legal action to seek redress

s 21(1): ultimate limitation period of 15 years from date of act/omission regardless of when damage is suffered or discovered

s 23: extension when there is acknowledgement of liability for BOTH basic and ultimate LPs
- ie if you write a demand letter to D past LP and they acknowledge liability, you're good to go

EXCEPTIONS

s 3: basic/ultimate LPs do not apply to claims established under another enactment (ie Insurance Act has an LP)
(1) lists other exceptions to general LP
s 32: counterclaims and third party claims can be brought after basic LP, subject to rules

INTERPRETATION ACT

s 25: calculation of time and age

(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.
(3) If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.
(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.
(6) If, under this section, the calculation of time ends on a day in a month that has no date corresponding to the first day of the period of time, the time ends on the last day of that month.

(7) A specified time of day is a reference to Pacific Standard time, or 8 hours behind Greenwich mean time, unless Daylight Saving time is being used or observed on that day.
(8) A person reaches a particular age expressed in years at the start of the relevant anniversary of his or her date of birth.

s 29: definitions
"**holiday**" includes

(a) Sunday, Christmas Day, Good Friday and Easter Monday,
(b) Canada Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day, Family Day and New Year's Day,
(c) December 26, and
(d) a day set by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer or mourning, a day of public rejoicing or thanksgiving, a day for celebrating the birthday of the reigning Sovereign, or as a public holiday;

"**record**" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

"**Rules of Court**", when used in relation to a court, means rules made under

(a) the Court Rules Act, or
(b) any other enactment that empowers the making of rules governing practice and procedure in that court;

Methods of Service

Rule 4-3(1) PERSONAL SERVICE—>initially for NCC and petitions
Personal service is accomplished by **4-3(2):**

- individual: leaving a copy of the document with them
- company: by leaving copy with president, official of company, serving by any manner in BCA

Rule 4-4(1) SUBSTITUTIONAL SERVICE
If person cannot be found after search or is evading service, apply for court order (**DISCRETIONARY**)

- 4-4(2): attach copy of order granting substitutional with document to be served
    - send by regular mail—>service occurs 7 days later

Rule 4-2 ORDINARY SERVICE
After initial PERSONAL SERVICE (4-3), all documents can be served through ordinary service, subject to 4-3(1)

(1) party of record must provide address for service and keep it up to date
(2) documents **deemed to be delivered** if sent to recorded address

Rule 4-5(3) SERVICE EX-JURIS
Can serve without leave if you satisfy **s 10 CJPTA** (Rule 4-5(1)) or with leave of court under s **3(e) CJPTA**

4-5(2): ex-juris w/o leave must endorse grounds on which service is based

Types of proceedings

Three ways to commence proceedings: NCC, petition, requisition (desk order)

Rule 2-1(1): NCC is the default manner to commence a proceeding unless the criteria of 2-1(2) are met

PETITIONS

Rule 2-1(2): MANDATORY grounds for filing a petition

(a) person starting proceeding is the only person interested in the relief OR there is no person against whom relief is sought
(b) proceeding brought in respect of an application that is **statutorily authorized**
(c) principle question is construction of enactment, will, deed, oral/written k, or other document
(d) relief, advice, or direction sought relates to execution of a trust, performance of a trustee, or whether persons are entitled as creditors to the trust property
(e) relief, etc relates to maintenance, guardianship, or property of infants or other disabled persons
(f) relief is for payment of funds into or out of court
(g) relief relates to land **AND** is for:
    (i) declaration of beneficial interest, charge on **and** characterization of the interest or charge
    (ii) declaration that settles priority between interests or charges
    (iii) order that cancels certificate of title **or** make title subject to an interest or charge
    (iv) an order of partition or sale
(h) relief, etc relates to determination of SCP

Rule 16-1(2): Filing a petition

Person wishing to commence proceeding by petition must file through **Form 66** AND each supporting affidavit at the time same time

- rationale for rule is that there is no trial for petitions, so you have to file everything at once

Rule 16-1(3) Service of a petition

Both petition AND affidavits must be served through personal service

Rule 16-1(18): converting petition to an action

Court may refer any petition to the trial list under 22-1(7)(d), and can apply any other civil rule to the proceeding.

Southpaw: Test to be applied for converting a petition to an action is whether there are bona fide triable issues between the parties that cannot be resolved through documentary evidence. Factors: undesirability of multiple proceedings, desirability of avoiding unnecessary costs and delay, whether credibility issues are involved, the need for the court to have a full grasp of the evidence, whether it is in the interests of justice that there be pleadings and discovery to resolve the dispute, and timeliness.

Douglas Lake Cattle Co. v. Smith: when deciding whether to make a final determination in a petition or to refer it to trial, chambers judge should consider whether there is a dispute as to facts or law which raises a reasonable doubt in the claim, or suggests a triable defence.

Strata Plan No 1086 v. Coulter: petitions presupposes there is no dispute on material facts, but there may be argument on the inference drawn from the facts, which are sworn by affidavit

Bringing a petition presupposes there is no dispute as to the material facts, but parties may disagree as the inference drawn from the facts (Coulter). To convert a petition to an action, the chambers judge should consider whether there is a dispute as to the facts or law which raises a reasonable doubt in the claim or suggests a triable defence (Douglas Lake). Test to be applied for converting a petition to an action is whether there are bona fide triable issues between the parties that cannot be resolved through documentary evidence. Factors: undesirability of multiple proceedings, desirability of avoiding unnecessary costs and delay, whether credibility issues are involved, the need for the court to have a full grasp of the evidence, whether it is in the interests of justice that there be pleadings and discovery to resolve the dispute, and timeliness. (Southpaw).

REQUISITIONS

__Rule 17-1__
A requisition is a proceeding covers very limited matters where an order may be obtained from the court without notice to the other party or where the other party consents.
(1): Proceeding started by by **2-1(2)** can be brought by requisition if the parties consent or the proceeding is one where notice need not be given.
(2): proceedings in (1) may be brought by filing
 (a) requisition in Form 31
 (b) draft of proposed order
 (c) if parties consent, evidence of consent
 (d) if no notice need be given, evidence support of order sought

PLEADINGS

Pleadings are written statements exchanged by parties that identify the parties, events giving rise to the action, issues in dispute, legal nature of claims and defences, and set out relief sought.

__Rule 1-1 Definition__
"Pleadings" include NCC, response to NCC, reply, counterclaim, response to counterclaim, third party notice, response to third party, **but not petitions**

__Rule 3-7 General drafting rules__
3-7(1): must not contain evidence proving the alleged facts (**only material facts—>test below**)
3-7(2): must omit superfluous details and **summarize the effect** of conversations and documents
3-7(3): can omit a fact when burden of disproving the fact lies with other party and also where fact is presumed in law to be true
3-7(6),(7): no inconsistent allegations (6), but can frame allegations in the alternative (7)
3-7(7), (8): can raise objection on point of law; no conclusions of law may be pleaded unless material facts supporting them are also pleaded
3-7(11): counterclaims and claims for set off are allowed
3-7(12): pleadings subsequent to NCC must plead specifically any matter of fact or point of law that the party claims makes the other side's case not maintainable, might take other party surprise if not pleaded, or raise issues of fact not arising from preceding pleading
3-7(14): do not plead general damages
3-7(15): denial of a fact in pleading must not be evasive but squarely answer the fact denied
3-7(16) bare denial of a k is only a denial of the k's existence (ie cannot go on to make issue of k's terms)

Four functions of pleadings
1. Clearly and precisely define the issues in dispute
2. Gives other side notice of the case it has to meet
3. Court is informed of the events and issues
4. Confirmation of jurisdiction

CBA v. BC: Pleadings ensure disputes are resolved efficiently, guard against loose thinking, prevent expansion of issues, give notice to court of the case to be met, provide certainty of issues and purposes of appeal.

Jones v. Donaghey: Material fact relates to ultimate issue of facts puts in issue by the pleadings
- __**TEST: whether the fact is in issue in the litigation as revealed in the pleadings**__

Pleadings ensure disputes are resolved efficiently, guard against loose thinking, prevent expansion of issues, give notice to the court of the case to be met, provide certainty of issues, and purposes of appeal (CBA). Pleadings must only contain material facts rather than the evidence proving these material facts. (3-7(1)). A material fact relates to the ultimate issue of the pleadings (Jones).

Particulars

Particulars are the detailed facts on which a claim is based.
Rule 3-7(18) et al: Mandatory particulars
Parties in claims for misrep, fraud, breach of trust, wilful default, undue influence entitled to particulars as of right

- other claims: if particulars may be necessary they must be stated in the pleading

(19) if particulars are required under (18) are lengthy, pleadings can refer to this fact and instead pleading the particulars, serve them in a separate document either before or with pleadings
(20) party need only plead particulars that are known at date of pleading, but further particulars can be served (a) as they are known and (b) within 10 days after demand is made in writing

Rule 3-7(22) et al: Demand for particulars
Application may be made demanding particulars (22), but only after applicant has made a demand for further particulars from other party in writing (23)
(24) demand for particulars is not a stay, but party can apply for extension

Andrus v. Sihata: particulars delineate issues between parties, inform other side of the case they have to meet, prevent surprise at trial, enable other side to prepare evidence, limit generality of pleadings, limit issues to be tried, ties down parties.

Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.: particulars ordered when necessary to delineate issues between parties—>particulars not discovery because they do not obtain information on how an issue will be proven, but informs the other side of the nature of the case it has to meet, etc.

Particulars delineate the issues between the parties, inform the other side of the case to be met, prevent surprises at trial, enable the other side to prepare evidence, limit the generality of pleadings, limit the issues to be tried, and tie down the parties (Andrus). They are ordered when it is necessary to inform the other side of the nature of the case it has to meet (Hayes).

Amending Pleadings

Rule 6-1(1): Permission to amend
(a) Can amend once without leave if done before the earlier of the date of service of Notice of Trial or CPC
(b) any other time with leave of the court or by consent of all parties of record

When pleadings are amended, parties must strike out any deleted wording and underline new wording (6-1(3)). The amended pleading must be filed (6-1(2)(c)) and served on all parties on record (6-1(4)).
A party of record may amend pleadings in response within 14 days (6-1(5)). If a party fails to respond to an amended pleading, their original pleading is seen as their response and any new facts in the amended pleading are deemed to be outside their knowledge (6-1(6)).

Notice of Civil Claim

A NCC must be filed in Form 1 to begin an ACTION—3-1(1)

Rule 2-1(1): default is NCC

Rule 3-1(2): Requirements of NCC
NCC must comply with **rule 3-7 (pleadings drafting guidelines**) and set out:
(a) concise statement of **material facts** giving rise to the claim
(b) relief sought by P against each named D **and**
(c) concise summary of legal basis for relief sought

Venrose case: corporation may commence proceedings through an authorized officer

Lee case: requirements of the rule are mandatory

Renewal of NCC

Rule 3-2(1): First renewal of NCC
Original NCC is in force for 12 months, expires if not served within this period
- application may be made **before or after** first 12 months end to renew it for another 12 months

Rule 3-2(2): Subsequent renewals
Application **within the renewal period** may be made for a further renewal of up to 12 months

Imperial Oil Ltd. v. Michelin North America: five factors for discretionary renewal of NCC
1. whether application to renew was made promptly
2. whether D had notice of the claim before it expired
3. whether D was prejudiced
4. whether failure to serve was attributable to D
5. whether P was personally at fault, as opposed to P's solicitor

Sutherland v. McLeod: rule is engineered towards rights of litigants, not conduct of solicitors—>overarching objective is to see justice done

Renewal of NCC is discretion and depends on a consideration of five factors: whether the renewal application was made made promptly, whether D had notice of the claim before it expired, whether was prejudice, whether the failure to serve was D's fault, and whether P was personally at fault as opposed to P's solicitor (Imperial Oil). The renewal rules are engineered to protect the rights of litigants, and preserve the overarching object of the rules in 1-3 to see justice done (Sutherland).

Responding to an Action

Response to Civil Claim (Form 2)

A D who wishes to contest an action and avoid default judgment must file RCC in Form 2 and serve it by ordinary service—3-3(1) within the time periods of 3-3(3)(a).

Rule 3-3: Response to civil claim
3-3(2): contents of RCC analogous to contents of NCC 3-1(2)
- (a)(ii) D cannot have blanket denial, must concisely set out D's version of denied fact
- (a)(iii) any additional material facts
- (b),(c) position on relief sought and legal basis for opposing the relief sought

3-3(3)(a): time limit is 21 days if D served in Canada, 35 days in US, 49 days anywhere
3-3(8) if allegation or fact is not responded to, it is deemed to be outside the knowledge of the D

Counterclaims

Counterclaims are authorized in rule 3-7(11). A CC is a standalone claim that can be brought by D in a separate action, but is brought within the existing action for the sake of convenience. CCs must pursue a claim against P and may pursue a claim against third party. A CC continues even if P's claim is dismissed or abandoned. NB: if a party brings a CC (or TP), any LPs do not apply.

Rule 3-4(4): Service of a counterclaim
Counterclaims must be served through ordinary service on all parties of record, but if it named new parties, but be personally served with CC and original NCC within 60 days of filing

Default Judgment

Rule 3-8(1), (2): Filing requirements
DJ may be filed if D has not filed and served RCC and the period for filing and serving RCC has expired (1). To give effect for a DJ, DJ, P must file proof of service, proof D failed to respond, a requisition endorsed by registrar, and a draft order under Form 8 (2). However, a court can vary or set aside any order for DJ (11).

Compensation for judgment
3-8(3): if claim is ascertainable, P may take judgement that amount
3-8(12), (13): if claim for damages is to be assessed, P may take judgment and have damages assessed by trial or summary application

Professional Code 7-2(1)
If lawyer knows there is another lawyer involved, must take reasonable steps to notify other lawyer about DJ

Parties

Change of Parties

Rule 6-2(1) to (5): Change of parties arising from change circumstances
If a party dies, becomes bankrupt, winds up, or otherwise ceases to exist but the claim survives, the proceeding may continue.
If an estate, title, or interest is transferred, a proceeding relating to it may be continued against the transferee.

Rule 6-2(7): Removing, adding, or substituting parties
With leave of court, part may:
(a) be removed if they are not a proper or necessary party
(b) be added or substituted if they ought to have been joined or if their participation is necessary OR
(c) be added as a party where it would be just and convenient to determine the the issue between the added party and the applicant

Partnerships and Persons Under Disability

Rule 20-1: partnerships
Partners can sue and be sued in the name of the firm (1). Service may be effected by leaving a document with a partner or at the partnership office to someone who appears in charge (2).

Rule 20-2: persons under disability
Any person under a disability must commence or defence proceedings through a litigation guardian, who must act through a lawyer unless they are the Public Trustee

- if party becomes incompetent during course of litigation, court must appoint litigating guardian; court may remove or change litigation guardian
- upon reaching age of majority, party may take over the conduct of matter if there is no other disability

Multiple Claims

Rule 22-5: joint claims
(1): P may join several claims in the same proceeding
(2): P may name two or more Ds in a single suit if:
(a) there is common question of law or fact
(b) there is common relief sought arising out of the same transaction or

(c) the court grants leave to do so

<u>Rule 22-5(6) to (8): separating claims</u>
(6) party may apply to separate trial or hearings if joining them would unduly complicate proceedings
(7) counterclaim or third party proceeding can be ordered to be tried separately
(8) two separate actions can be consolidated into one or remain separate but tried at the same time

Shah v. Bakken: discretionary factors for granting consolidation

1. whether there is common question of law or fact
2. avoidance of multiplicity of proceedings
3. savings of time and expense
4. inconvenience to parties
5. whether one action is more advanced than another
6. whether an order of consolidation would cause delay and prejudice a party

Merritt v. Imasco Enterprises: additional considerations for granting consolidation

1. do common claims, disputes, and relationships exist between the parties (disclosed in pleadings **3-7**)
2. are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with economic expense (disclosed in pleadings and matters outside of pleadings including savings in pre-trial procedures, reduction in trial delays, inconvenience to parties, and savings in witness time and fees)

Consolidation is discretionary and depends on several factors. These factors include whether there is a common question of law or fact, the avoidance of a multiplicity of proceedings, savings of time and expense, inconvenience to parties, whether one action is more advanced than another, and whether an order of consolidation would cause delay and prejudice a party (Shah). Additionally, the court will ask whether common claims, disputes, and relationships as disclosed by the pleadings (3-7) arise between the parties (Merritt). Finally, if the claims are so interwoven as to make separate trials undesirable and too expensive, the court may be more willing to grant an application for consolidation (Merritt).

THIRD PARTY PROCEEDINGS

<u>Rule 3-5(1), (2): Who can bring a claim</u>
Person who is **NOT** A P may file third party notice against any person if:
(a) party filing is entitled to contribution or indemnity from third party
(b) party is entitled to relief against third party which is connected with original subject matter of action
(c) question or issue connected with relief claimed or subject matter is substantially the same as the question or issue between the party and should be determined in the action

<u>Rule 3-5(4): When a third party notice may be filed</u>
Any time with leave OR as of right within 42 days after being served NCC or CC, but court may set aside any third party notice (3-5(8))

<u>Rule 3-5(7)</u>: <u>Service</u>
Must be served within 60 days of being filed—service must include TPN and if not previously a party on record, all other pleadings delivered by any party in the action. All other parties on record myst be served copy of TPN.

<u>Rule 3-5(9) to (10): Response</u>
Response just like any normal D unless (10) applies

<u>Rule 3-5(11) to (17): Rules for third party notice</u>
TPN is like a NCC and response from original claim. Third party can file RCC and raise any defence to a D (12). DJs are also available if TP does not respond in time (16), (17).

Reply

Rule 3-6

(1) P may serve all parties on record a reply within **7 days of when RCC was served**
(2) no pleading subsequent to reply can be served without leave
(4) a reply that is a simple joinder to RCC should not be filed—**limited to something new that has happened**

Certus Strategies: Reply restricted to something that necessarily and relevantly confronts the defence, response to statement of defence—>do not repeat, amend, or clarify allegations from NCC or create new COA

Discontinuance and Withdrawal

Rule 9-8

(1) before notice of trial is served, P can discontinue by filing notice in Form 36 and serving it
(2) P can discontinue action after trial notice with consent or leave
(4) other party is entitled to costs up to date of service of notice

Building the Case—Documents

Discovery and Inspections of Documents

Rule 1-1: Definition of document

Any information of a permanent or semi-permanent character, and any information stored by means of any device

Rule 7-1(1): Materiality

All parties must serve to all parties on record a list within 35 days of the end of the pleadings stage including:

1. All documents that:
   are/have been in party's possession or control AND
   that could be used by any party on record at trial to prove or disprove a material fact 7-1(a)(i)
2. All other documents which the party intends to refer to at trial 7-1(a)(ii)
3. Insurance policies (to encourage settlement) 7-1(3), (4)

Subject to privilege, each list must contain brief description of each listed document 7-1(2)

- documents must be enumerated and described meaningfully, reliable and complete disclosure to aid the other side to understand the documents

Rule 7-1(9): Continuing obligation

If, after service, a party notices the list is incomplete or inaccurate OR a new document that fits 7-1(1) comes into the party's control, party must promptly amend and serve revised list

- (10) party can demand documents if they feel the list omits things that should have been disclosed

Rule 7-1(11): Demanding additional disclosure

A party who believes the list should include certain documents may demand:

Documents that are within listing party's possession or control that are additional to those required in (1) or (9) if they are identified with reasonable specificity and demanding party explains why should be disclosed

Biehl v Strang: initial production is limited to what is required to prove or disprove a material fact rather than every matter in question—>includes evidence that proves a material or that can assist in prove or disproving a material fact.

Wolansky v. Davidson: control means enforceable right to obtain documents from a person who has possession

Sumnar v. U-Haul Co: power is broader than control, includes right of access to documents

Doucette v. Wee Watch Day Care: implied undertaking that document will not be used except for the purpose of litigation—undertaking continues after settlement or until trial

Halliday v. McCulloch: when patient-litigant asserts privilege for medical records, court can order a list of documents

Edwards v. Ganzer: applicant must show some grounds to require production

Fric v. Gerhman: Production of social media information depends on applicant producing evidence to allow the court to determine that the information is relevant and privacy concerns of third parties is to be respected

The test for initial document production is whether the document tends to prove or disprove a material fact (Biehl). A party in "control" of a document pursuant to 7-1(1) has an enforceable right to obtain said document from the person in possession. Parties must give an implied undertaking during production that the document will not be used except for the purpose of the litigation (Doucette). This undertaking continues after either a settlement or until trial of the adverse party incorporates answers or documents obtained on discovery as part of the court record (Doucette). Production of social media information depends on the applicant producing sufficient evidence to allow the court to determine that the information is relevant and privacy concerns of third parties are respected (Fric).

Privilege

Parties are exempt from producing privileged documents under 7-1(15, (16), but not exempt from listing these documents. The description of a privileged document must state that the document is privileged, but with sufficient details (**7-1(6), (7)**).

Hodgkinson v. Simms: need for full disclosure rarely displaces privilege, copies of documents prepared for the dominant purpose of litigation may be privileged even though the originals may not

Gardner v. Viridis Energy Inc.: privileged documents must be sufficiently described without giving away the privileged information

Non-Party Documents

Rule 7-11(18)
If document is in possession/control of a party not on record, court can order
(a) production, inspection and copying
(b) preparation of a certified copy that can be used instead of the original

Kaladijan v. Jose: some evidence required to support an application for additional documents when the demand is made under 7-1(18), proving that invasion of privacy is necessary

Building the Case—Testimony

Examinations for Discovery

Examinations for discovery are available as of right. They are oral examinations under oath (7-2(4)) in the form of a cross examination. They are conducted privately in front of court reporter who provides transcript to parties. Parties must state that discoveries are complete before filing trial certificate (12-4(3)).

Rule 7-2(1): Who can be examined
A party on record adverse in interest must make themselves available for examination

- 22-5(7): can obtain order that party attend examination if they do not show
- 5-3(g): at CPC, judge may order to either limit, expand, or modify conduct of examination

Rule 7-2(5): Examination of a corporation
Unless court otherwise orders, if examinee is a corporation, parties can examine one nominated representative
- nominated representative must be knowledgeable about issues, but examining party has right to pick nominee or anyone who was or is director, officer, employee, agent, or external auditor

Court has discretion to order otherwise in two circumstances:
1. D tried to prevent P from picking representative of their choice under (5)(c)
   Examinee may nominate their most knowledgeable representative, but examiner has final choice—> court make a substitution if it is necessary for justice and fairness (**Rainbow**)

2. P tried to examine additional representative beyond the one it is entitled to under **Westcoast**
   When considering whether to grant application for further representative, must consider whether adequate and satisfactory discovery has been or can be obtained from representative put forward by examinee (**Westcoast**)—>objective test, must show examination was unsatisfactory

Rule 7-2(25): Objections
Reporter records any objections and the examiner may apply to courts to decide on validity of objection. Counsel should not object unless it is very clear the answer may not be relevant. Counsel should not interfere unless is it is necessary to resolve ambiguity or to prevent injustice (**Kendall**).

Rule 7-2(2): Time limits
Unless court order, examination cannot exceed 7 hours or any greater period examinee consents to
- 15-1(11): fast track examination cannot exceed 2 hours by all parties unless court orders/consent
- 7-2(3): application to extend time limit considerations
  (a) conduct including (i) unresponsiveness, (ii) failure to provide complete answers, (iii) evasive, irrelevant, unduly lengthy answers
  (b) any denial/refusal to admit anything that should have been admitted
  (c) conduct of examining party
  (d) whether it is practical to complete examination within 7 hours
  (e) number of parties and proximity of their interests

Rule 7-2(11): Location
Unless there is court order or consent, examination must take place within 30 km of registry that is nearest to the place where the examine resides

Rule 7-2(13): Service
Must serve notice of appointment at least 7 days before the examination in Form 23, and on all parties of record

Rule 7-2(22), (23), (24): Examinee must inform self
If person has to comply with (18) and (19), can adjourn examination to go inform themselves, and may provide a response by letter (23). The response by letter is deemed to have occurred under oath (24)

Rule 12-5(46): Use of examination transcript at trial
Examination evidence can only be used in trials (**including ST because 9-7(6) imports 12-5(46)**) if the evidence is otherwise admissible AND is used against the party who provided the evidence.

"Otherwise Admissible"
If XFD contains hearsay, it cannot be used. Since admissions of a party are presumptively admissible according to the law of evidence, any admission of the party being examined will likely be admissible against that party.

Use of XFD During P's Case
The P can **read in** parts of the transcript which support their case into evidence at trial. A read in is when counsel stands at podium and reads selected parts of the transcript to the court. The defence may use XFD transcripts to impeach the P's credibility on cross-examination if the P says something different at trial from what they said during the XFD.

Use of XFD During D's Case
Generally, because the P goes first, XFD evidence will only be used by the P during cross-examination of the D by the P's counsel in an attempt to impeach

Other considerations
Judge can order evidence is inadmissible OR that other parts of the transcript qualifying the part used in evidence can be introduced (Rule 12-5(49))

If the party dies, the transcript from the XFD may be used to serve as evidence

A XFD testimony can be attached to an affidavit and relied on NOT for the truth of its contents but to decide the issue of whether the action is suitable to be decided by a 9-7 summary trial.

Hogg v Hansen: generally party is limited to a single examination, and there is a heavy onus on the applicant to justify a further discovery once the examination has been concluded—full and frank disclosure was not made or case had materially changed

More Marine: discovery is broader than document production

Rainbow Industrial Caterers v. CNR: party should have free right to examination, but can take away the general right if there is unfairness

Westcoast Transmission Co. v. Interprovincial Steel and Pipe Co: nomination of corporate party does not remove adverse party's privilege to examine representation of its choosing; however, selecting a representative may remove right for further examination of the examinee is unsatisfactory

Fraser River Pile v. Can-Dive: limitations of counsel attending discovery
- if discovery is 1 day, lawyer should not talk to witness
- if discovery is longer than 1 day, lawyer can talk to witness about case including evidence at the end of the day, provided lawyer has told other side of doing this in advance
- lawyer should not seek adjournment during examination discuss evidence that was given

Rogers v. BMO: parties have right attend each other's examination unless justice demands otherwise—court may exclude if evidence covers same ground and credibility is a factor, will not produce transcripts until examinations are completed

Gardner v. Viridis Energy: obligation to answer questions within one's knowledge includes obligation to make reasonable preparation for discovery—will vary from case to case accounting for the nature of the case, the amount involved, the importance of the issues in dispute, the complexity of the proceedings, time/expense

LaPrairie Crane v.Triton Projects Inc: silence at examination does not equate consent to production in the circumstances of limited examination

Dann v. Dhaliwal: if representative under 7-2(5) is unsatisfactory, can apply for leave to examine another representative

Kendall v Sun Life: scope for examination is very broad, defined in the pleadings

Conseil scolaire: discretion to allow a second representative should be exercised if first representative is unable or unwilling to inform themselves and discovery cannot reasonably be conducted

Examination for discovery is broader than document production (More Marine). Parties almost always have a free right to examination, but the court may take away this general right if there is substantial unfairness (Rainbow). Parties of record are limited to one examination. The onus to justify further discovery once the examination has concluded is heavy (Hogg). The scope for examination is very broad, but is defined within the pleadings (Kendall). Parties have the right to attend each other's examinations unless justice demands otherwise. To achieve this end, the court may exclude evidence if it covers the same ground and credibility is a factor. The court

may also restrict the production of transcripts until the examinations are completed (BMO). Examinees have an obligation to answer questions within their knowledge. This duty includes the obligation to make reasonable preparation, which will depend from case to case accounting for the nature of the case, the amount involved, the importance of the issues in dispute, the complexity of the proceedings, and time/expense involved. (Gardner) An examinee's silence at an examination does not equate to consent to outstanding document production requests (LaPrairie). It falls to counsel to behave ethically at an examination for discovery. Fraser River contains the guidelines for lawyers' behaviour at examination. If a discovery lasts for one day, the lawyer cannot speak to the witness. If discovery is longer than a single day, the lawyer can speak to the examinee about the case, including the evidence at the conclusion of the day, subject to the requirement that the lawyer tell the other side they intend to speak to the witness in advance. A lawyer should not seek adjournment during examination to discuss the evidence that was given.

Examining corporate parties involves special guidelines contained in 7-2(5). If a represented appointed under rule 7-2(5) is unsatisfactory, the examining party can apply for leave to examine another representative (Dann). The court retains the discretion to allow a second representative if the first representative is unable unwilling to inform themselves and the discovery cannot reasonably be conducted.

INTERROGATORIES

Court may set conditions on the interrogatories regarding the number of questions, matters covered in questions, and the timing of the response (7-3(3)). The purpose of interrogatories is to obtain admissions of fact (Credential). They are most often used for issues involving extensive lists for damages, orders, or chronologies (Credential).

Rule 7-3(1): not as of right
Interrogatories are available against any party of record (or director/partner, etc (7-3(2)). Parties must acquire consent or court order to serve interrogatories.

Rule 7-3(4): timing of response
Parties have 21 days to serve affidavit answering interrogatories unless the court orders otherwise

Rule 12-5(58): admissibility of interrogatories
Party may have interrogatories, but court can look to the whole of the answers, and if the answer is connected to an inadmissible answer inextricably, the court may direct the inadmissible answer to be admitted

Credential case: interrogatories must take into account proportionality rule in 1-3
- must be relevant to a matter in issue
- cannot be in nature of XE
- should not include demand for discovery of documents
- should not duplicate particulars
- not used to obtain the names of witnesses
- narrower in scope than examinations for discovery
- **purpose is to obtain admissions of fact**
  - appropriate for issues involving extensive research such as precise chronologies or exhaustive lists

Interrogatories must take into account the proportionality rule in 1-3 (Credential). They must be relevant to a matter in issue, not presented in the nature of a cross examination, should not include a demand for discovery of documents, should not duplicate particulars, should not be used to obtain the names of witnesses, are narrower in scope than examinations for discovery, and their primary purpose is to obtain admissions of fact (Credential). Interrogatories are appropriate for issues involving extensive research such as precise chronologies or exhaustive lists.

Physical Examination

Rule refers to a physical examination of a person by medical exam or an inspection of property. The purpose is to ensure all litigants obtain access to all relevant evidence and information and are on equal footing.

Rule 7-6(1): When available
Available if the physical or mental condition of a person if in issue—>court can order submit to exam

Rule 7-6(2): Subsequent examinations
Court can make discretionary order for additional independent medical examinations, only in exceptional cases

Rule 7-6(4): Examination of property
(4) court can order examination of property

Notices to Admit

Rule 7-7(1): When available
Only available in ACTION (NCC)—>party of record can request other party to admit truth of a fact or the authenticity of a document

Rule 7-7(2): Refusal to admit
Fact is deemed to be admitted if there is no response within 14 days that:
(a) specifically denies the truth or authenticity of the document AND
(b) set out in detail why admissions cannot be made OR
(c) claims privilege, or explains why request is improper

Rule 7-7(4): unreasonable refusal
If party is being unreasonable in refusing to admit, court can order cost ramifications (Blake)

Rule 7-7(5): withdrawing admissions
Certain admissions may be withdrawn by conent or with court leave including:
(a) admissions made in response to notice to admit
(b) deemed admissions AND
(c) admissions in pleading, petitions, or responses to a petition

Blake v Gill: unreasonable refusal to admit should result in punitive costs, so deter waste of court time

Skillings v. Seasons Development Corp: replying to notice/admit is improper/inadequate if it does not deny or explain in detail the reason for not making the admission—if this happens, the facts are deemed admitted

Hamilton v. Ahmed: high threshold for withdrawing admission

- is there a triable issue that should not be disposed of through admissions—consider factors:
  - whether admission was made hastily, inadvertently, without knowledge of the facts
  - whether the fact admitted was within the knowledge of the party
  - whether the fact admitted was not true, or mixed fact and law
  - whether withdrawal would not prejudice a party
  - whether there was delay in applying for withdrawal

A response to a notice to admit is improper or inadequate if it does not deny or explain in detail the reason for not making an admission. In this circumstance, the facts are deemed admitted (Skillings). An unreasonable refusal to admit may result in cost ramifications (Blake). There is a high threshold for withdrawing admission. A court will ask whether there is a triable issue that should not be disposed of through admissions. The following factors inform the analysis: whether the admission was made hasilty, inadvertently, or without knowledge of the facts, whether the admission was within the knowledge of the party, whether the admission was false or an admission of mixed fact and law, whether a withdrawal would not prejudice a party, and whether there was delay in applying for a withdrawal (Hamilton).

Depositions

Depositions are pre-recorded oral examinations under oath that involve direct, cross, and re-examination. Purpose of depositions is to take sworn evidence that can be introduced as evidence in trial from a witness in lieu of live testimony at trial.

Rule 7-8(2): When available
By order or consent, usually when evidence is directly material from a material witness

Rule 7-8(3): grounds for making order
(a) convenience of examinee
(b) possibility of unavailability at trial—death, infirmity, sickness, absence
(c) possibility person beyond court's jurisdiction at trial
(d) desirability of having person testify by video conference
(e) expense of bringing person to trial

Quinn v Hurford: order for deposition only when party shows evidence to be obtained to directly material to their case—not enough that evidence bolsters or may be corroborative (**must be on a critical point + very good reason to veer away from live testimony in court**)

Pre-Trial Examination of Witnesses

Oral examination under oath of uncooperative non-party witness.

Rule 7-5(1) to (3): Order for examination
Court can order person be examined on oath
Available by court order (affidavit) stating individual who is not party of record but has material evidence has:
(a) refused or neglected to give responsive statement OR
(b) has given conflicting evidence—purpose is to make witness answer questions originally posed to them when they have contradicted themselves, cannot ask questions that require new research (**Sinclair**)
(2): Must include in affidavit for expert witnesses that applicant is unable to obtain facts/opinion about subject matter by any other means

Rule 12-5 (52): admissibility of PEW evidence
Party can bring in PEW evidence in following circumstances
(a) to contradict or impeach the testimony of the person at trial,
(b) if it is necessary in the interests of justice and
(i) the person is dead
(ii) the person is unable to attend and testify due to age, infirmity, sickness, or imprisonment
(iii) the person is out of the jurisdiction
(iv) the person's attendance cannot be secured by subpoena

Sinclair v. March: scope of inquiry is not limited to issues between the parties from the pleadings, includes everything generally relevant to the parties

Yemen Salt Mining Corp v. Rhodes-Vaughn Steel Ltd.: scope is wider than 7-2 examinations for discovery, covers all that is relevant to the parties

Coates v. Triance: scope of examination is not limited to questions for which there were not responsive answers

The scope of inquiry is not limited to issues raised specifically in the pleadings, but includes everything generally relevant to the parties (Sinclair). Thus, the scope of PEW testimony is wider than examinations for discovery (Yemen). Furthermore, the scope of the examination is not limited to questions for which there were not responsive answers (Coates).

INTERLOCUTORY PROCEDURES

BRINGING AN APPLICATION

APPLICANT
Files: NoA + Affidavits (Rule 8-1(3))
Serves: NoA + Affidavits (Rule 8-1(7))

NB: must be served to **each party on record** and **any other person who may be affected** by the order sought
At least 8 business days before hearing (Rule 8-1(8)(a))

At least 12 business days before hearing (Rule 8-1(8)(b)) FOR SUMMARY TRIAL

RESPONDENT
Files: Application Response + Affidavits (Rule 8-1(9)(a)(b)
Serves: Application Response + Affidavits (Rule 8-1(9)(c))
Within 5 business days after service (Rule 8-1(9))

Within 8 business days after service (Rule 8-1(9)) FOR SUMMARY TRIAL

APPLICANT (OPTIONAL)
Files: Response Affidavits (Rule 8-1(13))
Serves: Response Affidavits (Rule 8-1(13))
No later than 4pm on the business day that is one business day before the date set for the hearing (Rule 8-1(13))

APPLICANT
Files: Application Record (8-1(15)) Serves: Application Record (8-1(17))
No later than 4pm on the business day that is one business day for the date set for the hearing (Rule 8-1(15)(17))

Rule 8-1(5), (6): Scheduling hearing date
For applications taking more than 2 hrs, application picks hearing date by should be professionally courteous
For applications less than two hors, registrar schedules hearing date

Rule 8-1(3), (4): Notice of Application requirements
To commence an application, must file NOA not exceeding 10 pages (except in exceptional circumstances):

1. Order sought
2. Other side proper notice of the relief sought to facilitate raising a proper defence
3. Summary of factual basis for the application
4. Legal basis behind the order sought
5. Material to be relied on (affidavits)

If NOA is deficient and does not provide other party with full disclosure, can be dismissed

Rule 8-1(9): Application response requirements
Responses cannot exceed 10 pages and must include

1. Orders consented/opposed/no position taken
2. Factual basis
3. Legal basis
4. Material relied on (affidavits)

POWERS OF COURT

Rule 22-1(7): General powers
Chambers court may:

(a) grant or refuse relief claimed in whole/part or dispute of any issues arising in chambers proceedings
(b) adjourn the application
(c) obtain assistance of experts

(d) convert petitions (16-1) to convert a chambers proceeding into trial

Rule 22-1(2): Party is absent from chambers application
Court can hear application without party's attendance ONLY if it determines party was served NOA—>absent party can apply to set aside order if they have a good excuse for not attending, prove weren't guilty, wilful deceit/delay

s 11(7) Supreme Court Act: Powers of masters
Statutory creatures that have same jurisdiction as a judge in chambers with certain limitations (practice directives)
Practice directive 42: masters jurisdiction
Paragraph 3(g): masters cannot hear applications for injunctive relief
Paragraph 8: subject to PDs, master can make final orders for:
(a) orders by consent
(b) orders for 22-7 (contempt)
(c) SJ under 9-6 where there is no triable issue
(d) striking pleadings under 9-5 if there is no determination of law needed
(e) granting judgment in default
(f) foreclosure order (21-7(5))
(g) order for administration of estates under 21-5

AFFIDAVITS

Rule 22-1(4)(a) to (e): Exceptions to affidavit rule
(a): XE on affidavit—likely when credibility is an issue
(b): direct of a witness/party—technically allowed, but very rare
(e): other forms of evidence

Rule 22-2(13): Hearsay in affidavits
General rule is that affidavits must only state what the person swearing would be permitted to state at trial (22-2(12)), but can include hearsay if
(a) the source of the information and belief is given and
(b) affidavit is not for a final order or the parties have leave under **12-5(71)**—>court may order evidence or document be presented including **(a) statement on oath of information or belief**

Rule 22-2(4): Affidavits may be allowed by court despite irregularities of form

Rule 22-2(2) form of affidavits
(a) must be in 1st person, show name, address, occupation of person swearing/affirming

Professional Code Appendix A
- lawyer as commissioner taking the oath must be physically present to take the affidavit
  - cannot take affidavits over the phone, email, fax
  - lawyer acting as officer of the court when taking the affidavit—not responsible for the truth of the statement, only that person swearing makes solemn promise not to tell the truth

ORDERS

An order is the result of the conclusion of the court process. Orders are governed by rule 13-1. The court provides the substance of the order, but counsel drafts the order, which is approved by all parties of record.

Rule 13-1(8): Orders take effect when they are pronounced, not when they are filed

(11) disputed orders can be settled by registrar

(17) court can correct clerical orders, amend orders to provide for matters that should have been adjudicated on

8-3: Orders by consent
(1) Application for order by consent can be made by:
- (a) requisition in Form 31
- (b) draft of Form 34
- (c) evidence that the application is consent to
- (d) any consent or comments of Public Guardian or Trustee

(2), (3) Registrar can still refer application to a judge—>judge can make the order or give directions

8-5: Urgent applications
Can bring application on less notice than would normally be required—>use requisition in Form 17 (2)

8-6: Orders in writing
If order is made at CPC (**5-1**), CPC judge can give directions respecting the application

Without Notice Orders

Rule 8-5(6)
PC Chapter 5.1
Commentary (6): in w/o notice orders, presenting lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case to not mislead arbiter

Enforcement of Orders

Rule 13-2
Various orders can be made to enforce the order

Rule 22-8: contempt of court
(1) power of court exercised by order of committal or imposition of fine
(2) if corporation is in contempt can be fined, directors jailed, directors fines
(14) if party has actual notice of terms of the order, may find contempt without service

Appeals of Orders

Rule 23-6(8): Any order (including final) from master may be appealed to judge
Notice of appeal may be filed within 14 days after interlocutory/final order has been made by master (9).
All appeals are governed by **18-3**

Rule 23-8(11): Appeal is not a stay of proceedings unless court orders otherwise

Case Planning Conference

Rule 5-1
(1) party of record can request CPC by (a) obtaining date from registry and (b) filing notice in Form 19
(2) court can order CPC
(5) if CPC is requested or requested or ordered, parties must file case plan proposals
(6) contents of CPC proposal must include party's proposal regarding
- (a) discovery of documents
- (b)examinations for discovery
- (c) dispute resolution procedures
- (d) expert witnesses
- (e) witness lists
- (f) trial type (estimated length and preferred period for trial date)

5-2 Conduct of CPCs
(1) must be conducted by judge or master
(2) each lawyer representing party of record or unrepresented party or party ordered by court—must attend
(7) CPC must be recorded, but parties cannot access it without a court order

Parti v. Pokomy: CPCs recorded to foster full and frank discussion, order making the recording available only made when there is compelling, reasonable grounds (not for educational purposes)

Summary Proceedings

"Summary proceedings" refer to ways of concluding an action without conducting a convention trial.

NAME	QUESTION	EVIDENCE	AVAILABILITY	RESULT	MASTER
Striking Pleadings (9-5)	Law	No	Any time	Procedural order	If no decision on question of law relating to issues
Summary Judgment (9-6)	Any	Yes	After exchange of pleadings b/w affected parties	Substantive judgment or dismissal on all or part of a claim	If no triable issue
Summary Trial (9-7)	Any	Yes	Period b/w filing of responding pleading to 42 "clear days" before trial	Substantive judgment or dismissal of all suitable issues	No
Point of Law (9-4)	Law	No	Any time < trial	Binding substantive decision on a point of law arising from the pleadings	No
Special Case (9-3)	Any	*	Any time by consent/order	Non-binding opinion	Unlikely

Striking Pleadings

Rule 9-5(1): Application
At any stage of proceeding, party may apply for pleading or petition to be struck or amended if:
(a) if discloses no reasonable COA or defence
(b) it is unnecessary, scandalous, frivolous, or vexatious
(c) it may prejudice, embarrass, or delay fair trial or hearing of the proceeding
(d) otherwise an abuse of process of the court

Rule 9-5(2): Admissibility of evidence
No evidence is admissible—>pleaded facts assumed to be true (**Odhavji, Vo**)
- high threshold—courts want to allow people to bring their claims

Rhodes v. All Pro Building Maintenance Ltd.: Pleading is unnecessary or vexatious when it does not go to establishing a cause of action or advance any claim known in law; poorly drafted pleadings will not be struck on this basis alone

Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress
- scandalous allegation will not be struck if it is material to proceeding
- pleading is unnecessary or vexatious if does not establish COA or advance claim known in law
- frivolous is a pleading unsustainable due to estoppel

Odhavji Estate v. Woodhouse—test for striking is **plain and obvious** no reasonable COA is disclosed
- court will not strike if there is a chance P might succeed, only dismiss if claim is sure to fail
  - length or complexity will not dismiss claim

McNaughton: assumption that all facts are true, amendments are liberally granted

A pleading is unnecessary or vexatious when it does not got to establishing a cause of action or advance any claim known in law. Furthermore, poorly drafted pleadings will not be struck simply for their drafting errors (Rhodes). A scandalous allegation will not be struck if it is material to the proceedings. Pleadings are unnecessary or vexatious if they do not establish a COA or advance a claim known in law. Frivolous pleadings are unsustainable due to estoppel (Citizens for Foreign Aid). The test for striking pleadings is whether it is both plain and obvious no reasonable cause of action is disclosed. The court will not strike if there is a chance P might succeed, and will strike the pleadings if the claim if sure to fail. Length or complexity are not grounds for striking pleadings (Odhavji). A 9-5 hearing proceeds on the assumption that all the pleaded facts are true (McNaughton). Amendments of deficient pleadings are liberally granted rather than struck (McNaughton).

SUMMARY JUDGMENT

Rule 9-6(2), (4): Application for summary judgment
The claiming party (P) filing original pleading may apply for SJ after being served response (2).
Answering party (D, TP) may apply for summary judgement only after they serve a response (3)

Rule 9-6(5): Test for granting summary judgment
Court may:
(a) if no genuine issue for trial, order judgement or dismiss claim
(b) only genuine issue is amount claimed—> can order trial to assessment amount or pronounce judgement
(c) if only issue is question of law—>pronounce judgment
(d) any other order

Rule 9-6(6): Claiming party may proceed
If claiming party obtains judgment,
(a) can proceed with action in respect of any other claim and
(b) proceeding against any other person against whom claim is made in originating pleading

Rule 9-6(9): Bad faith or delay—>court can order cost ramifications

International Taoist Church v. Ching Chung Taoist Assn: application for SJ asserts claim or defence is factually without merit, no prohibition on receipt of evidence and court can dismiss application on absence of evidence, court should always consider whether a claim or defence may be amended first.

Summary Trial

Summary trial is where the court tries issues on affidavit evidence in chambers. The result is deposition of the issues or a final deposition of the case. Occasionally, court will decide that the issue is not suitable for ST and order full trial.

Rule 9-7(2), (3): Requirements of summary trial
ST is available when: there is an action or petition converted to action, TP, CC; AND responding pleading filed
NB: ST must be brought at least 42 days before a scheduled trial date (9-7(3))

Rule 9-7(5): Permissible evidence
Rule expand on the types of evidence that may be received without leave

(a) affidavits
(b) answer or part of an answer to interrogatories
(c) any evidence from examination—>NB: 12-5(46) applies, only admissible against adverse party
(d) admissions under rule 7-7
(e) expert reports if 11-6(2) applies under rule 9-7(7): report conforms to 11-6(1) OR court says it is admissible

PTEW (7-5) are **inadmissible** for ST (9-7(5))

Rule 9-7(15): Test for suitability of ST
Court may grant judgement unless it is:

(i) unable to find facts necessary to decide issues after considering all the evidence OR
(ii) of the opinion it would be unjust to decide issues on application

Rule 9-7(11): Application to consider suitability
Application for suitability can be heard either before or at same time as ST application

Western Delta: if preliminary application fails and subsequent ST does not resolve issues in litigation, parties will be greater prejudiced than if they had done a normal trial

Gichuru v. Palli

Fraser v. Abma: factors and framework court uses to consider evidentiary issues

- primary concern is whether there is a need to see live witnesses whether affidavits are sufficient
  - court wants to see live witnesses to assess credibility (ie contradiction on key factual point)

Lewis v. Lewis: court considers whether material evidence is available via affidavits

Querfurth v. Querfurth: applicants must wait for time to respond to close before serving ST application

Roynat v. Dunwoody: application for ST is not a stay

Anglo Canadian Shipping v. Pulp: eventual application has obligation to forewarn other parties of impending ST application—cannot frustrate discovery process

Cara v. Qtrade: issue of contradictory evidence

- when there is contradiction in the evidence, look at backup records as underlying evidence to figure it out—can also use examination for discovery evidence
- whether contradictory evidence relates to material fact or collateral fact
- court can order XE on affidavits either on general or specific point
- whether application will dispose of the whole case or one, more, or some of the issues
  - if result of the application is that case will probably still have to go to trial on some point, no ST (?)
- whether fact gathering process is complete (if incomplete, probably no ST)

Hunt v. TN: cannot succeed on ST application if there is pending demand for discovery or order for documents

Colosimo v. Geraci: court can reject ST application if there is an overwhelming load of affidavit evidence

Inspiration v. McDermid: consider whether evidence is sufficient to determine the issues at ST

Foreman v. Foster: court can refuse application on following grounds
- issues not suitable for disposition (9-7(11)(b)(i))
- application will not assist efficient resolution of proceeding(9-7(11)(b)(ii))
- on whole of evidence, court unable to find fact needed to decide fact or or law (9-7(15)(a)(i))
- unjust to decide issues, esp when there is no XE (9-7(15)(a)(ii))

Kassam v. Kassam: normal trial rules do not apply to STs, applicant can withdraw application at any time without leave of the court—**NB: cannot just withdraw if you think you're going to lose**

Parties cannot apply for summary trial until the time for response has ended (Querfurth). An application for summary trial does not operate as a stay of proceedings (Roynat). Parties have the obligation of forewarning other parties of an impending ST application to prevent the frustration of the discovery process (Anglo Canadian). To this, a party cannot succeed on an ST application if there is pending demand for discovery or an order for document production (Hunt). A court can refuse an ST application if the issues are not suitable for disposition (9-7(11)(b)(i), the application will not efficiently resolve the proceedings (9-7(11)(b)(ii), the court is unable to decide fact or law based on the entirety of the evidence (8-7(15)(a)(i), or it would be unjust to decide the issues through an ST (9-7(15)(a)(ii)) (Foreman). When granting an ST application, the court will consider whether the material evidence is available through affidavits (Lewis), and whether this evidence is sufficient to determine the issues (McDermid). The Cara case addresses the approach to contradictory evidence at ST. When such contradiction becomes apparent, the court will look to backup records as underlying evidence to resolve the issue. The court will also consider whether contradictory evidence relates to material facts or collateral facts, whether the application will dispose of the whole or one, more, or some of the issues, and whether the fact gathering process is complete. The court can order cross examination on conflicting affidavits either general or specific points. (Cara) If the contradiction is on a key factual point, the court can order live testimony to assess the witness's credibility (Fraser). The court can reject an application for ST if there is an overwhelming amount of affidavit evidence (Colosimo).

At an ST, normal trial rules do not apply, and applicant can withdraw their application at any point without leave (Kassam). Practically speaking however, a party cannot simply withdraw their ST application because they believe a loss is inevitable (Kassam).

Special Cases

Where a question of law or fact, or mixed law and fact is stated for the court to give an opinion. Used exceptionally where court thinks determination of a hypothetical question will have a conclusive effect and save time.

Rule 9-3: Availability
(1) parties may concur in stating question of law/fact in form of special case for court's opinion
(2) court can order special case form
(3) special case must
    (a) be divided into paragraphs numbered consecutively,
    (b) state facts and refer to documents allowing court to decide questions stated, AND
    (c) be signed by parties and their lawyers

Rule 9-3(5): Effect of court opinion
If parties consent, court's opinion can be converted to special relief or judgement, otherwise not binding.

Hunt v. TN: before ordering an opinion to be stated separately on a question of law, court should consider whether order would result in saved expense to parties and time of the court

BC v. Cie Abitibi: Question of law must be unambiguous, supported by unambiguous statement of facts

Xeni Gwetin v. BC: parties must include every material fact—court cannot proceed on assumed facts

Point of Law

Rule allows court to consider a pure question of law based on facts arising from pleadings.

Rule 9-4
(1) POL can, if parties consent, be set down by requisition
(2) if decision on POL resolves the case or distinct claim, defence, counterclaim, court can dismiss action

Alcan Smelters: endorsed by BCCA in Can-Dive
- POL has to be raised and and clearly defined in the pleadings
- only appropriate in cases where, assuming pleadings are true, question arises as to whether such allegations raised and supported a claim or defence in law
- facts not disputed, POL can be resolved without hearing evidence
- whether POL ought to be decided is discretionary, has to appear that determination of question will be decisive to the litigation
- court considers whether the effect of such a decision would immeasurably shorten trial, or result in cost savings

Interim Relief

Pre-Trial Injunctions

Two types of injunctions:
Interim: stay in place for a specific period of time
Interlocutory: expires at conclusion of trial subject to continuation by final order
Injunctions may also be prohibitive (don't do the thing), or mandatory (must do the thing)

Rule 10-4 (1), 2): When application for pre-trial injunction can be made
Party can apply for injunction even if it was not included in relief sought from pleadings (1)
Injunction can be sought before a proceeding has commenced (2)

Rule 10-4(4): Injunction is an order of the court
Limited appeal order—>**requires leave under s 7(1), (2) of Court of Appeal Act**

Rule 10-4(5): Undertaking as to damages
Unless court orders, an order for pre-trial injunction must include undertaking as to damages

TEST IN BC ON WHETHER TO GRANT A "STANDARD" PRE-TRIAL INJUNCTION – AG V WALE
The overriding question is whether it is **just and equitable** in all the circumstances to grant the injunction, but the following criteria must be met:

1) Is there a **fair (arguable) question** to be tried as to: (lower threshold than *pf* case *(CBC)*
    a. The existence of the right which the applicant alleges and
    b. A breach thereof (actual or reasonably apprehended)

    The threshold is quite low. The applicant does not have to make a *pf* case (i.e. bring enough evidence in application for pre-trial injunction to support a final order) *(CBC v CKPG)*

    The strength of the applicant's case is not even considered under this prong (rather, under balance of convenience) *(CBC v CKPG)*

2) Does the **balance of convenience** favour granting injunction? Weigh the following non-exhaustive list of factors: *CBC*

- Who will suffer the **greater inconvenience** from granting or refusal of the injunction
- If either of the parties will suffer **irreparable harm** if the injunction is granted/refused.
  - Irreparable harm: a mere doubt that damages awarded at end of trial will not be enough to repair the harm (clear proof not needed) *Wale*
  - If both parties will suffer irreparable harm, the one who bases their claim on existing rights rather than maintaining the status quo may tip the balance in their favour *Wale*
  - In practice, an injunction is unlikely to be ordered w/o some form of irreparable harm even though there is no need in theory to establish b/c factors are weighed
- Which party **acted to affect the status quo**
- Likelihood of damages being paid by D at end of trial (look at financial health of parties)
- **Strength** of the **applicant's case**
- Preservation of contested **property** (if it will be altered if injunction not granted, may tip scale)
- Factors affecting **public interest** *(AG v Wale, preservation of fisheries)*

If the scale is even, the court will generally preserve the ***status quo***
- To determine the status quo, consider which party took the first step to alter the relationship leading to an alleged actionable breach; which party did the thing that is the subject of the litigation; the nature of the conduct said to be wrongful *(CBC v CKPG)*

The **second prong of the test is the critical question** when considering whether to grant a pre-trial injunction. The strength of the case is not considered under the first prong, which can be a factor under the second prong. If a trial judge errs on the first prong but comes to the correct conclusion on the second prong, the finding will be not be varied on appeal *(CBC)*

The *RJR MacDonald* test is 3 parts and has "irreparable harm" as a condition. In BC, we consider irreparable harm as part of the second branch. *AG v Wales* was affirmed by the SCC and not expressly overturned in *RJR MacDonald*. The two tests are seen as a "**distinction without difference**".
- Can use both in practice. Use *RJR* when you have a strong case for irreparable harm; *Wale* when you do not

Edward Jones v. Voldeng: injunctions are seldom granted without irreparable harm (no IH is not determinative, but it is a high hurdle to jump over)

CBC v. CKPG Television Ltd: court considers adequacy of damages, likelihood of paying damages, preservation of contested property, which party altered the status quo, strength of the applicant's case, public interest, etc

Onkea v Smith: porno dude directs to porn sites, shares technology with porno site—>steals tech and chambers judge grants INJ on irreparable harm

Non-quantifable harm vs harm that cannot be compensated for

RJR MacDonald contains the three stage test for granting injunctive relief. First, the court will ask whether there is a serious issue to be tried, which is a minimal threshold. The court will then consider whether the applicant will suffer irreparable harm if the injunction were refused. This stage looks to the nature of the harm itself rather than the magnitude. Finally, the court will ask whether the balance of convenience lies with the applicant. Injunctions are seldom granted without clear demonstration of irreparable harm (Edward Jones). While the absence of irreparable harm is not determinative, applicants face an even higher burden of obtaining injunctive relief without showing it (Edward Jones). In its analysis, the court considers the adequacy of damages in lieu of an injunction, the likelihood of the other party paying said damages, the preservation of any contested property, which party altered the status quo, the strength of the applicant's case, and the interest of the public (CBC). Irreparable harm is often rolled into one of these considerations.

Preservation of Property

Anton Pillar orders are made ex parte and are a <u>mandatory</u> injunction on the respondent to allow the applicant to come and take evidence. APs require satisfaction of the test AND implementation of safeguards.

<u>Rule 10-1: Guidelines for AP orders</u>
(1) court can make order for detention, custody, or preservation of any property—can authorize someone to enter onto any land or building to enable the order

(4) if party wants specific property other than land, court may order the property be given to the party pending the outcome of the proceeding

(5) receiving party must give undertaking as to damages

XY: courts are serious about expecting parties to adhere to AP requirements

Celanese:
- parties against whom AP orders are made are protected in three ways
  1. ensuring the orders identify the things to be seized and provide safeguards for dealing with privileged documents, among other things
  2. requiring appointment of vigilant, independent solicitors to supervise the execution of orders
  3. expecting parties executing the orders to exercise self-restraint
- AP orders made in very exceptional circumstances, lawyers should exercise very high professional diligence
- AP orders made only in extreme cases where the is grave danger of property being smuggled away or of vital evidence being destroyed
- requirements for bringing AP
  - applicant must demonstrate strong PF case
  - damage the applicant will suffer from target's alleged misconduct is serious
  - convincing evidence that the target possesses incriminating documents or things
  - real possibility that the target may destroy the documents or things before discovery process can occur
- guidelines for executing an AP on pg 265-267

Mareva Injunctions

Mareva injunctions are orders to freeze someone's assets. Court are cautious to grant Marevas because their effect is draconian and they impact another party's ability conduct business.

Rule 10-4: special type of injunction that freezes D's assets when there is a risk the assets will not be available to satisfy an eventual judgment

Seksui House v. Nagashima: requirements for Mareva injunction (onus on applicant)
- full and frank disclosure of all material matters
- particulars of the claim, grounds for it, amount
- fairly state points made against the claim by the defendant
- some ground for believing D has assets in the jurisdiction
- some ground for believing there is a risk of the assets being removed before judgement is satisfied
- undertaking in damages, supported in suitable cases with bond or security

Pre-judgment Garnishing Orders

Pre-judgment garnishing orders may be made ex-parts
COEA
s 3: can get desk order or security of liquidated sums
(2) execution on a judgment: attach judgment with affidavit saying party has not been paid, plus evidence D owes money (bank account)

s 3(2)(d): prejudgment garnishing order

show evidence someone in the jurisdiction owes money to the person you're claiming against, like a bank account

get bank to pay into court what D owes as security

affidavit must show action has started, cause of action, actual amount of debt, evidence there is another person liable to D, reasonable certainty of residence of garnishee

Alternatives to Trial

Offers to Settle

Rule 9-1: Offers to settle may be brought to court's attention

A party who makes a settlement offer can bring that offer to the court's attention for consideration at the conclusion of the action to persuade the court to award costs differently (9-1(2)).

Offer to settle is without prejudice and is not an admission (9-1(3))

9-1(4) to (6): Highly discretional

On receipt of an application:

(4) court may consider the offer to settle in exercising its discretion for costs

(5) where offer to settle has been made, court may do one, more, or none of the following:

(a) deprive party of costs from date of the offer (if P should have taken the offer)

(b) award double costs from the date of the offer (if D should have taken the offer)

(c) award costs in respect of certain steps undertaken after the date of the offer

(d) if an offer is made by B and P recovers an amount that does not beat the offer, award D costs from date of the offer

(6) in doing anything under (5), court may consider following factors

(a) whether offer should reasonably have been accepted

(b) the relationship between the terms of the offer and the final judgment

(c) the relative financial circumstances of the parties and

(d) anything else court deems appropriate

EA v JDW: discretion belongs to court to award or deprive a party of costs, encourages expeditious and cost effective way of resolves disputes

Giles v. Westminster Savings Credit Union: court considers whether offer to settle provided a genuine incentive to settle (depends on circumstances of the case)

Hartshorne v. Hartshorne: court looks are particular time of the offer and whether it had relationship to the claim —whether there was a principled basis for making the offer

Ward v. Klaus: court makes determination from perspective of the offeree (ie whether they had a good reason not to accept the offer)

0759594 BC: court will consider whether offer actually provided a real compromise

The court retains the discretion to award or deprive a party of costs based on the disclosure of an offer to settle (EA v JDW). Offers to settle encourage expeditious and cost effective means of resolving disputes outside of the courtroom (EA). When setting costs based on rule 9-1, a court will consider whether the offer to settle provided a genuine incentive to settle depending on the unique circumstances of the case (Giles). To make this determination, the particular timing of the offer, whether there was a principled basis for making the offer are relevant considerations (Hartshorne), and whether the offer actually provided a real compromise (0759594). The court makes the determination from the perspective of the offeree (Ward).

Judicial Settlement Conference

Rule 9-2
(1) parties of record can jointly request a settlement conference through requisition, or judge/master directs them to attend conference—>must attend private conference w/o witnesses to explore possibilities of settlement
(2) proceedings must be recorded, but no part can be made available without court order
(3) judge at JSC cannot preside over trial, unless consent

Alternative Dispute Resolution

Mediation

Notice to Mediate Regulation

- parties can deliver a notice to mediate on other parties (**s 3**)
  - can be served no earlier than 60 days after filing forest response to civil claim and no later than 120 days before date of trial (**s 5**)
- proceedings are confidential, heard before a trained mediatory or specialist
  - only derive a resolution if both parties agree (mediator or judge at JSC cannot impose)

Arbitration

- different from mediation because it is an adjudication—not contained within the rules
  - parties usually have a preexisting agreement to arbitrate
    - cannot force other side to go into arbitration
- can agree to arbitrate while proceedings are ongoing
- arbitrations result in decisions, not agreement or resolution
- cannot use anything from arbitration or other ADR at trial—agreement at the end of an arbitration settlement is an enforceable k

Trial

Setting Down Trial

Rule 12-1(2): Notice of Trial
Trial dates are set by reserving a date at the registry and then filling/serving a Notice of Trial to all parties of record (12-1(6)). Generally as a matter of courtesy, lawyers should consult with the other side before setting a date.

(4) must be filed in (a) registry where NCC was filed or (b) registry where proceeding was transferred
(7) if party objects to notice of trial date, must within 21 days of service (a) request CPC or (b) apply to reschedule the trial

Trial Management Conference

Rule 12-2(2): TMCs
Must be a TMC at least 28 days prior to the trial. Parties are technically meant to attend with their counsel (12-2(4), (5)) but masters/judges generally order otherwise in practice.

(1) must take place at least 28 days before trial date
(2) conducted by judge or master, if practicable by presiding judge
(3) each party of record must at least 7 days before TMC file trial brief (form 41) and serve it—>sets out witnesses, time estimates, key issues
(9) court can make various orders for conduct of trial

(11) judge/master cannot hear any application at TMC for which affidavits are needed or make final order without consent

Landis: TMC cannot be scheduled until notice of trial is filed

Trial Record

Rule 12-3

(1) party who filed notice of trial must file TR containing

- (a) pleadings,
- (b) particulars served under demand + the demand,
- (c) case plan order,
- (d) any order relating to conduct of trial,
- (e) document required by registrar

TJ uses TR throughout the trial to make sure things are on track

(3) party filing TR must file it at 14 days before, but not more than 28 days before scheduled trial date

NB: practically speaking, file TR once TMC has been held

Trial Certificate

Rule 12-4

(1) each party of record must file TC (Form 42)
(2) at least 14 days before, but not more than 28 days before, scheduled trial date
(3) must contain

- (a) statement of ready for trial,
- (b) certifying examinations for discovery are completed,
- (c) current estimate of length of trial,
- (d) statement that TMC has been completed

(5) if no party files TC, trial is removed from trial list

NB practical tip: if you don't want trial to go ahead, can strategically see if other side will file TC

(6) if party does not file TC, cannot make further applications without leave

Evidence at Trial

Rule 12-5

(27) default witness testimony is orally in open court

(4) D can apply for no evidence application at end of P's case—if court finds some evidence, D can proceed to present their case

(6) D can apply for insufficient evidence—P has not met their burden, ask judge to make final determination
NB: D gives up right to present their case

(19-26) adverse witnesses

- (20) if party wishes to call adverse party or director/officer/agent, must serve a notice at least 7 days before attendance required
- (22) can call witness without paying fees if they are attending the trial
- (23) can apply to have adverse witness application set aside—witness's location may be unknown, their evidence is unnecessary, undue hardship to require attendance
- (25) if adverse witness refuses or neglects to attend, court can grant judgment, adjournment, or award costs
- (26) can examine adverse witness through XE right away
  - (a) other party cannot XE witness except to explain matters

(c) other parties have ability to XE witness
(d) party calling witness cannot re-examine except in relation to new matters

EXPERT EVIDENCE

Generally, evidence is only admissible to establish facts. Expert evidence is an exception to this rule, and is used where the court needs to understand a complex issue or something technical. Experts are called upon to give their opinion on these matters. The expert writes and submits a report that goes into record as direct evidence and they do not appear in court unless the court grants an order allowing cross-examination.

Rule 11-2: duty of expert witnesses
(1) expert appointed by party or court has duty to assist the court and not an advocate for any party
(2) if appointed by party, must certify the report as conforming with (1) duty

Rule 11-3: appointment of joint experts
Expert can be appointed by two or more parties who are adverse in interest

Rule 11-5: court appointed experts

Rule 11-4: party's own expert
A party may appoint their own expert subject to following limitations:

1. CPC has been held—>no new experts unless provided in case plan order (11-1(2))
2. Adverse parties appointing joint expert may not appoint other experts on that issue w/o leave 11-3(9)

EXPERT REPORTS

Rule 11: procedural rules for expert reports

RULE 11-2(2) RULE 11-6(1)
Expert must certify:
They're aware of duty to assist the court and not to advocate for a party
They've made the report in conformity w/ their duty and
They will give oral or written testimony if called and give that testimony in conformity with their duty An expert's report must additionally set out the following:

a) Name, address, area of expertise
b) Expert's qualifications and employment and educational experience in his area of expertise
   There must be a link between the qualifications and the opinion sought *(Turpin)*
c) Instructions provided to expert in relation to the proceeding
d) Nature of the opinion being sought and issues in the proceeding to which the opinion relates
e) Expert's opinion respecting those issues
f) Expert's reasons for their opinion incl.:
   i. Factual assumptions on which the opinion is based
   ii. Description of research conducted by expert that led to him forming the opinion and
   iii. A list of all documents relied on by the expert
      (Can't say "I reviewed mad literature literature", *Turpin*)

Rule 11-6: general guidelines for expert reports
(1) formalities of expert report
(2) assertion of qualifications
(3) report must be served on every party of record at least 84 days before trial
(4) responding report must be served at least 42 days before trial
(10) party objecting export report must either on TMC date or 21 days before trial (whichever is earlier) serve notice of objection to report's admissibility

(8) party must make expert report available to other side

Rule 11-6(6), (7): Revisions to expert reports
If joint/own expert opinion changes in a material way after their report has been served, must prepare supplementary report, setting out change and reasons for the change (7)

Rule 11-6(8): Expert's file disclosure
(a) Promptly after being asked by any party of record, tendering party must serve the following:
- (i) written statement of facts on which report is based
- (ii) independent observations made by expert
- (iii) any data compiled by the expert
- (iv) results of any test or inspection conducted by the expert if relied on to come to the opinion

(b) if asked by party of record, make available to requesting party for review and copying expert's file
- (i) promptly if request made more than 14 days before trial OR
- (ii) at least 14 days before trial

Rule 11-7: expert evidence at trial
If no party demands an expert's attendance at trial for XE, expert's report stands as evidence **11-7(2)(b)**

Any party of record may XE joint experts **11-3(10)**
Any party of record may XE court appointed experts unless court says you can't **11-5(6)**
Only an adverse party may demand the attendance of a party's own expert for XE **11-7(3)(b)**

> **exception:** where appointing party believes direct is necessary to clarify terminology or otherwise make the report more understandable **11-7(5)(a)(ii)**
> Appointing party cannot XE their own expert at trial **11-7(5)(b)**

If a party entitled to XE expert demands their attendance within 21 days after service of report, report may not be tendered as evidence unless expert summits **11-7(2)(a)**

Court may allow expert to give evidence at trial in following scenarios **11-7(6)**
- (a) New facts comes to light that could not have been discovered through due diligence to go into report
- (b) non-compliance is unlikely to cause prejudice OR
- (c) the interests of justice require it

Mohan: criteria for admitting an expert report
1. testimony is relevant—PV vs PE, likely to assist or likely to confuse the court
2. evidence is necessary to assist TJ
3. whether the opinion is outside the experience and knowledge of the judge
4. absence of an exclusionary rule
5. expert is properly qualified

JURY TRIALS

Rule 12-6
(2) situations where trial can only be heard by a judge
(3) party can request trial by jury within 21 days of serving notice of trial, at least 45 days before scheduled trial date —must serve notice and pay sheriff a sufficient sum to pay for jury fees
(5) except for defamation, false imprisonment, MP, other party can apply to remove jury notice

> court will set aside jury notice for very complicated proceedings, if there is prolonged examination of documents (very high threshold)

Fast Track Litigation

Rule 15-1
(1) rule only applies if
  (a) only claims are for money, real property, personal property, lien, and total is 100k or less
  (b) trial can be completed within 3 days
  (c) parties consent
  (d) court orders
(7) party cannot serve application or affidavit unless CPC or TMC has been conducted unless
  (8)(a) court has ordered a fast track
  (c) application is for 9-5, 9-6, or 9-7
  (d) to add, remove, or substitute a party or
  (e) by consent
(10) fast track trial is without jury
(11) oral discovery cannot exceed (a) 2 hours, (b) any greater period than examinee consents
(14) court at TMC can adjourn trial to another date if it looks like it will take longer than three days
(15) predetermined cost provisions

Smith v Van Bregt: factors to consider whether fast track no longer applies
- consequences to parties of continuing or not under the rule
- convenience or inconvenience of witnesses
- prejudice to the parties
- interests of justice, including interests of general community
- impact of order on timing of the trials of actions

Costs

A cost is an order that one party has to pay another's legal fees—>COSTS DRIVE LITIGATION

Rule 14-1: Default quantification and award
Party and party costs are payable under Appendix B, and are the default method of quantification. They are generally awarded to follow the event (14-1(9)) unless the court orders otherwise
(1)(c): lump sum for proceeding and fixes them under (15)
(1)(d): lump sum for application is discretionary

Rule 14-1(12)(a): costs on an application
Unless court orders otherwise, the default is party bringing the application is entitled to costs in the cause, but the party opposing the application is not entitled to costs at all (NB unless there is costs in any event to a party).

Rule 14-1(3): when costs payable
Default entitlement is payable at the conclusion of the proceedings unless the court orders otherwise—forthwith

Rule 14-1(14): Costs from improper act or omission
If anything is done or omitted improperly or unnecessarily, court can order
  (a) deprive costs
  (b) pay costs incurred by bad act

Rule 14-1(33): Lawyers are liable for costs
Court can disallow a lawyer from collecting fees or to make lawyer personally liable for costs if lawyer has unreasonably caused costs through delay, neglect, and other fault

Rule 14-1(5): Disbursements
Registrar must determine which disbursements have been necessarily ot properly incurred in the conduct of the proceeding AND allow a reasonable amount for those disbursements

Appendix B
s 2: costs fixed using three scales—B is the default ($110 per unit)

A is less than ordinary difficulty
C is more than ordinary difficulty

If there is disagreement, parties can apply to have registrar assess costs
Successful parties also entitled to obtain reasonably incurred disbursements

S 3(2): registrar has the discretion to allow a number within the range of maximum and minimum units from the Tarriff, (3) regarding:

(a) one unit is for matters on which little time should ordinarily have been spent
(b) the maximum is for matters on which a great deal of time should ordinarily have been spent

Types of costs

Costs other than PPCs include

1. Costs in the cause—whoever wins the ultimate issue
2. Costs to a party (P or D) in the cause
   —>if party win the whole enchilada, the get the costs
   —>if party does not win the whole enchilada, no one gets the costs
3. Costs in any event of the cause—successful party is awarded the costs of the application/step at issue
5. Costs payable on a lump sum basis—court awards the successful party a specific sum (not based on bill of costs), payable immediately
5. Costs payable forthwith—order for immediate costs to be paid as opposed to at the end of an action
6. No costs

Special Costs

Costs that are incurred by the party not in Appendix can additionally be awarded.
Special costs are punitive. They apply when a party has done something reprehensible and deserving of rebuke. They are meant to protect the integrity of the process and to deter poor conduct.

Bradshaw Construction v Bank of NS: indemnity for fees reasonable client would pay reasonable lawyer, assessed objectively

Lee v. Richmond Hospital Society: special costs should resemble actual costs, not equal them

Garcia v. Crestbrook Forest Industries Ltd: special costs may be ordered for behaviour deserving reproof or rebuke, but falls short of scandal or outrage

Skidmore v. Blackmore: costs are meant to encourage settlement, discourage frivolous litigation or unnecessary steps in the litigation process; special costs available to unrepresented litigants

Costs drive litigation. Costs are meant to encourage settlement, discourage frivolous litigation or unnecessary steps in the litigation process (Skidmore). They provide indemnity for fees a reasonable client would pay a reasonable lawyer, and are assessed objectively (Bradshaw). A court may award special costs for behaviour deserving reproof or rebuke, but falls short of scandal or outrage (Garcia). Special costs should resemble actual costs rather than equal them (Lee), and are available to unrepresented litigants (Skidmore).

SECURITY FOR COSTS

Occasionally, court will order claimant to post funds into the court as a security to ensure that future costs will be paid. The purpose is to ensure fair payment of costs. These provisions provide protection for the defendant that P will have money to pay eventual costs. Therefore, an application for security for costs is only available to D or a third party, as P has the option of applying for a Mareva injunction.

Kropp v Swaneset Bay: court has complete discretion for ordering security for costs

Security for costs:

(a) may be ordered, even if there is a possibility that the party against whom the order is sought may be deterred from continued participating in the proceeding
(b) will be ordered unless it can be proved that security is sought as an instrument of oppression to stifle a legitimate claim and that the claim would probably stifled if security were ordered

(c) should be ordered without the court first hacing made a detailed inquiry into the merits of the proceeding, except that the court should consider whether success or failure appears obvious
(d) may be ordered in any amount, other than a nominal amount
(e) may be ordered even if the application for security is made late in the proceeding

It is not enough for a party resisting security application to provide a blanket and empty assertion of impecuniosity, must provide evidence of assets and debts.

Fat Mel's v. Canadian Northern Shield Insurance: party can apply for security of costs

- awarded when there is factually based concern other party will not be able to cover costs
- until security is given, responding party cannot take any further steps in the action

APPEALS

Court of Appeal Act

s 6: appellate jurisdiction
appeal lies to the BCCA from order of BCSC or order of judge of that court

s 7: leave to appeal
limited appeal for certain orders—-CA rule 2.1 for list of order requiring leave

s 14: bringing an appeal

s 15: bringing a cross appeal

s 13: quorum—>has to heard by at least three, can increase to five if there is no satisfactorily settled law and decision has not already been decided by panel of three judges (**Murphy, Winters**)

APPENDIX A: SAMPLE NCC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

ABC INC.

Plaintiff

and:

DEF INC.
XYZ CORP.

Defendants

NOTICE OF CIVIL CLAIM

"Boilerplate provisions"

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The plaintiff, ABC Ltd., is a company duly incorporated in BC with registered office at [address].
2. The defendant, DEF Inc., is a company duly incorporated in BC with a registered office at [address].
3. The defendant, XYZ Corp., is a company duly incorporated in BC with a registered at [address].
4. On or about [date], ABC Ltd. and DEF Inc. entered into an agreement.
5. The agreement contained, inter alia, the following terms:
   (a) The defendant DEF agreed to provide the plaintiff with 100 mufflers on or before [date].
   (b) The defendant agreed that the mufflers would be fit for the intended purpose, mainly for use in 1950 Fords.
   (c) The plaintiff agreed to pay $100 for the mufflers.

6. The plaintiff made payment to the defendant DEF on or about [date].
7. On or about [date], the defendant DEF delivered 100 mufflers. The mufflers, however, do not fit the Ford automobiles as required by the agreement.
8. The plaintiff attempted to return the mufflers, but the defendant DEF refused to accept the return.

Part 2: RELIEF SOUGHT

The plaintiff seeks the following relief:

1. A declaration that the agreement was breached.
2. General damages for breach of the agreement.
3. Costs
4. Interest pursuant to the Court Order Interest Act
5. Such further and other relief as this Honourable Court may seem just.

Part 3: LEGAL BASIS

1. The defendant DEF breached the agreement by failing to provide the mufflers as set out in the agreement.
2. In the alternative, the defendant DEF was negligent in providing the wrong mufflers.

etc, etc

THE PLAINTIFF'S ADDRESS FOR SERVICE IS:
XXXXXXXXX

Dated: April 14, 2015

UBC Law LLP
Per: name
Solicitor for the Plaintiff

APPENDIX B: SAMPLE RESPONSE TO CIVIL CLAIM

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

ABC LTD.

Plaintiff

and:

DEF INC.
XYZ CORP.

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: DEF Inc.

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1: Defendant's Response to the Facts

1. The facts alleged in paragraphs 2 and 7 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29, 30 and and 31 of Part 1 of the notice of civil claim are denied.
3. The facts alleged in paragraphs 1, 3, 4, 5, 6, 25, 26 and 28 of Part 1 of the notice of civil claim are outside the knowledge of the Defendant.

Division 2: Defendant's Version of the Facts

1. Set out facts—whatever is denied, or admitted in part give your version.

Division 3: Additional Facts

1. The Defendant pleads no additional facts, outside of those contained in Division 2 above.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant opposes the granting of all relief sought in Part 2 of the Notice of Civil Claim.

Part 3: LEGAL BASIS

1. In general response to the whole of the Notice of Civil Claim, the Defendant denies that any representations were made to the Plaintiff, or any agent or representative of the Plaintiff, regarding in the term or termination date of any lease applicable to the Property, as alleged or at all.
2. In the alternative, in general response to the whole of the Notice of Civil Claim, if any representations were made to the Plaintiff, etc etc etc

DEFENDANT'S ADDRESS FOR SERVICE:
XXXXXXXXXX

Dated: April 14, 2015

Per: signature
Solicitor for the Defendant

APPENDIX C: SAMPLE AFFIDAVIT

This is the 1st affidavit of *John Smith* in this case and was made on April 14, 2015

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

ABC LTD.

Plaintiff

and:

DEF INC.
XYZ CORP.

Defendants

AFFIDAVIT

I, *John Smith*, Chief Executive Officer of [address], MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chief Executive Officer of ABC Ltd., in Vancouver, British Columbia, the Plaintiff in the action, and as such have personal knowledge of the facts and matters hereinafter deposed to except where the same are stated to be based on information and belief and where so stated I verily believe the same to be trie.
2. I am authorized to swear this Affidavit on behalf of ABC Ltd.
3. Continue with story

THE DEFENDANTS
4. The Defendant, DEF Inc. is [relationship to plaintiff].
5. The Defendant, XYZ Corp., is [relationship to plaintiff].

RECORDS RELATING TO "XXXXXX"
6. ABC Ltd. maintains numerous records [XXXXXXX].

BREACH OF CONFIDENTIALITY BY DEFENDANTS
7. On [date], XXXX informed me and I believe it to be true that XXXXXX.

POTENTIAL HARM FROM DISCLOSURE
8. I am concerned that XXXXXX.
9. I make this Affidavit in support of an injunction application, among other things, to prevent disclosure of the Record and there contents. On behalf of ABC Ltd., I undertake to abide by any order that this Court may make as to damages if the Court later determines that the Defendants suffered damages resulting from the granting of an injunction and that ABC Ltd. should pay such damages.

SWORN BEFORE ME at Vancouver, British Columbia on April 14, 2015.

Signature
A Commissioner for taking Affidavits for British Columbia

Name
[Name of Commissioner]

Signature of John Smith
John Smith

APPENDIX D: SAMPLE ORDER

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

ABC LTD.

Plaintiff

and:

DEF INC.
XYZ CORP.

Defendants

ORDER MADE AFTER APPLICATION

Before:

THE HONOURABLE PROFESSOR GOULDEN

Monday, the 14th Day of April, 2015

ON THE APPLICATION of the Plaintiff:

[] coming on for hearing at….on……………………………and on hearing……[name of party/lawyer]………..and …………………[name of party/lawyer]……………..;

[X] without notice, coming on for hearing at Vancouver, British Columbia, on this 14th day of April, 2015, and on h and on hearing XXXX, counsel for the Plaintiff, and on reading Affidavit #1 of John Smith sworn [date];

[] without a hearing and on reading the materials filed by……..[name of party/lawyer]…….and………… [name of party/lawyer];

THE COURT ORDERS that:

1. The Plaintiff do XXXXXX
2. The Honourable Madam Justice XXXX shall remain seized of the Plaintiff's application;
3. Costs shall be in the cause.

Signature of XXX
Printed name
Counsel for the Plaintiff

By the Court
Signature of Registrar
Registrar