Civil Procedure Outline

CANONS OF LEGAL ETHICS

The Rules provide a *technical outline*, but the Professional Conduct Handbook provide an *overarching structure* for the use of the Rules. The decisions you make based on the Rules have to be informed by legal ethics obligations.

PCH CHAPTER 1: CANONS OF LEGAL ETHICS

A lawyer is a **minister of justice who owes duty to the State, Courts & Tribunals, Client, Other Lawyers and Oneself**. You should not aid/counsel anyone in ways that are contrary to the law.

A lawyer is an officer of court and owes an obligation to **courts and tribunals** (***Chapter 1 Canon 2***); conduct must be guided by candour & fairness; must defend judges; should not attempt to deceive court or tribunal by offering false evidence by misstating facts or law, should never seek to privately influence court or tribunal.

A lawyer is the **client's advocate** (***Chapter 1 Canon 3***): must obtain knowledge of facts and law before offering advice; disclose any conflicts of interest and perceived conflicts of interest (though clients can waive conflicts); advise to settle if settlement fair; treat adverse parties w/ fairness; abide by the law; defend in criminal cases; do not divulge clients' info; don't co-mingle own money and clients money; are entitled to be paid a reasonable amount of money; profession is a branch of the administration of justice, not just about $, don't submit own affidavit. Must point out to unrepresented client that you are NOT their lawyer.

Lawyers have **obligations to other lawyers** (***Chapter 1 Canon 4***) to act with courtesy and good faith. Neither give nor request an undertaking that cannot be fulfilled, should "avoid sharp practice." When lawyer makes mistake, provide written notice ASAP.

Finally, lawyers have **obligations to themselves** (***Chapter 1 Canon 5***), to uphold honesty and integrity of profession, to expose dishonest conduct by another lawyer, establish a reputation of trustworthiness and competence, recognize that oaths taken are solemn undertakings, maintain the traditions of the profession by steadfastly adhering to all sorts of things like probity, honesty, integrity, and dignity.

PCH CHAPTER 4: AVOIDING QUESTIONABLE CONDUCT, INCLUDING IMPROPER COMMUNICATIONS

Threatening criminal or disciplinary proceedings (***Chapter 4 Rule 2***) Purpose: You don't want the threat to intimidate the civil litigation process. You are within your rights to make a complaint, but you shouldn't be using that to gain an advantage in the litigation.

PCH CHAPTER 8: THE LAWYER AS ADVOCATE

Inconsistent statements or testimony (***Chapter 8 Rule 6***) Note: Mere inconsistency is insufficient to prove that someone is lying, *but* when you come across an inconsistency, you should investigate further.

When seeking an *ex-parte* order, you have a duty to present both sides of the case (***Chapter 8 Rule 21***).

INTRODUCTION TO THE RULES OF COURT

INTERPRETATION

Rule 1-1: **Interpretation:** First place to look for interpretation: ***Rule 1-1(1):*** Definitions. Second place to look for interpretation: *Interpretation Act* (See ***Rule 1-1(2): Interpretation Act*** **and** ***Supreme Court Act***)

TIME

Rule 22-4(1): **Computation of time:** If less than 7 days, it has to be business days (holidays are not counted), if 7 or more days, you include every day. What are *holidays*? Not in *Rule 1-1* (Interpretation), so see *Interpretation Act*.

Rule 22-4(2): **Extending or shortening time:** Court may extend or shorten any period of time even if the application is made after the period has expired. Between counsel, extensions are liberally granted (either counsel will agree to it or the court will grant it unless there is a true prejudice) // Rationale: Court wants to deal with substance. // Amendments of documents are also liberally granted // Can argue: I can file a basic *pro forma* response in time and go back and amend it later, but if you give me a time extension, I can give you a meaningful response. *Ex:* Rules say if other party doesn't deliver a response in time, you take default judgement, but in reality, counsel gives a 7-day warning beforehand and upfront. Two factors to consider: **(1) prejudice** (*would the party be prejudiced*) **(2) justice** (*would justice be served; merits of the claim: if the claim is not very good, courts more reluctant to give an extension*)

OBJECT OF RULES & PROPORTIONALITY

Rule 1-3(1): **Object of Rules**
The object of these Supreme Court Civil Rules is to secure the **just**, **speedy** and **inexpensive** determination of every proceeding on its merits.

Rule 1-3(2): **Proportionality**: **Proportionality is an overarching consideration** which informs the interpretation and implementation of the rules (***Kim v Lin 2010 BCSC***, *you should be looking at proportionality/context of the underlying case—if it is a small case, we may not want to have multiple independent medical examinations*). Under proportionality rule, the court may consider **economic concerns** when the value of the claim is low (***Boss Power Corp v BC*** **2010 BCSC,** *proportionality in costs of production of documents*). Proportionality is aimed at process in litigation but **it can also apply to everything else**, such as disbursements (***Stapleton v Charambidis*** **2010 BCSC**, *trying to recover $30K expert fees as disbursements on $100K claim – should someone be spending $30K on a $100K claim? Court knocked it down to $20K*).

CHANGE OF LAWYER

Rule 22-6: **Change of Lawyer:** Process of how a party may change lawyers; also rules for lawyer withdrawal. When you file a notice of civil claim, you provide an address for service (usually your lawyer's address); until you *officially* change lawyers, the other party can continue to serve you at the address provided (***22-6(1)***). Lawyer must: (1) file notice of intention to withdraw. The other party has 7 days to object. If there is no objection, lawyer can (2) file notice of withdrawal.

PCH Chapter 10: **Ethical Issues Re Withdrawal: (1) Obligatory withdrawal** (***section 1***): a lawyer is required to sever the lawyer-client relationship if (a) fired (b) instructed by client to do something inconsistent with the lawyer's professional responsibility (*ex. mislead the court*) (c) client takes position solely to harass or injure another (d) will place lawyer in a conflict of interest (e) lawyer is not competent to handle the case. **(2) Optional withdrawal** (***section 2***): a lawyer may withdraw if (a) serious loss of confidence between lawyer and client **(3) Residual** (***section 3***): situations not covered; only if withdrawal is not unfair to the client (*ex. quitting on the eve of a trial*) or done for an improper purpose (*ex. trying to delay*). Confidentiality: if the reason for withdrawal comes from confidential information from client, lawyer must *not* disclose the reason for the withdrawal unless the client consents (some circumstances: if client objects to withdrawal, that may amount to a waiver, allowing that lawyer can respond to that objection).

NON-COMPLIANCE WITH RULES

Rule 22-7: **Non-Compliance:** Provides some remedies if the other party will not comply with the rules. Under the new rules, courts have been given a lot more discretion. *Note: the Rule provides some pretty draconian remedies; most of these failures are treated as irregularities; usually, if someone screws up, you should give them a second chance to redeem themselves unless there are good reasons (**prejudice, justice**).* **Rationale**: we want to get to the **substance** of the case. Number 1 way of getting ***22-7(5)***: consistently screwing up.

Rule 22-7(2): **Powers of the court:** If there has been a failure to comply with these Supreme Court Civil Rules, the court may (a) **set aside a proceeding**, either wholly or in part, (b) set aside any step taken in the proceeding, or a document or order made in the proceeding, (c) allow an amendment to be made under Rule 6-1, (d) **dismiss the proceeding** or **strike out the response to civil claim** and pronounce judgment, or (e) make any other order it considers will further the object of these Supreme Court Civil Rules.

Rule 22-7(5): **Consequences of certain non-compliance:** If a person, contrary to these Supreme Court Civil Rules and without lawful excuse,

(a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for his or her **examination for discovery**,
(b) refuses to be sworn or to answer any question put to him or her,
(c) refuses or neglects to **produce or permit to be inspected any document** or other property,
(d) refuses or neglects to answer interrogatories or to make discovery of documents, or
(e) refuses or neglects to attend for or submit to a medical examination, ***then***
(f) if the person is the plaintiff or petitioner, a present officer of a corporate plaintiff or petitioner or a partner in or manager of a partnership plaintiff or petitioner, the **court may dismiss the proceeding**, and
(g) if the person is a defendant, respondent or third party, a present officer of a corporate defendant, respondent or third party or a partner in or manager of a partnership defendant, respondent or third party, the **court may order the proceeding to continue as if no response to civil claim** or response to petition had been filed.

Rule 22-7(5): **Failure to comply with direction of court:** If a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5) (f) or (g).

Example: you try to get the other lawyer to give you dates for examination for discovery and they don't get back to you. Go ahead and set up a date unilaterally, then, if they don't show up, ask the court to schedule an examination for discovery that they have to show up to. If they don't show up to that, you can refer to the court for a remedy, i.e. seek order to have the case dismissed or proceed for default judgment.

DISMISSAL FOR WANT OF PROSECUTION

Rule 22-7(7): **Dismissal for want of prosecution:** If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

Want of Prosecution: When someone has started a proceeding, served it on you, but then does nothing. You can bring an application to have the case dismissed on its merits (but this can get expensive). You can let it sit, then bring an **application seeking dismissal** (see also: ***Rule 22-4(5):*** **re Time**). Court will look at various factors in deciding whether to grant a dismissal for a case that has been sitting around: time, reasons for delay, prejudice (*whether it is still in a position to deal with the case*), justice (***0690860 Manitoba Ltd. v. Country West Construction Ltd.*** **2009 BCCA**).

PRELIMINARY CONSIDERATIONS

COSTS OF LITIGATION

Costs are a driver in the litigation process. Reasons to consider a **settlement**: (1) Out-of-pocket costs (2) Risk of litigation (3) Ability to collect.

Default rule re costs: successful party recovers their costs from unsuccessful party based on a schedule under the rules of the court (not actual costs, might get 50%). But for **disbursements** (out-of-pocket costs), successful party is entitled to get dollar cost.

LIMITATION PERIODS

Time period between the time of the event/breach and the commencement of the civil litigation process.

First question to ask: Are there limitation periods that apply? If so, when is that limitation period? Should I be filing something this afternoon?

Missing a limitation period is not fun. It must be reported to the Law Society Insurance. ***On exam: key thing is to recognize it is an issue. Recognize limitation act issues and general provisions that would apply. Understand postponement, confirmation, counter-claim rule. Issues with respect to minors.***

Limitation Act

- ***s. 3(2):*** Deals with things like injury to person/property, defamation, etc. (2-year period)
- ***s. 3(4):*** Deals with possession of land, return of collateral, etc. (no limitation period)
- ***s. 3(5):*** Any other action not specifically provided for in this Act (6-year period)
- ***s. 3(6):*** Breach of contract (ex. employment contract) (6-year period) – ???

One of the ways you can get around missing a limitation period is to file it as a counter-claim (includes change of party name) (***s. 4(1)***)

Confirming a cause of action (*during* a limitation period) renews the limitation period so that the limitation period then runs from the date of the confirmation, not from the date of the initial breach (***s. 5***). *Classic example: when people keep promising that they will pay back a debt.* But note: confirmation of a cause of action *after* the limitation period does not count.

Postponement of limitation period (***s. 6***) // Where there is an unknown cause of action, *classic example*: improper construction (***s. 6(4)***)

Minors/persons with disability: time period is postponed until they are capable of managing his/her affairs (*classic example: minor*) (***s. 7***) // *Note:* for a person that has a permanent disability that impedes their ability to deal with the matter, the expectation is that a *guardian ad lidem* would proceed with the cause of action.

Maximum 30 years: Generally speaking, 30 years is the maximum limitation period (***s. 8***)

COMMENCING AN ACTION

FORM OF PROCEEDING

3 forms of proceeding: (1) Action (2) Petition (3) Requisition

- Action: commenced by notice of civil claim – leads to trial
- Petition: leads to hearing
- Requisition: a document filed, asking the court to do something that is relatively straightforward and doesn't involve any contested facts (*ex. substitutional service of tax notice for unpaid property tax*)

Default for proceeding is that you are going to be commencing it by a notice of civil claim (action), but you have to think about which of the two main proceedings you want to use. ***Have to understand the differences between the two and figure out which one you want to use.*** Some rules are only available for actions, not necessarily available for petitions.

Rule 2-1: **Choosing the Correct Form of Proceeding**

Rule 2-1(1): **Commencing proceedings by notice of civil claim**

- Every proceeding must start with a notice of civil claim (*default*).
- As a general rule, most of the tools that are in the Rules to help you gather evidence and proceed with the claim are available in an action.

Rule 2-1(2): **Commencing proceedings by petition or requisition**

- Sets out the 8 proceedings that must be commenced by way of petition
- Common petition proceedings: interpretation of documents, enforcement/interpretation of by-laws, etc.
- The majority of the tools that are available in the Rules are not available in a petition. It is designed for shorter and simpler matters that don't require much gathering of evidence.

JURISDICTION

Question to ask: Should a proceeding be brought in British Columbia? Does BC have **territorial competence**? i.e. Do we have the *jurisdiction simpliciter* (basic jurisdiction) to be dealing with this proceeding?

Court Jurisdiction and Proceedings Transfer Act

- ***s. 3:*** Talks about when the court has territorial competence and sets out a number of categories
- ***s. 3(d):*** That person is **ordinarily resident** in BC at the time of the commencement of the proceeding (i.e. the defendant ordinarily lives in BC)
- ***s. 3(e):*** There is a **real and substantial connection** between BC and the facts upon which the proceeding against the person is based

- ***s. 10:*** Sets out categories that automatically meet the test for "real and substantial connection to BC" (*Examples*: the tort took place in BC)

- ***s. 11:*** Even with territorial competence, the court has residual discretion to not claim jurisdiction over a matter (*forum non conveniens*). This is where the court goes into the debate (secondary question): what is the most convenient/appropriate forum? ***s. 11(2)*** sets out factors to consider (*Note:* BC courts will apply local, BC laws unless there is evidence to the contrary)

OTHER KINDS OF PROCEEDINGS

CLASS ACTIONS

Used when a large group of people share the same grievance forming a class of plaintiffs who can collectively bring a claim to court (guided by the ***Class Proceedings Act***).

Used in contexts where you have a product that you supply to hundreds of thousands of people or a major event that causes losses to many people. Rather than having each individual commence their own action so you have multiple actions determining the same issues of fact and damages, etc., you can have a class action.

A **representative plaintiff** will start the claim, and then you will have **classes of plaintiffs** who have similar claims against the defendant(s). There is a procedure to have the classes certified (to make sure each plaintiff has standing to participate). The ***CPA*** has mechanisms to help **prove losses and facts on an aggregated basis** as opposed to individual claims, so the totality of losses is considered rather than individual plaintiffs' losses.

You don't necessarily need **identical issues of fact** or even **identical issues of law** – if they are similar enough, the court my certify the proceeding. *Ex. Defective seatbelt in a car. Many people might be harmed as a result of the defective seatbelt, but their injuries and damages might be different. But it is still the same seatbelt from the same manufacturer. So the **breaches of the manufacturer are common to a group of people**, so you can bring those group of people together in a class proceeding to have the facts determined by one trier of fact.*

Certification Process (***CPA s. 2***): You have to have one person acting as the **representative plaintiff**, who is a resident of BC, and brings the action on their own but will plead the aspects of the Class Proceedings Act in their notice of civil claim, which is then served on the defendant (***CPA s. 2(1)***).

Within 90 days of either the date on which the last response to civil claim was served or the date on which the period for service of the last response to civil claim expires (whichever is later) (***CPA s. 2(3)***), the person who wishes to start the class action has to apply to the court to **certify the proceeding** as a class proceeding (***CPA s. 2(4)***). This has to do with **certifying a class of people** who will be part of the lawsuit.

Class Certification (***CPA s. 4***, *outlines the factors the judge will consider*). Judge is looking to see if this is the right kind of case to be a class proceeding. **There must be:** a cause of action is disclosed in the pleading (***CPA s. 4(1)(a)***); an identifiable class of 2+ people (***CPA s. 4(1)(b)***); common issues among the people in the class (***CPA s. 4(1)(c)***); a class proceeding is the best way to deal with the case (***CPA s. 4(1)(d)***); someone willing to lead the case as a representative plaintiff (***CPA s. 4(1)(e)***). Factors to consider in determining whether a class proceeding is the best way to deal with the case are outlined in ***CPA s. 4(2).***

Stages of the class proceeding set out in ***CPA s. 11***.

Opting out/opting in: If you're a resident of BC and there is a lawsuit happening about an issue that you are affected by, you are automatically opted in as part of the class, whether you know about it or not (***CPA s. 16***). If you are a BC resident but you can be living outside of BC, but still opt in to a BC class action (***CPA s. 16(2)***).

Note: Class actions are rarely used in BC. *It is preferable to bring a class action in Ontario, because the Ontario CPA automatically includes any plaintiffs in Canada, whereas in BC, it is limited to BC residents. So, if it is a big enough case to warrant a class action, chances are someone in Ontario has already thought about it and brought an action. There is also a lot of difficulty with representative plaintiffs getting cases off the ground; the defendants are big entities and have a lot of money so they can challenge the case at the certification stage and blow up representative classes. If you can't certify a class proceeding, there may be cost awards involved, so a representative plaintiff doesn't want to be left with the cost consequences of not being able to get a class action off the ground.*

PETITIONS

Why petitions are used: Actions commenced by way of a notice of civil claim can be costly and time-consuming (a civil trial may take years). Sometimes, the best way to get the plaintiff in front of a judge is by way of a **petition.** In a petition, an issue comes to the court for a full determination on the merits without having a full trial. You **file a petition** setting out the facts, and the law, and submit **supporting affidavits** – this is all the judge when making their determining of facts. *Note: petitions usually heard by **judges**.*

When petitions are used: When **facts aren't at issue**; there are **no credibility concerns** (*if there are any disputes over facts or there is credibility at stake, judge will probably want to see the witnesses in a trial*); **not seeking any damages** (*you need evidence to help quantify damages*); usually only matters that are simply at **the plain discretion of the court** upon hearing the evidence or authorized by statute. *Note: if there is an isolated concern over an affidavit or an affiant's version of events, the respondent can usually, with the agreement of the other side, cross-examine the affiant.*

Rule 2-1(2) governs when a petition **must be filed**, i.e. when: the person starting the proceeding is the only person who is interested in the relief claimed, or there is **no person against whom relief is sought** (***Rule 2-1 (2)(a)***, *when there is no other person affected by the case, ex.*); the proceeding is brought in respect of an application that is **authorized by an enactment** to be made to the court (***Rule 2-1(2)(b)***, *when you have a provision in a statue stating that relief sought should be by way of a petition*); the sole or principal question at issue is alleged to be one of **construction of an enactment**, will, deed, oral or written contract or other document (***Rule 2-1(2)(c)***, *interpreting the wording of a contract, will, etc – based on rules of interpretation, not facts*); (***Rule 2-1(2)(d),*** *re administration of an estate*); (***Rule 2-1(2)(e),*** *re guardianship of an infant*); *etc.*

Process of Filing Petitions (***Rule 16-1***)**:** Must file a petition in **Form 66**, and provide **supporting affidavits** setting out enough facts to support the relief sought (***16-1(2)***) and attaching, as exhibits, all of the **documents** they think the court needs to determine the issue (***Note: another advantage of petition vs. full trial:*** document discovery phase and examination for discovery phase can take a very long time).

Service: A copy of the **filed petition** and **filed affidavits** in support must be served by **personal service** on any respondents, or anyone whose interests may be affected by the order sought (***16-1(3)***). The respondent must file a **response to petition** with 21/35/49 days of being served (if they want to receive notice re date/ time of hearing) (***16-1(4)***). If respond wants to **oppose the relief sought by the petition**, they must summarize the facts/legal basis for not granting the relief, submit a supporting affidavit and attach any relevant documents (***16-1(5)***). *It is often at the response stage where it may be found that the action is not suitable for petition, because this is when issues of credibility, contested facts may be raised.*

Sending a petition to trial: Question is not whether there is any dispute as to facts or law, but whether there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried (ultimately up to **discretion** of the court) (***Douglas Lake Cattle Co. v. Smith 1991 BCCA***).

Bottom line: When you want something determined quickly, and it is suitable to be determined by petition, it is the best way to go. You can get a petition together relatively quickly. The most time consuming aspect is meeting with your affiants (person who swears the affidavit), and collecting all the documents. You file it, serve it. There is a lag of 21 days, but if no one responds in the 21 days, you can set up your hearing within a week and get your relief sought. *Note: if there is a response to the petition, you need to make sure the respondent is consulted in when the hearing is scheduled for, time estimates for the hearing, etc.*

Petition record: The petitioner has to provide the registry where the hearing is to take place with a petition record including the petition, supporting affidavits, response to petition, and any documents, etc. (***16-1(11)***).

Ex. Two joint owners of a property can't agree on whether to sell the property. ***Partition of Property Act:*** *any of the owners can go to court and seek an order to partition the joint tenancy and sell the property (the court must sever the joint tenancy and order the sale of the property unless it would be inequitable to do so).*

DEFINING AN ACTION

PLEADINGS

Pleadings set the base for your claim, the foundation you work from in conducting the litigation process. They are going to structure what you are allowed to claim, etc.

Pleadings: (1) notice of civil claim (2) a response to civil claim (3) a reply (4) a counterclaim (5) a response to counterclaim (6) a third party notice (7) response to third party notice (***Rule 1-1:*** **Interpretation**)

4 Main Functions of Pleadings

1. **Define the issues/questions which are in dispute**
   - Important to make these clear and precise early on. At trial, the first thing the judge looks at is the pleadings, so you need to have the issues defined and set out.
   - For every application, we go back to the pleadings—that is what the court uses as a base for deciding whether or not to grant an application.
2. **Avoid surprises**
   - Giving fair notice of the case you're advancing and that the other side has to meet so there are no surprises – courts don't like surprises.
3. **To inform the court**
   - So that the court that is going to be adjudicating knows what the facts are, what brings us here.
4. **To provide a permanent record of the above**
   - What was the issue, what were the facts, etc.
   - For precedent purposes, etc.

Rule 3-7: **Pleadings** (sets out general principles)

- Generally speaking, you're only supposed to plead material facts, pleading must not contain evidence (***Rule 3-7(1)***) // **A material fact is the ultimate fact, sometimes called the ultimate issue, to the proof of which evidence is directed. It is the facts put in issue by the pleadings.** (***Jones v. Donaghey* 2011 BCCA**)// *Ex.* You allege that the D was negligent because they were speeding, you don't say what the evidence is that shows that they were speeding.

There should be **consistency in your pleadings** (***Rule 3-7(6)***) ***but*** **you can have alternative pleadings** (*but you better make it clear that they are just that, alternative arguments*) (***Rule 3-7(7)***)

Amount of general damages (pain and suffering) must not be stated in any pleading (***Rule 3-7(14)***)

General denial of a K will be construed as a denial of the existence of the K, but not as a denial of the legality/sufficiency in law of that K (***Rule 3-7(16)***) *Ex. If you allege that there was no consideration, you have to plead that specifically.* If there are specific facts that you are going to be relying upon, plead them!

Particulars: Where there is detail required in order to respond to a pleading, *sometimes* the rules mandate that you give particulars, *sometimes* you have to ask for them (***Rule 3-7(18)–(24)***). *Ex. Defamation: you have to spell out the words that constitute the defamation (that is the particulars).*

If you need particulars, you have to ask for them in writing (***Rule 3-7(23)***). You send over a request for particulars to the other side. Only when they fail to respond to that or deny it can you then bring an application to the court seeking particulars. The court can then, in response, order the other party to provide particulars.

A request for particulars does not amount to a stay of proceedings. So, just because you ask for particulars, doesn't mean you don't have to carry on until you get them.

#1 – NOTICE OF CIVIL CLAIM

Notice of civil claim is the **first and primary pleading** you have as part of an **action** (covered in ***Rule 3-1***). What is in the notice of civil claim drives the steps you will take later. What can be asked, answered, what documents have to be produced are all driven by what is in the pleadings, particularly, the notice of civil claim.

Key elements to cover off in a notice of civil claim:

1. **Identification of the parties**, establish the identity of the parties – who is involved?
2. **Status of the parties** – are they individuals/corporations? Ex. The plaintiff, ABC Corporation, is a registered corporation in BC.
3. **Jurisdiction** of the BC Court to take jurisdiction over the case – in your pleadings, you must establish jurisdiction, this is a material fact (i.e. show that the defendant is resident in BC or that there is a real and substantial connection to BC, ex. the tort took place in BC)
4. **Substantial facts**: what, where, when, how
5. **Legal basis**: Why this is before the court? Why should the court care?
6. **Relief sought**: damages, etc.

STATEMENT OF FACTS

Establish the facts that are going to go to the claims you are going to be making; set up the parties, set up how they came into a relationship, establish what happened with that relationship (what went wrong), and if there is a basis for why you are claiming damages (*i.e. I paid the money and I want it back, I suffered a loss of profit*).

Identify the parties: Plaintiff: "*The plaintiff, ABC Corporation, is a company duly incorporated in BC with a registered office at [address]*" (Establishing identity, name, and also justification of jurisdiction).
Defendant: "*The defendant, DEF Ltd., is a company duly incorporated in BC with a registered office at [address].*"

What brings these two parties together? "*On or about [date], the P and D entered into an agreement."*

What is bringing you before the court: "*The agreement contained inter alia (amongst others) the following terms: (a), (b), (c).*" You're not going to list all the terms, but **only the key terms**. Only plead the terms that are going to **matter in what brings you before the court**. "*The defendant agreed to provide the plaintiff with 100 mufflers on or before [date]. The defendant agreed that the mufflers would be fit for the intended purpose, mainly for use in 1950 Fords.*" Also: "*The plaintiff agreed to pay $xx for the mufflers. The plaintiff made payment to the defendant on or about [date]*" You want to **establish the terms** that you know are going to come into issue later on. The issues: "*On or about [date], the defendant delivered 100 mufflers, however, the mufflers do not fit the Ford automobiles as required by the agreement."*

Note: Point out that you didn't rush straight to court, you took **steps to mitigate**. "*The plaintiff attempted to..."*

Note: Instead of saying "*the D was speeding*", you should say "*the area where the accident took place was a 50 km/h zone and the D was driving in excess of 50 km/h*". This gives the judge the ability to make a factual finding based on the evidence and come to the conclusion that the D was speeding.

RELIEF SOUGHT

What are you asking the court to do? Ex. "*Plaintiff seeks general damages from the Defendant. The plaintiff seeks interest. The plaintiff seeks costs"*. If you want the court to do something, put it in there!

LEGAL BASIS

In the facts, you have established why you're here. In the legal basis, explain **why the court should do what you want it to do**. **Legal cause of action** may be as simple as: "*The plaintiff holds that the defendant's conduct was a breach of contract*" or "*the defendant's conduct, as described in paragraphs 6 and 7 of the statements of facts, was negligent and/or breach of statute*".

The legal basis should **give the court an ability to give you the relief you are seeking:** Ex. If you are seeking an injunction, explain why the facts that you pled meet the test for an injunction. *"The 3-part test for an injunction is found in Case X. Here are the 3 parts, and here is why these facts meet them."*

Exam Tip:

Give the **Style of Cause** and then go straight into the paragraphs: (1) Statement of Facts (2) Relief Sought (3) Legal Basis. Sign at the end. *Ignore the boiler plate (it will be on the forms). Don't worry about the appendices.*

IN THE SUPREME COURT OF BRITISH COLUMBIA

ABC Ltd, Plaintiff

v

DEF Inc, Defendant

Notice of Civil Claim

(1) Statement of Facts

(2) Relief Sought

(3) Legal Basis

RENEWAL OF NOTICE

A notice of civil claim is only **valid for one year** (***Rule 3-2***). When you commence an action by filing a notice of civil claim, you have 12 months to serve the notice of civil claim on the defendant. Once the notice of civil claim is served, expiry is no longer an issue, you are in the legal process.

Rationale*:* (1) Service – Sometimes the defendant will evade service. (2) Parties may want to file a notice of civil claim within a limitation period to preserve their right to sue, but they may not necessarily want to serve it on the other side if they are still having discussions with them, or if they have ongoing contracts (they want to make sure will be delivered on). So you may commence an action by way of a notice of civil claim and hold on to it while the discussions are going.

Limitation period issue. If your notice of claim expires within the limitation period, you can start a new claim. **But** if your notice of civil claim **expires outside of the limitation period,** you will not be able to start a new claim.

At 12 months: (1) The notice of civil claim **expires** or (2) You get an **extension.**

Extension: If you are not able to serve the notice of civil claim, you can apply to the Court to extend the 12-month time period to serve (court has **discretion**). You should generally try to get the extension before the 12 months, but the ***Rules*** specifically give the court **discretion to grant an extension before or after the 12 months.** If there is no limitation period issue, the court will usually give the extension.

Factors the court will consider in deciding to exercise discretion to give an extension: (1) Whether the application for renewal was made promptly (2) Whether the defendant had notice of the claim before the writ (notice of civil claim) expired (3) Whether the defendant was prejudiced (4) Whether the failure to affect service was attributable to the defendant (*evading service, etc.*) (5) Whether the plaintiff, as opposed to his solicitor, was at fault (*if the solicitor screwed up, the courts will often allow a renewal – the plaintiff shouldn't lose their case just because their lawyer screwed up*) – this is a strong factor for justifying extension of the notice of civil claim (***Imperial Oil Ltd. v. Michelin North America Inc.* 2008 BCCA,** *note: this case refers to a writ, but analysis can be applied to renewal of a notice of civil claim*). **The overarching objective is to see that justice is done.** This rule is primarily concerned with the rights of litigants, not the conduct of solicitors. Court will consider **prejudice** (*what is the prejudice to the defendant to give the extension?*) and **justice** (*if they have a legitimate claim, it should be addressed, not dismissed based on a technicality*) (***Sutherland v. McLeod* 2004 BCCA**).

SERVICE

Once you've commenced an action by filing a notice of civil claim, the next step is service (***Rule 4***).

Ordinary Service

Service by mail or other delivery method (***Rule 4-2***, *spells out what constitutes ordinary service*)

Personal Service

There are some documents that must be served personally, i.e. **personally delivered** to the defendant, unless otherwise court-ordered. A **notice of civil claim** is one of these documents (***Rule 4-3***, *spells out specific documents that must be personally served, includes notice of civil claim, counterclaim*).

Note: lawyers can agree as to whether something does or doesn't have to be done a certain way. Ex. When dealing with another lawyer, they might say, is it okay that I just serve your office and you'll agree that that is proper service – parties can agree that way. But short of those agreements/compromises reached by counsel, personal service is required for notice of civil claim, petition, and other items spelled out in ***Rule 4-3***.

The document does not need to be delivered by the plaintiff themselves – a **service agent** can be used.

For a **corporation defendant**, service can be done by: (1) personally serving **certain individuals on behalf of the corporation** (*ex. President, Chair, other chief officer*) (2) delivering to a **city or municipal clerk** (3) delivering it by **registered mail to the corporation's registered office** or (4) in the manner provided by the ***Business Corporations Act*** or any enactment relating to the service of court documents (***Rule 4-3(2)***).

ADDRESS FOR SERVICE

Rule 4-1 **Address for Service:** A **party of record** has to provide an address for service. "Address for service" is defined in the *Rule* and in the *Interpretation Section*.

Rationale: Transition from Personal Service to Ordinary Service. The address for service sets up a simpler process for the delivery of documents to avoid personal service beyond initial personal service. In the notice of civil claim, the plaintiff has provided an address for service. In their response to civil claim, the defendant provides an address for service. **Going forward: you don't have to personally serve documents.** You will have an address for delivery of documents. **Note: Once you send the document, service is deemed** (Parties are entitled to serve to the address for service until the address is officially changed).

SUBSTITUTIONAL SERVICE

Substitutional service an alternative method for serving documents when the primary method of **personal service** provided for in ***Rules 4-1***, ***4-2*** and ***4-3*** is not available. It is a way to get the default/general rules, such as personal notice for a civil claim, waived. Most often used when you have a defendant that you can't locate or is evading service (***Rule 4-4***).

Rule 4-4(1): If it is **impractical** to serve a document by personal service or if the person to be served by personal service **cannot be found after a diligent search** or is **evading service** of the document, the court may, on application *without* notice, make an order for substitutional service. *Examples: defendant is in prison, in a coma (it is not practical to serve them; substitutional order may allow you to serve their guardian for example).*

SERVICE EX JURIS

Rule 4-5 **Service outside of BC:** provides for a process to serve outside of BC in two ways: **(1) Without Leave:** You can do it on your own as long as you follow the proper procedures (***4-5(1)***). Requires an **endorsement:** At the end of your notice of civil claim, you fill out a form (***Form 11***) outlining your justification for why you are entitled to serve this document outside of the jurisdiction (***Court Jurisdiction and Proceedings Transfer Act, s. 10***, *outlines circumstances where you can serve outside of BC*) *Ex.* "*The Defendant is entitled to serve this document outside of BC for the following reason: The tort was committed in BC*". **You need to have a justification!** or **(2) With Leave:** If you can't find a justification for serving outside of BC in ***Section 10***, you must apply to the court to authorize you to serve outside of BC (***4-5(3)***).

RESPONDING TO AN ACTION

#2 – RESPONSE TO CIVIL CLAIM

Response to civil claim (statement of defence) is the **second pleading** as part of an **action** (see ***Rule 3-3***).

Response to civil claim: contains the defendant's pleadings of material fats (i.e. their version of the facts) and outlines their defences (if any). The response to civil claim is split into 3 parts. See below.

Set off as a Defence: As a defence to a claim, you can plead a "set-off"– i.e. you have some sort of claim that should enable you to reduce the amount the plaintiff is claiming. A set-off is pled **in the response to civil claim** and it **must be connected to the issues the plaintiff is claiming.** If it is not related, then you have to bring a counter-claim.

RESPONSE TO FACTS

You must indicate, for each fat set out in the notice of civil claim, whether the fact is **admitted, denied,** or **outside of your knowledge** (***Rule 3-3(2)(a)(i)***)

Admitted Facts

Be careful which facts you admit. If you admit a fact, you don't want to have to recoil later on – there is a process you have to go through for this and it's not fun. On the other hand, you don't want to be denying even obvious things, just for the sake of denying – if you make the other side have to prove things that are obvious, the court might award costs against you for wasting the time (we didn't really need to establish the fact that there was an accident, the focus is on who was at fault).

Denied Facts

You must, for any fact that you deny, set out the **defendant's version of that fact** (***Rule 3-3(2)(a)(ii)***). You should be in a position to establish your own case

You must set out in a concise statement any **additional material facts** (***Rule 3-3(2)(a)(iii)***) (*ex. set out their breach/failure – the reason you didn't deliver the product might be because they didn't do something they were supposed to do*) – there usually won't be much here – most of it will be in your version of the facts.

Ex: (1) I accept/deny paragraph numbers a, b, c (2) Then I tell my story (3) Then say, all additional facts are included above.

Caution: Don't just deny all the notice of civil claim paragraphs – when a judge gets this, they see the story of the plaintiff, but all they see is denial on your side, they don't know what your position is. Think of the response to civil claim as a way to advance your own position. Say what you agree with and what you don't agree with so the judge can see what is actually at issue.

RESPONSE TO LEGAL BASIS

"We weren't negligent, they're outside of the limitation period, etc."

RESPONSE TO THE RELIEF SOUGHT

There might be some relief you agree to, others you don't.

Filing

General rule: You have **21 days** to respond to a notice of civil claim if you were served in Canada, **35 days in the US**, **49 days elsewhere.**

"Appearance" (*old terminology*): indication by a defendant (*I'm working on my statement of defence, here is an address to serve me at*) – a one-paragraph letter will suffice. This gives the defendant a chance to go start working on the response.

#3 – COUNTER-CLAIM

Counter-claim: a claim by the defendant against the plaintiff *or* the plaintiff and someone else (***Rule 3-4***). (a counter-claim is separate from the response to civil claim – two separate documents).

Re: limitation periods: Even if the limitation period on an issue has expired, if the other party sues you for something (can be totally unrelated), then you can sue back. The counter-claim does not need to be connected to the issue the plaintiff is raising. All you need is for the claim to against the the plaintiff (there could also be other third parties against whom you want to claim). If the court finds that the counter-claim is unrelated to the original claim, it can sever the two claims and allow the defendant to pursue his counter-claim separately.

Rule 3-4 Specifically provides for the identification of the parties. The original plaintiff stays the plaintiff, the defendant stays the defendant, but a new third party party becomes a **"defendant by counter-claim"**.

Filing: The counter-claim must be **filed within the same period of time as the response to civil claim** (21 days in Canada, 35 days in the US, 49 days worldwide), but extensions are liberally granted.

Service: Notice of counter-claim can be **served on the plaintiff at the address for service** provided on the notice of civil claim. **But** the counter-claim must be **personally served on the new third party**.

#4 – REPLY

Sometimes the defendant may raise issues in the response to civil claim that aren't in the notice of civil claim. *Ex. P: We had an agreement, it was breached, I was harmed. D: There was no consideration, so no agreement.*

The plaintiff may, within 7 days after the response to civil claim has been served, file and serve a **reply** in Form 7 (***Rule 3-6(1)***). This is used to address **new issues raised in the response to civil claim that weren't addressed in the original notice of civil claim**. If no reply to response to civil claim is filed, a joinder of issue on that response to civil claim is implied (*i.e. it is* ***assumed that you deny*** *those facts*) (***Rule 3-6(3)***). It is not used to simply deny, it is used to enter **new material facts** into the record.

Courts have made it clear that a reply should be an unusual pleading. "Pleadings subsequent to a statement of defence (*now: response to civil claim*) are discouraged except for a reply that necessarily and relatively confronts the evidence. A reply must be responsive to the statement of defence and should not repeat, amend or clarify allegations made in the statement of claim (*now: notice of civil claim*) or raise a new cause of action" (***Certus Strategies Corp. v. ICBC BC 2005***).

#5 – THIRD PARTY NOTICE

If the **defendant** believes that there should be someone else participating in the proceedings (as a new party, or as another defendant), they can file a **third party notice** (***Rule 3-5***). The third party notice, in essence, sets out the claims you have against that third party; *i.e. why you think they should be involved.*

Two common reasons for filing a third party notice:

(1) Indemnification: You are claiming that the third party agreed to **indemnify you in full** for costs in the event of any problems (classic example: insurance company).

Ex. Plaintiff sues a defendant in a construction case. The defendant was working for a contractor who agreed to indemnify him if anything went wrong. So the defendant files a third party notice for the contractor. In the third party notice, they are going to spell out material facts that justify that claim for indemnification. May be as simple as: Defendant 1 and Defendant 2 entered into an agreement. Pursuant to this agreement, which provided that Defendant 1 for Defendant 2 fully for all costs in the event of any problems.

(2) Contribution: You are claiming **a share of the damages** you are going to pay.

Note: **The plaintiff cannot collect from a third party** – that is a relationship is only between the defendant and the third party. If defendant 1 and 2 are found to be 80% liable and the third party is found to be 20% liable, the plaintiff can only collect the 80% from the two defendants, the plaintiff is SOL on that 20%. Also: Liability from 3rd party only flows through if the plaintiff is successful.

#6 – RESPONSE TO THIRD PARTY NOTICE

Third party can then file a response to third party notice, similar to response to civil claim.

MULTIPLE CLAIMS

You can have multiple plaintiffs and multiple defendants under certain circumstances (***Rule 22-5***).

Multiple claims: Subject to subrule (6), a person, whether claiming in the same or different capacities, may join several claims in the same proceeding (***Rule 22-5(1)***).

Multiple parties: Subject to subrule (6), a proceeding may be started **by or against 2 or more persons** in any of the following circumstances: (a) if separate proceedings were brought by or against each of those persons, **a common question of law or fact** would arise in all the proceedings (*ex. I've been defamed in a newspaper, I can bring an action against the author, newspaper, etc.*); (b) a right to relief claimed in the proceedings, whether it is joint, several or alternative, is in respect of or arises out of the **same transaction** or series of transactions (*ex. sale of property, different actions*); (c) the court grants leave to do so (***Rule 22-5(2)***).

Rationale: avoiding multiplicity of pleading. The court, if they can, would like to get everything dealt with together if they can. The court has the discretion to either join two actions together or to separate two actions.

Separation: If a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials (***Rule 22-5(6)***).

Consolidation: Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day (***Rule 22-5(8)***). *Ex. If the plaintiff brings 2 different lawsuits for the author and newspaper in the above example, the court may order that the two actions be combined – the cases become one case.* ***Contrast:*** *Ex. The plaintiff gets in 2 separate car accidents, the court may order that the 2 cases be heard at the same time – the case does not become one case.*

Factors to consider for consolidation: whether there is a common question of law or fact so that it is desirable to dispose of both cases at the same time; avoids multiplicity of proceedings; saves time and expense; inconvenience to the party; whether the two actions are at different stages (*one is on the verge of trial, the other was just started*); whether an order for consolidation that delays a trial prejudices one party (***Shah v Bakken 1996 BCSC***). Same factors would apply for separation.

JOINT VS. SEVERAL LIABILITY

Joint liability: the parties together committed the act so you can't sever out/split up the action. They are both jointly liable. *Ex. 2 people beating someone up – same event, same damage arising out of it.* **Several liability:** when you have a distinct apportionment, so you can sever out what the individual responsibility is. *Ex. Car accident, P goes to the hospital, and then doctor screws up, P sues driver and hospital – different events.* **Joint and several liability:** is applied where it is difficult to apportion liability between the defendants.

Note: the court will usually say that the defendants have are **jointly and severally liable** – so they are all responsible. The court will try to sever the liability (apportion it) but at the end of the day, the plaintiff can go after any of the defendants, and it will be up to them to go after the other defendants.

Negligence Act s. 4 *(p. 1293): Joint & several liability is the default for multiple defendants. Under the Negligence Act, the court is required to apportion liability. Joint and several liability allows the plaintiff to collect from either defendant the full amount of the claim. So the Negligence Act requires apportionment* ***but*** *that apportionment can be undone by the economic circumstances of the defendants.*

Note: **The plaintiff cannot collect from a third party** – that is a relationship is only between the defendant and the third party. If defendant 1 and 2 are found to be 80% liable and the third party is found to be 20% liable, the plaintiff can only collect the 80% from the two defendants, the plaintiff is SOL on that 20%. Also: Liability from 3rd party only flows through if the plaintiff is successful.

PARTICULARS

Where there is **detail required in order to respond to a pleading**, *sometimes* the rules mandate that you give particulars, *sometimes* you have to ask for them (***Rule 3-7(18)–(24)***). *Ex. When someone is pleading "representation," you need to know the nature of the representation that they are claiming to be able to respond.*

If you need particulars, you have to **ask for them in writing** (***Rule 3-7(23)***). You send over a request for particulars to the other side. Only when they fail to respond to that or deny it can you then bring an application to the court seeking particulars. The court can then order the other party to provide particulars.

A request for particulars does not amount to a stay of proceedings. So, just because you ask for particulars, doesn't mean you don't have to carry on until you get them.

DEFAULT JUDGMENT

Default judgment is a remedy that is available when the other side **fails to provide a response** to the party in question (the plaintiff or defendant if a counter-claim) can take default judgment (***Rule 3-8***).

But the reality is: If you are going to be taking default judgment, you have to give the other side on notice. **If you are intending to rely on the 21-day period**, you have to **put the other side on notice**. **If you know the other side has consulted counsel**, you have to give notice to that counsel as well.

PCH CHAPTER 11: RESPONSIBILITY TO OTHER LAWYERS

Professional Responsibility Obligation (***Section 12*** *proceeding in Default*): A lawyer who knows that another lawyer has been consulted on a matter must not proceed by default in the matter **without inquiry and reasonable notice** – must look and see if that lawyer is still involved and you've got to give reasonable notice to the other side of your intention to take default judgment.

You can put the other side on notice right from the beginning, when you serve the notice of civil claim on the defendant. *Ex. We intend to rely strictly on the rule for default judgment if we don't get a response to civil claim within 21 days*. The problem with this: You might rush the other side into filing a half-ass response which just denies everything and will likely be amended later on. Also: *he who lives by the sword dies by the sword* – at some point during a case, you will need an extension too.

Bottom line: You should let the other side know in advance that you are going to be taking default judgment, otherwise the judgment will be set aside (in the interest of **justice**, especially for unrepresented parties). (*Note: if you get default judgment against you or your client, you can apply to have it set aside*).

Default judgment is granted based on the relief sought in the notice of civil claim. If you're seeking default judgment where the judgment its **ascertainable**, you seek default in the amount that is claimed in your pleadings – court will give a specified judgment under ***Rule 3-8(3)***. If the amount you're claiming is **not ascertainable** (*ex. personal injury, pain and suffering, etc.*) and has to be calculated, the judgment is given under (***Rule 3-8(5)***, ***To Be Assessed***). So you get a judgment on liability, but the damages must be assessed (based on evidence). To apply for default judgment, you give the **registrar**: (1) notice of civil claim, (2) document from court confirming no response has been filed (3) document setting out that you're seeking default judgment.

CHANGE OF PARTIES

Amendments are liberally granted. So if it turns out that you named the wrong defendant, or you spelled their name wrong, the court will allow you to make those changes upon application, even if it is outside of the limitation period (***Rule 6-2***, *spells out adding, removing, changing of parties*). The courts will generally grant liberal change of parties (***Rule 6-2(7)***).

If you're **adding a new party** who is completely unconnected to the party already involved, then you will have to go through **personal service** of notice to them.

Parties won't always be individuals or corporations; there are other entities that can be parties to a civil claim (**partnerships, etc.**). If you are bringing an action against a partnership, **you can sue in the name of the partnership** (i.e. firm name is sufficient) (***20-1(1)***). Response to claim must be in the name of the firm, but a partner can respond and defend in their own name, whether or not named in the original pleading (***20-1(3)***).

AMENDMENT OF PLEADINGS

A party may amend the whole or any part of a pleading filed by the party (a) **once without leave of the court**, at any time before the earlier of the following: (i) the date of service of the notice of trial, and (ii) the date a case planning conference is held, or (b) after the earlier of the dates referred to in paragraph (a) of this subrule, only with (i) leave of the court, or (ii) written consent of the parties of record (***Rule 6-1(1)***).

Overriding principle: amendments are liberally granted! (unless the amendment would result in **prejudice** *that can't be dealt with* or it is **unnecessary**). Until the notice of trial is set (which schedules the trial date), you're entitled to one free amendment. Subsequently, the other side has to consent or you have to get a court order (*usually the other side will consent*).

DISCONTINUANCE AND WITHDRAWAL

Discontinuance: when you discontinue your claim (in the notice of civil claim).

At any time before a notice of trial is filed in an action, a **plaintiff may discontinue** it in whole or in part against a defendant by filing a notice of discontinuance in Form 36 and serving a filed copy of the notice of discontinuance on all parties of record (***Rule 9-8(1)***). Once the notice of trial has been filed, you either need consent of the other parties, or a court order (***9-8(2)***).

Withdrawal: when you withdraw your defence (in the response to civil claim).

A defendant may withdraw his or her response to civil claim or any part of it with respect to any plaintiff at any time by filing a notice of withdrawal in Form 37 and serving a filed copy of the notice of withdrawal on all parties of record (***Rule 9-8(3)***).

Recognize the cost ramifications! General rule: if a plaintiff discontinues their civlc claim, the defendant is entitled to their costs up until the date of the discontinuance (***9-8(4)***).

Discontinuing a claim does not prevent you from bringing that claim again in the future (***9-8(8): Discontinuance is not a defence***).

One of the practical ramifications of this is: consent to discontinuance vs. consent to dismissal. Before the notice of trial, the plaintiff is entitled to discontinue their claim. However, later on in the process, they either have to get the other party's consent or a court order. Generally speaking, in those circumstances, the best thing to do is try to get the other party to agree to a dismissal, because a dismissal *is with prejudice* – they cannot bring the claim again in the future.

STRIKING PLEADINGS: SCANDALOUS, FRIVOLOUS, OR VEXATIOUS MATTERS

The court may strike a pleading, petition, or other document: (a) it discloses no reasonable claim or defence, as the case may be (*most common*), (b) it is unnecessary, scandalous, frivolous or vexatious, (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or (d) it is otherwise an abuse of the process of the court, and the court may **pronounce judgment** or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs (***Rule 9-5(1)***). ***Key***: on the application under 9-5(1), no evidence is admissible – so court will look at document on its face (***Rule 9-5(2)***).

The determination of whether to strike out pleadings under Rule 9-5(1) must be made on the basis and the facts as set out in the pleadings are true and **it must be clear beyond doubt** that the pleadings do not disclose a reasonable cause of action (***TNR Gold Corporation v MIM Argentina Exploraciones* 2011 BCSC**). *This is a pretty high threshold.* (***Citizens for Foreign Aid Reform v Canadian Jewish Congress* 1999 BCSC**). Other use of Rule 9-5: information pled in the notice of civil claim is **not appropriate, often inflammatory**.

BUILDING THE CASE: DOCUMENTS

DISCOVERY AND INSPECTION OF DOCUMENTS

July 2010: new rules went into effect – substantially modified the obligations of litigants in producing relevant documents in an action. **Old rules:** after a statement of defence was filed, you would wait for the other party to ask you to produce documents. **New rules:** within 35 days of the close of pleadings (i.e. response to civil claim being filed), the parties are obligated to produce a list of documents. You have to obligation to produce any document that may be of marginal relevance to the issues as pleaded in the statement of claim or defence. **The intention of the rule change was to limit the scope of discovery** because, as issues become more complex, there is a huge volume of material that can overwhelm a lawsuit. These rules are designed to incorporate the **concept of proportionality** (***Rule 1-3(2)***, *see p. 4*).

Old test for discovery: Peruvian Guano Test: "You're obligated to produce every document related to a matter in question in the action (pleadings) **or** any document that **may lead to a train of inquiry** enabling a party to advance that party's case or damage the case of that party's opponent" (***Compagnie Financière du Pacifique v Peruvian Guano Co* 1882 QB**).

New test for discovery: A party must, within 35 days after the end of the pleading period, prepare a **list of documents** in **Form 22** that lists: (i) all documents that are or have been in the **party's possession or control** and that could, if available, be used by any party of record at trial to **prove or disprove a material fact** (*every lawyer in BC is wondering: w.t.f. does this mean?*) **and** (ii) all other documents to which the party intends to refer at trial (*ex. insurance documents outlining coverage in a personal injury case*) (***Rule 7-1(1)***).

Request for additional documents: You leave it to the other side to identify any perceived inadequacies with your list (***Tai v Lam* 2010 BCSC**, *confirms Peruvian Guano standard has changed, there now has to be greater justification for production of documents in a case, "full monty" disclosure will not be granted*). Parties are not obligated to produce documents on the basis that they **may lead to a path of inquiry** unless those documents are specifically requested, in which case, the other side needs to provide a **strong case for why** they need those documents (***Kassem v Barron* 2010 BCSC**).

If the party believes the list should include **additional documents** that (a) are within the listing **party's possession, power or control**, (b) relate to any or all matters in question in the action, and (c) are additional to the documents required under ***7-1(1)(a) or (9)***), then they can **request further documents** to be produced, but they need to explain **why** additional documents need to be produced (***Rule 7-1(11)***).

Documents not in possession of party: If it in your **power and control** to request production of documents from the 3rd party (*ex. call your doctor and ask for your x-rays*), you must do that (***Sumnar v U-Haul Co.* 1998 BCSC**). **"Control":** enforceable right to obtain the document from the person who has actual possession of them (***Nikolic v Olsen* 2011 BCSC**). If that doesn't work, court can order 3rd party to produce docs (***7-1(18)***). ***Halliday order*:** commonly used for medical records of P, if you're having difficulties with doctor. Documents are released to the P, who can review them, take out anything privileged, and then produce them to D.

If you can't play nice and come to an agreement on the list of documents being sufficient, you can seek an order from the court, **ordering production of documents** (***Rule 7-1(17)***).

Non-compliance: If a party who receives a demand under ***7-1(10) or (11)*** **does not comply with the demand** (within 35 days) (***7-1(12)***), you **may apply for an order** from the court compelling production (***7-1 (13)***). The court will then either excuse or order compliance with the rule (***7-1(14)***). *But this is generally a waste of time, because, most likely, the lawyer has simply forgotten to produce a list.* ***Word to the wise: just send them a reminder letter first.***

Note: under ***Rule 7-1(14)(b)(i),*** the **court may order** a party to amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating **to any or all matters** in question in the action (***interpretation***: this allows you to compel a party to the ***Peruvian Guano*** test). Court will consider **proportionality** in determining whether additional documents should be produced. cont'd

What the hell is a "material fact"? "A fact necessary to formulate a cause of action or a defence, including any facts which the party pleading is entitled to prove at the trial" (***Nathanson's Complex Litigation Article***). "The ultimate fact, sometimes called the ultimate issue, to the proof of which evidence is directed. It is the facts put in issue by the pleadings" (***Jones v. Donaghey* 2011 BCCA**). The concept of materiality requires requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case (*so you are under an obligation to produce documents that may hurt your case or advance the other party's case*) (***Biehl v Strang* 2010 BCSC**).

LISTS OF DOCUMENTS

So you produce a list, and then the party looks at the list and says, "*I've seen this, this and this. I want to see documents 20, 45, and 58*." You make a request to the other party to produce copies of the documents. The other party has the **right to inspect the documents** that have been listed (***7-1(15)***) and the **right to get copies of the documents** (***7-1(16)***).

Lists of Documents
Part 1: Documents which prove/disprove material facts // **Part 2:** Documents which you intend to refer to in trial (*may not have factual bits but may assist trier of fact*) // **Part 3:** Other documents relating to a matter at issue (*the part you fill in after there has been a fight over documents*) // **Part 4:** Privileged list

PRIVILEGE

There are some documents that you may have in your possession, power, or control, and you have given to your lawyer, but they need not be produced to the other party because they are covered by **privilege**.

Main grounds for privilege: (1) solicitor-client privilege (*confidential communications between a solicitor and their client, must entail legal advice, just because the lawyer is cc-ed on a random e-mail doesn't automatically make that e-mail privileged*) **(2) litigation privilege** (*protects work done by counsel, protects the counsel's role in the litigation process, including communications with third parties, ex. letters marked with "without prejudice"*). *Examples of what may trigger privilege: letters/emails between client and lawyer, insurance adjustors, claims analysts, own experts, documents created after the notice of civil claim (may fall under litigation privilege).*

The rules of court require you to produce a **list of privileged documents** (***Rule 7-1(6)***).

Explanations of things that are privileged: It's really difficult to figure out how to list privileged documents. *Note: practically speaking, few lawyers actually list the documents one by one – even though you are required to. This only becomes necessary when parties begin to rumble, if they think you are withholding documents, etc.*

The privilege list is **almost never requested**, unless there is a concern that there missing documents and that they may be not producing them because they are so-called privileged. It's difficult to determine what to put on the list. You don't want to put so much information on the list that it gives away the basis of the privilege. There is case law to help guide on what to list: *solicitor-client privilege 1, 2, 3, litigation privilege, 1, 2, 3, etc.* You don't have to provide full disclosure, only enough information to show the basis for privilege.

If the other party calls b.s. on your list of privileged documents, they can make an application to have the documents produced to the court. The court may then review the documents to determine if it is privileged.

Instances when a solicitor's file may be produced: *Ex. Contract case*: one party says a provision is missing, the other party says they agreed to have it removed. In this case, the draft versions of the contract that are on file with the lawyer may become relevant. *Important to know*: if it becomes relevant to your case, things that might be solicitor-client privilege may become relevant. The party subject to the privilege still needs to consent to having privilege waived.

Court can order an **affidavit verifying the list of documents** ***Rule 7-1(8)*** – it is one way to compel the other side to make sure they have given you everything, *but is rarely ever used! Lawyers don't like to use it because you never know if your client has actually produced everything to you. Only used when there is repeated, consistent delays by the other party – as a last resort!*

Note: misuse of privilege can lead to ethical concerns. Discovery is an ongoing process. Make sure evidence is not destroyed. Make sure to advise your clients appropriately regarding production of documents.

BUILDING THE CASE: TESTIMONY

EXAMINATIONS FOR DISCOVERY

Each party of record to an action must (a) make himself or herself available, or (b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available, for **examinations for discovery** by the parties of record to the action who are adverse in interest to the party subject to examination (***Rule 7-2(1)***). The examination for discovery **must not exceed 7 hours** (unless the person being examined consents to a greater period) (***Rule 7-2(2)***). Court may grant more time if you have a legitimate reason for needing more time.

An examination for discovery is an **oral examination on oath** (***Rule 7-2(3)***). An examination for discovery is to be taken down in the form of **question and answer** (***Rule 7-2(26)***).

The party wishing to conduct examination for discovery **must serve notice** by way of an appointment (Form 23) on the person being examined (or their lawyer if they have one) and all other parties of record (***Rule 7-2 (13)***). A person to be examined for discovery **must attend and submit to examination** for discovery if the party wishing to conduct that examination for discovery has complied with subrule (13) as the case may be.

Examination of corporation, partnership, etc: The examining party gets to choose who the deponent is, however, court can override this if there is a more appropriate party (***Rule 7-2(5)***).

Purpose of Examinations Discovery: (1) To understand the **other party's position** – it is not your chance to tell story! **(2)** To **obtain admissions** from the other side that will help your case **(3)** To pin down the evidence before it fades from memory and to avoid surprises (know what you are dealing with).

Start off broad and narrow your questions, get to a yes/no answer. Make sure you identify the witness, confirm they are who you should be talking to, swear them in, make sure all acronyms, etc are on the record.

Parties usually want to talk during examination and tell their story – DON'T! Prep your witness: **the party doing the examining is the only one that can use the transcript!** That party can use the transcript to (1) **impeach the witness** if they contradict themselves on the stand (2) **read in evidence from transcripts** in the form of Q&A (*practical note: sandwich good answers in between neutral stuff, i.e. keep bad answers away from the stuff you want to use – judge's eyes can wander*).

*In **trial**, you only want to ask questions you already know the answer to. In **discovery**, you can go exploring and ask questions you don't know the answer to. Then, at trial, you can choose which questions you want to ask.*

Scope of discovery is quite broad: A person being examined for discovery (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and (b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action (***7-2(18)***). The scope is broad, but you are limited to 7 hours, so don't waste your time on useless stuff. Get to the point.

Objections: Generally, have to answer all questions unless your lawyer objects, which is rare. If the question relates to an matter that is not in the pleadings, and is not reasonably related to an issue in question, **counsel can object to the question** (***More Marine Ltd v Shearwater Marine Ltd* 2011 BCSC**). Objections must be stated on the record (***7-2(25)***). Objections: (1) Relevance (2) Privilege (3) Lack of clarity.

You can ask the witness for names of others for more info. Witnesses **must make inquiries and inform themselves** if required by the situation, examination may be adjourned for this (***7-2(22)***). Response can be by way of a letter (***7-2(23)***). Rules of hearsay do not apply, however, hearsay evidence cannot be used at trial.

Generally, **party can have representative in the room as well** (plaintiff can be in room while plaintiff's lawyer is examining witness). However, you can get an order for exclusion in rare cases if you can show that the individual's attendance will be prejudicial.

During day of discovery, **lawyer and their witness should not be talking about the evidence or the case** (counsel should limit interactions). If the examination goes over one day, at the end of the day you can talk to your witness client (generally, but confirm with counsel).

FILLING IN THE GAPS

INTERROGATORIES

A party of record to an action may serve interrogatories in Form 24 on any other party of record, or on a director, officer, partner, agent, employee or external auditor of a party of record, if (a) the party of record to be examined consents, or (b) the court grants leave (***Rule 7-3(1)***).

Interrogatories are only allowed with leave or by consent (***Rule 7-3(1)***). Its purpose is to obtain an admission of facts, but the scope is more narrow. They are good if you are looking for lists of information (*ex. a list of 50 transactions*). Interrogatory questions can't be formed as cross-examination questions – they must be open-ended. You cannot request production of documents for interrogatories. It is not a place to demand particulars either, it is more about evidentiary exploration.

You **can direct interrogatories to particular individuals** in the organization. So you may not have that person available on discovery, but you may have some questions for them.

There is a **continuing obligation** to answer interrogatories. Once you put the question out there, the other side has to respond in 21 days. But if throughout the proceeding, if they discover something new in response to that question, they have a continuing obligation to respond.

PRE-TRIAL EXAMINATION OF WITNESS

If a person who is **not a party of record to an action may have material evidence** relating to a matter in question in the action, the court may (a) order that the person be examined on oath on the matters in question in the action, and (b) either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination (***Rule 7-5(1)***).

You can get a **subpoena for a witness** (Form 25), requiring the person to bring to the examination (a) any document in the person's possession or control relating to the matters in question in the action, and (b) any physical object in the person's possession or control that the party contemplates tendering at the trial as an exhibit (***Rule 7-5(5)***). The documents don't need to be identified but the objects do (***Rule 7-5(6)***).

The scope for discovery is pretty broad: anything that is generally relevant.

PHYSICAL EXAMINATION

If the **physical or mental condition of a person** is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person (***Rule 7-6(1)***). The court can also make an order regarding expenses and the result of the examination. This rule is usually used for **independent medical examinations** (IME's) in personal injury cases. Ultimately the court makes the order on who the examiner should be, but realistically, the parties will come to an agreement among themselves.

If the court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may order the **production, inspection and preservation of any property** (***Rule 7-6(4)***).

ADMISSIONS (NOTICES TO ADMIT)

Admissions allows either party to make admissions, so that certain facts don't need to proven at trial.

A party of record may, by **service of a notice to admit in Form 26**, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice (*not the truth of the contents of the document!*) (***Rule 7-7(1)***). **The other side has to respond in 14 days**, can respond in 5 ways: (1) Not respond at all (*failure to respond = deemed admission*) (2) Admit the fact (3) Specifically deny the truth of fact or authenticity of document (***7-7(2)(a)***) (4) Set out reasons you can't make the omission (***7-7(2)(b)***) (5) Object on basis of relevance or privilege (***7-7(2)(c)***).

Don't be a jerk and not admit a fact that you should, otherwise court can order you to pay the **cost of proving that fact** (***7-7(4)***) and may even award additional costs against you. **Be careful what you admit! It is very difficult to withdraw an admission!** You can't withdraw an admission made in response to a notice to admit (***7-7(5)(a)***); a deemed admission (***7-7(5)(b)***); a pleading, petition, or response to petition (***7-7(5)(c)***) except with leave of the court.

KEEPING THE PROCEEDINGS ON TRACK: INTERLOCUTORY PROCEDURES

INTERLOCUTORY APPLICATIONS

Interlocutory applications are applications along the way, generally with respect to process. An interlocutory application is one of the tools available if the other side is either not complying or not giving you what you need under the rules, and you need the court's involvement (***Rule 8***). Ex. If you're seeking a dismissal for non-compliance under Rule 22-7, you do it by bringing a **notice of application** under ***Rule 8-1***.

The point of an application is to get an order from the court, and it is that order from the court that will direct certain things to happen.

The notice of application is the legal document that sets out what you're seeking, the **legal basis** for what you're seeking. It sets out the structure of what the application is (***Rule 8-1(4)***). The legal arguments will come from whatever Rule you are relying on (*Ex. For non-compliance, Rule 22-7*).

The affidavit is the factual basis, **the evidence, in support of the application**. Most, but not all, applications require an affidavit. *Ex. When you are applying to strike a pleading under Rule 9-5, you can't submit affidavits.* Affidavits are generally used for interlocutory applications, but in trial, you use *viva voce* evidence. The facts must come from the affidavit. // *Ex. You have to request particulars in writing first under Rule 3-7. So if you are applying to have the court order the other side to give you particulars (because they haven't responded), you may get an affidavit from your legal assistant saying she sent a letter to them on whatever date, attach the letter that was sent, state that no response was received, etc.*

Caution: In response to an affidavit, the court can order a cross-examination on the affidavit – it is also a waiver of privilege.

Hearsay evidence is permitted for regular, interlocutory applications, where you are not seeking a final order (*ex. dismissal, judgment, etc.*)**.** However, if there is fighting going on, the more hearsay evidence there is, the less weight it will probably be given.

If the application is **less than 2 hours**, you can just set it down for a date and go into chambers. If it is **more than 2 hours**, then you have to call the court registry and get a date set.

For most interlocutory applications, you have serve your **notice of application 8 "business days"** before date set for hearing of the application (***Rule 8-1(8)***). For an application for summary trial, 12 business days. **Definition of "business day":** a day on which the court registries are open for business (***8-1(1)***).

The applicant must provide the registry with an **application record**, which contains the application, affidavit, response to an application, along with the pleadings (for context) (***8-1(15)***).

TYPES OF APPLICATIONS

Contested Application: A response to application can be made by the other side within 5 days (***8-1(9)***). Then you go to court and argue about it.

Consent Applications: Often parties will agree on something but still need to get a court order (***Rule 8-3***). A consent application provision allows parties to file an application for an order by way of a requisition (no need for notice of application). Every party involved must sign a consent order (***8-3(2)***).

Ex Parte* Application:** Allows you to ask the court to bring an application **without notice** to the other party (Rule 8-4***). Usually because there would be **prejudice** to you if you give notice, *i.e.* the other side will do something (*ex. destroy the painting*). ***Key:*** **full and frank disclosure:** you have a professional responsibility obligation to argue both sides of the case and make sure that all material facts are presented to the court.

Urgent Applications: Allows you to ask the court to shorten the time frames (***Rule 8-5***). 2-part process: You prepare your **notice of application,** but also seek **short leave**. ***Key:*** you must then **justify** why you needed an urgent application (you give evidence by way of affidavit).

AFFIDAVITS

Affidavits is the **sworn evidence** of the deponent. It provides **evidence in support of applications** along the way, whether for interlocutory applications, injunction, summary trial. Generally, affidavits are **not used at trial** (*some exceptions: ex. if someone dies*). It is sworn before a person authorized to take an affidavit (ex. lawyer or notary public). Set out in ***Rule 22-2***

The affidavit includes: (1) the facts in support of the application (2) the documents (as exhibits)

Hearsay evidence is permitted for regular, interlocutory applications, where you are not seeking a final order (*ex. summary trial, petition, dismissal, judgment, etc.*)**.** However, if there is fighting going on, the more hearsay evidence there is, the less weight it will probably be given. The affidavit is not supposed to include **arguments** or **speculation**, it is only supposed to contain evidence (whether direct or hearsay).

PCH APPENDIX 1: AFFIDAVITS AND SOLEMN DECLARATIONS

Professional Responsibility Obligation: Lawyers should not be giving affidavits on matters that are at issue in the case. They should only be for uncontroverted facts. And usually, in interlocutory applications, you are arguing for procedural matters, so the extent of the affidavit might be attaching some letters or documents. You don't need a whole lot of other facts to justify them.

Professional Conduct Handbook Appendix 1: The lawyer must not swear an affidavit or take a solemn declaration unless the deponent: (a) is physically present before the lawyer, (b) acknowledges that he or she is the deponent, (c) understands or appears to understand the statement contained in the document, (d) in the case of an affidavit, swears, declares or affirms5 that the contents of the document are true, (e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and (f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

CHAMBERS

Chambers is where applications are heard – basically just a court room (***Rule 22-1***).

MASTERS AND APPEALS FROM MASTERS

Judges have broad powers. They have the jurisdiction to hear applications as well as make **final orders**. So they can hear trials, summary trials, etc. Note: most **petitions** will only be heard by judges because they are usually seeking a final order. Also, **injunctions** will only be available through judges.

Masters are appointed employees of the court whose primary purpose is to deal with interlocutory matters in the course of proceeding (***Rule 23-6***, *see also p. 621*). A master's jurisdiction is limited; they do not have the inherent jurisdiction that a judge has. They are involved in interlocutory applications that **do not require a final order** (*summary trial, full trial, most petitions, injunctions, etc.*). When filing your application, there is a box that you check if the application is within the jurisdiction of a master – so the registry knows where to send you (but if a master is not available, it will be heard by a judge).

Appeals from Masters

If an order is granted by a master, you have 14 days to appeal that decision. The appeal will be heard by a judge. If you still don't get what you want from a judge, you can appeal to a Court of Appeal.

CASE PLANNING CONFERENCE

Case Planning Conference (***Rule 5***) is built on the idea of judicial management of the litigation process. In federal court, the court is much more involved in the litigation process. In supreme court, the process is mostly driven by counsel. The CPC is trying to get SC judges more actively involved in the judicial process: reduce delays, provide more certainty, etc. **Purpose of CPC is to make things more efficient and cost-effective.**

CPC is a 30-minute meeting with a judge/master. The goal of the CPC is to have a **case plan order** (***Rule 5-3***)**.** It is designed to set timelines/deadlines regarding all sorts of things, witnesses, amendments, etc.

CPC is not mandatory: Either party or the courts may request a CPC (***5-1(1)***). Once the request has been made, it is mandatory. This request can be made after the pleading period has expired.

CPC requests are usually made in response to how the case looks like it's going to go, once you get a sense of how the other party is going to be conducting the litigation. If you have two reasonable counsel and they are playing nice, there is no reason to have a CPC. **If the other side is being a jerk**, a case plan order allows you to keep proceedings on track without having to go to court 20 times to fight about various applications.

One of the best uses of CPC is when the other side is **unrepresented**, because they may not necessarily understand the requirements and obligations under the rules. The CPC gets that unrepresented person before a judge/master who then often explains the process/requirements to that person and gives an order. If the other party does not comply with that order, you can use one of your tools for non-compliance (*dismissal/ striking a pleading (9-5), contempt (22-8), non-compliance (22-7)*).

How it works: The person who makes the request for CPC prepares a **proposal for a case plan**, and the other side will provide their response. Attendance: it can be the party or their lawyer, although sometimes the court will order that the party attend as well. The judge/master will then make a case plan based on the proposals. You can bring various **applications** at a CPC to be included in the case plan order, but **no application that involves affidavit evidence** can be heard at a CPC (***5-3(2)***). You can only argue your application based on the pleadings or the submissions.

Note: you can have multiple CPCs.

A **transcript** must be made with respect to what took place at the CPC but that transcript is not available to parties without a court order (*rationale: you want to be able to have a candid discussion of the issues*). There must be a pretty good justification and really reasonable grounds if the transcript from a CPC is to be produced (***Parti v Pakomy* 2011 BCSC**). The point of CPC is the case plan order – it's not supposed to be about how you get there.

ORDERS & INJUNCTIONS

ORDERS

Orders are how the court articulates what it has decided at the conclusion of an application (***Rule 13-1***). It is the **end result**. **An order is binding from the moment it is pronounced.** However, you still want to have the order in writing – makes it easier to enforce. It is critical that the order accurately and clearly set out what the judge has decided. It must be **clear** and **unambiguous.**

Any party can **draft the order** (***Rule 13-1(1)***), but generally speaking, the **successful party** will prepare the order. It's easy when the judge/master gives **written reasons for judgment** (this usually never happens for applications). In interlocutory judgments, the judge/master will often render their decision by way of **oral reasons for judgment**. So, its important to listen carefully and make notes on what the judge/master ordered (note: the court clerk also takes notes). From the oral/written reasons, you have to draft a written order. *Practical note: You can prepare an order beforehand and pass it up to the judge saying, "this is the order I am seeking." If the judge grants the order in the form counsel passed up to me.*

The order must be then **entered** by the registry. The order can only be entered if all the parties have signed it (only people that take part in the order have to sign it, if you have no position, you don't have to).

If there is a **dispute over the terms of the order**, you can apply to the registrar to **"settle the order"**. This is where clerks notes can become very useful, and can be used to support your argument for what the order should be. Registrar can then make a decision on whether or not the order needs to be modified. If the registrar can't make a decision, they may send you back to the judge. If you don't agree with the registrar's decision *re* amendments, you can appeal the decision to a judge.

Every order should include how **costs** for the order are to be dealt with.

ENFORCEMENT OF ORDERS

There are various tools to enforce orders, in terms recovering property, etc. (***Rule 13-2***).

Remedy for Non-Compliance on a Specific Performance Order: If a **mandatory order** or an order for the **specific performance** of a contract is not obeyed, the court, in addition to or instead of proceeding against the disobedient person for contempt, may **direct that the act required to be done** may be done so far as is practicable **by the person who obtained the order**, or by some other person appointed by the court, **at the expense of the disobedient person**, and on the act being done, the expenses incurred may be ascertained in such manner as the court may direct, and execution may issue for the amount so ascertained and costs (***Rule 13-2(7)***). *So if the other party doesn't do what they are supposed to, you can go in and do it yourself. Note: most enforcements costs are awarded on a tariff.*

WITHOUT NOTICE ORDERS

PHC CHAPTER 8: THE LAWYER AS ADVOCATE

Ex Parte* Application:** Allows you to ask the court to bring an application **without notice** to the other party (Rule 8-4***). Usually because there would be **prejudice** to you if you give notice, *i.e.* the other side will do something (*ex. destroy the painting*). ***Key:*** **full and frank disclosure:** you have a professional responsibility obligation to argue both sides of the case and make sure that all material facts are presented to the court. When you are arguing an order without notice, you have to bring all the arguments that support why you the order should be granted but also argue the other side's case.

If one side obtains an **order without notice**, the other side has the ability to go back before the court and ask that the **order be set aside**. When it is without notice, you don't necessarily have to appeal. You can bring your own application arguing that the order should be set aside. The number one reason for having a without notice order set aside is that **the court did not have all the facts.** If you have been less than full and frank in your disclosure to the court, (1) your order may be set aside (2) there may be cost ramifications (3) the Law Society will be displeased.

INTERLOCUTORY INJUNCTIONS

An injunction is an order by the court that either prohibits/restrains or requires a party to do something (***Rule 10-4***) – **prohibitory injunction** vs. **mandatory injunction** . Prohibitory injunction is more common to the interlocutory process – it's when you need to stop someone from doing something until the final order is given. Mandatory injunctions are usually done as a final order. *Notes: injunctions can only be granted by* ***judges****. Injunctions are an equitable remedy, they are* ***discretionary,*** *based on the inherent jurisdiction of the court. Appeal courts will not interfere with discretionary orders.*

Types of Injunctions

Interlocutory Injunctions: up until the trial (can be prohibitory or mandatory). *Ex. I want to stop them from selling the property before the trial*.
Interim Injunction: an injunction for a set period of time (*If you bring an interlocutory injunction without notice, judge may grant you an interim injunction, so that you can come back before the court and have a full argument*). *Also: if judge says they will "remain seized of the matter", you can only go back before that judge.*
Permanent Injunction: almost always done at the conclusion of a proceeding (trial/hearing of a petition), it is a final order. *Ex. Nuisance case.*

Test for Injunctions

General 3-part test for interlocutory injunctions: (***RJR MacDonald Inc. v Canada* 1995 SCC**)

1. Whether there is a **serious question** to be tried. Because you are not fighting about the outcome, the judge wants to know that there is something meaningful that you are fighting about. So you need to have some evidence, by way of an affidavit, as to why on the substantive legal issue, you are in the right. Generally speaking, it is **not a very high threshold**. It has almost been reduced to a "*prima facie*" or "fair question" standard.
2. There must be **irreparable harm**. If you're seeking an injunction, you're saying, if you do not grant this injunction, we will suffer irreparable harm. What is important is the **nature of the harm suffered**, rather than its magnitude, *i.e.* harm that either cannot be quantified in monetary terms (***RJR MacDonald***). *But note: if it's going to destroy a business, that may be quantifiable in monetary terms, but it destroys the concept of the business, court will likely still grant an injunction.*

   Irreparable harm cannot be inferred from the pleadings, etc, you need evidence of irreparable harm. So, in your **notice of application,** you are going to have to **provide evidence of irreparable harm**. If you can't prove irreparable harm, an interlocutory injunction will not be granted.
3. The court will consider **balance of convenience** in deciding whether or not to grant the injunction. There are **various factors the court can look at:** (a) the adequacy of damages if the remedy is not granted (*related to irreparable harm*) (b) the likelihood that if damages are awarded, they would be paid (c) the preservation of contested property (*if there is something specific that you are fighting about*) (d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable (e) the strength of the applicant's case (f) public interest (*ex. injunction against a radio show raises freedom of expression issues*) (g) maintaining status quo (*if you're just trying to keep things the way they were, court is more likely to grant the injunction*) (h) any other factors affecting the balance of convenience and justice (***CBC v CKPG Television* 1992 BCCA**). *Note:* In BC, *sometimes* irreparable harm gets rolled into balance of convenience (***Onkea Interactive Ltd v Smith* 2006 BCCA**), but stick into the 3-part test.

Interlocutory injunction is simply an application you make along the way, so it doesn't need to be set out in your pleadings. But a **permanent injunction** is the kind of relief you need to seek in your pleading.

Undertaking as to Damages: Unless the court otherwise orders, an order for a pre-trial or interim injunction **must contain the applicant's undertaking to abide by any order** that the court may make as to damages (***Rule 10-4(5)***). In your affidavit in support of the injunction, there needs to be a paragraph that says, "I undertake to abide by any order that the court may make as to damages" (*not done by the lawyer, but the party*). This is creating a **cause of action for the wrong granting of the interlocutory injunction** (*i.e. It lets the other party sue for damages for the harm you suffered as a result of the granting of the injunction*).

ANTON PILLAR ORDER: RECOVERY OR PRESERVATION OF PROPERTY

Recovery or preservation of property orders ((***Rule 10-1***)) a.k.a. Anton Pillar order (*i.e. civil search/seizure order*) is a tool that is available for someone to basically go recover something in a civil proceeding while litigation moves along. It is used to either preserve or obtain evidence that you need in the case that may be destroyed if you don't go in to get it (***Anton Pillar KG v Manufacturing Processes Ltd* 1976 UK**). This goes one step farther than an injunction. **An Anton Pillar Order is <u>always</u> done without notice.**

Test for Anton Pillar Order

Anton Pillar Order has a **<u>very high threshold</u>**. The court will only grant this order in the **most exceptional of circumstances** (***Anton Pillar***).

An Anton Pillar Order should only be granted if: (a) the applicant has demonstrated a **strong *pima facie* case** (b) the damage that the applicant will suffer from the alleged misconduct is serious (c) there is **convincing evidence** that the party possesses the incriminating documents or things (d) the **real possibility** that the party may destroy the evidence before the discovery process/trial.

If you're going to be seeking an Anton Pillar order, you usually hire a very reputable, senior lawyer to carry out the terms of the order. They will be the ones to go and seize the property and they will take possession of it.

MAREVA INJUNCTIONS

A mareva injunction is an equitable remedy designed to **freeze the assets or income** or ability of the other party to pay judgment at the end of the day. If there is a risk that the other party will be relocating their assets and moving it out of the jurisdiction, you can get a mareva injunction which restrains that party from dealing with some or all of their assets or income until the outcome of the trial is known. *i.e. When someone is trying to make themselves judgment-proof.* **An Mareva Order is generally done without notice.**

<u>Threshold</u>: There has to be a **<u>real risk</u>** that the assets are going to be moved out of the jurisdiction.

Originally, a mareva injunction could only freeze the assets of a party inside the jurisdiction of the court, but now, there are **extraterritorial mareva injunctions** (*i.e. worldwide*), where the court will freeze the assets of the party anywhere in the world. But recognize the limitations of such an order: to enforce an extraterritorial injunction, you either need international cooperation or you can hold the party in contempt *here. Practically, a mareva injunction will only work if the party is residing in BC.*

Mareva Order has a **<u>very high threshold</u>**. Mareva injunction is a severe interference with someone's life.
A Mareva Order will only be granted if: (a) the applicant has demonstrated a **strong *prima facie* case** (*in your application, you want to have evidence that supports your case*) (b) there is a **real risk of removal or diminishment** of assets from the jurisdiction to avoid judgment.

<u>Undertaking as to Damages</u>: Unless the court otherwise orders, an order for a pre-trial or interim injunction **must contain the applicant's undertaking to abide by any order** that the court may make as to damages (***Rule 10-4(5)***). The court has the ability to order someone to **post security** with respect to that undertaking.

Note: Mareva is <u>not designed to provide security for damages</u>. It is only to provide protection when there is a real risk that assets are going to be moved/diminished to avoid the judgment.

Also: Court may make exceptions for cash going in and out of a business to allow for n<u>ormal course of business</u>.

PRE-JUDGMENT GARNISHING ORDERS

Its an extraordinary type of relief because it allows execution before verdict to ensure security of payment (***Court Order Enforcement Act***). You have to be meticulous in complying with the requirements that are set out in the COEA. This is also a **without notice application**. Judge or master can preside.

A pre-judgment garnishing order allows you to get some security for your claim. There is no risk that assets would be moved, etc. *Ex. You bring an action against some dude, and you know that said dude has money in a bank. So you get a garnishing order against the bank so that the bank pay that money to the court up to the amount you are claiming. The money then sits in the court as security for your claim until you get your judgment.*

It is used in cases where the damages are a **liquidated, objective amount**, i.e. easily identifiable damages – not for general damages for personal injury, tort claims, etc.

Unlike Mareva and Anton Pillar (which involves preparation of an application and arguing before a judge), you don't have to go to court. Pre-judgment garnishing orders are **done by way of affidavit** (***COEA s. 3(2)***). The affidavit must include: (i) that an action is pending, (ii) the time of its commencement, (iii) the nature of the cause of action, (iv) the actual amount of the debt, claim or demand, and (v) that it is justly due and owing, after making all just discounts (***COEA s. 3(2)(d)***) and stating that the garnishee, is indebted or liable to the defendant and is in the jurisdiction of the court, and with reasonable certainty, the place of residence of the garnishee (***COEA s. 3(2)(e)&(f)***). You also provide a **draft order** requiring the garnishee (*the person that owes money to the defendant*).

You then **serve the order** to the garnishee, and then the defendant.

The defendant can apply to have the order set aside. There is usually 2 reasons for this: (1) there wasn't **meticulous compliance** with the requirements set out in the act (2) it is not just and equitable ("*you garnished my last $10,000 that was going to go to my heart surgery"*).

Note: No undertaking needed, so no relief if they lose in the end!

SUMMARY PROCEEDING

The court is generally interested, in avoiding a full trial if possible, so the court encourages summary proceedings (***Inspiration Management Ltd v McDermid St Lawrence Ltd 1989 BCCA***). **Summary proceedings**: focuses mainly on documents, not viva voce evidence.

SUMMARY JUDGMENT

Summary judgment (***Rule 9-6***) is designed for cases where there is not really a **bona fide trial issue** or **bound to lose essentially**. Bona fide trial issue is when the plaintiff is bringing a summary judgment (*i.e. does the defendant really have a defence?*) vs. Is the plaintiff bound to lose their proceedings? (*i.e. we don't need to argue about anything, you're sunk*) (***Skybridge Investments Ltd. V Metro Motors Ltd 2006 BCCA***). Or you can just look at: is there a real trial issue between the parties? Period.

If there is any doubt, the summary judgment application will fail. It has to be clear. There has to be no bona fide issue. The plaintiff has to be *bound to lose*. The defendant must have *no defence.* You rarely bring a 9-6 on it's own. You will argue ***9-6*** summary judgment: there is no basis, there is no claim **but** if there is any doubt, let's do it under ***9-7*** summary trial.

If the court is satisfied that there is **no genuine issue for trial** with respect to a claim or defence, the court must **pronounce judgment** or **dismiss the claim** accordingly (***Rule 9-6(5)(a)***).

If the court is satisfied that **the only genuine issue is the amount** to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount (***Rule 9-6(5)(b)***), *so the court will pronounce judgment on liability but order a trial for damages to be determined.*

If the court is satisfied that **the only genuine issue is a question of law**, may determine the question and pronounce judgment accordingly (***Rule 9-6(5)(c)***), *when its absolutely black and white, they can do a question of law in summary judgment, but court usually will order a summary trial or question of law.*

SUMMARY TRIAL

Summary trial (***Rule 9-7***) is used when there is a bona fide trial issue (so can't use summary judgment) but is an alternative to a full trial, because it is mostly based on documents and tends to save a lot of money. Summary trial **is still a trial**, so you have to prove all of your claims. For a summary judgment/summary trial, you are bringing a **notice of application** (***Rule 8***), the other side is responding, and you are both bringing affidavits to support your respective positions.

Note re Timing: *Normal notice of application: must serve notice 8 days before hearing, respond within 5 days of service. Summary trial application, must serve notice 12 days before hearing, respond within 8 days of service.* (***Rule 8-1(8)&(9)***)*. Also, application for summary trial must be heard 42 days before trial date* (***Rule 9-7(3)***).

Applying for summary trial: A party may apply for summary judgment, either on an issue or generally, in: (a) an **action** in which a response has been filed; (b) a proceeding that has been **transferred to the trial list** (*i.e. a petition turned into trial*); (c) a **third party proceeding** in which a response has been filed; (d) an action by way of **counterclaim** in which a response to counterclaim has been filed (***Rule 9-7(2)***).

A summary trial **does not necessarily have to deal with everything that is at issue in the case**. However, the case law has indicated that the court will be hesitant to proceed by summary trial unless it deals with most if not all of the matters at issue. *Rationale: we don't want multiplicity of issues.*

Evidence at summary trial is not presented through *viva voce* evidence, but through (a) affidavit (b) answer to interrogatories (c) transcript from examination for discovery (d) admissions (notice to admit) (e) expert report (***Rule 9-7(5)***). In some cases, court may allow an exception to the no v*iva voce* evidence rule, but this is very rare! *Note: pre-trial examination of witness (3rd party) is not admissible at summary trial, you have to get an affidavit. If they won't give an affidavit, you will have to subpoena them – good argument for full trial*.

Notice of evidence: If a party intends to rely on (a) evidence taken on an examination for discovery, (b) answers to interrogatories, or (c) admissions, the party must give notice of that fact to other parties 12 days before the hearing (***Rule 9-7(9)*** *in accordance with* ***Rule 8-1(8)***). cont'd

3 possible responses to a notice of application for summary trial: (1) **consent** that it would be appropriate for summary trial (*usually when there is no contradictory evidence*) (2) **objection, in advance**, to the appropriateness of summary trial (3) **object, at the hearing**, to the trial **but** be prepared to argue the case just in case it is not dismissed. However, **the court still has the discretion** to kick it over to a full trial (*usually, the court will go with what the parties consent on but may give a warning to parties, i.e. don't appeal!*)

Disposition of summary trial: Either before or during a summary trial hearing, the court may (a) **adjourn the summary trial application**, or (b) **dismiss the summary trial application** on the ground that (i) the issues raised by the summary trial application are **not suitable** for disposition under this rule (*ex. its all about credibility*), or (ii) the summary trial application **will not assist the efficient resolution** of the proceeding (*ex. summary trial on one issue only, so we are not saving anything by doing this*) (***Rule 9-7(11)***).

Judgment: On the hearing of a summary trial application, the court may (a) **grant judgment** in favour of any party, either on an issue or generally, **unless** (i) on the whole of the evidence before the court on the application, the **court is unable to find the facts** necessary to decide the issues of fact or law, or (ii) the court is of the opinion that **it would be unjust** to decide the issues on the application, (b) impose terms respecting enforcement of the judgment, including a stay of execution, and (c) award costs (***Rule 9-7(15)***).

Suitability of summary trial (***9-7(11)***)**:** Court will look at various factors: (a) the amount that is involved, (b) the complexity of the matter (*more complex, less likely to be appropriate for summary trial*), (c) the urgency of the case (*more appropriate*), (d) the prejudice if not decided by summary trial (delayed until full trial), (e) the costs of a conventional trial, (f) where you are in the course of the proceedings (*if you've gone through examinations for discovery so you have an evidentiary basis for the case, court will be more inclined to proceed with summary trial*) (***Inspiration Management Ltd v McDermid St Lawrence Ltd 1989 BCCA***).

Efficient resolution of proceeding: factors the court will look at in terms of efficiency: (a) where the litigation is extensive (b) where the summary trial would take considerable time in relation to what a full trial would take (c) the unsuitability of a summary determination is relatively obvious (*ex. credibility is clearly an issue*) (d) there is a real risk of a substantial wasting of time and effort (e) the issues are not determinable through litigation and are inextricably interwoven with the other issues that are remaining (***Western Delta Lands Partnership v 3557537 Canada Inc 2000***). *Note: prelim app in advance re 9-11 – master can preside*

Common issues and objections to summary trial:

(1) **Whether the issue is appropriate for summary trial** – this can be done either in advance of the summary trial (*so you don't have to prepare for the hearing*) or you can bring it at the summary trial (*but you better be prepared to go on*). Court may ask you to make all your arguments at the hearing, **and then** they will make a ruling as to whether or not the matter is appropriate for summary trial.

(2) **Lack of or inability to have completed various pre-trial processes that are available to a party.** Most common one: "*I haven't had a chance to do examinations for discovery*". Default: if a party has not had the opportunity to conduct examinations for discovery, court will say summary trial should not proceed.

(3) **There is conflicts in the affidavits that should not be decided on a summary trial basis.** Summary trials are supposed to be focused on the documentary evidence before the court, they are not supposed to be focused on resolving conflicts on testimony. Default: *"The judge should not decide on an issue of fact or law solely on the basis of conflicting affidavits, even if he prefers one to the other. However, other evidence may make it possible to find the necessary facts for judgment to be made."* (*ex. used in* ***Cara v Qtrade Canada Inc*** **2003 BCSC**, *documentary evidence was consistent, Cara was purposefully giving conflicting evidence in affidavit to try to get summary trial dismissed, judge made judgment*).

Resolution: The court may order a **cross-examination** of the person who swore the affidavit (***9-7(12)***). This is usually only done if it is a **clear point that cross-examination** will simply clarify. If there is contradictory evidence in the affidavit, the judge may decide that the matter is not appropriate for summary trial because they want to see the witnesses and assess their credibility, etc. *Note:* cross-examination does not take place in front of the judge, but in front of a court recorder and that transcript is what is brought back before the judge on summary trial. **Resolution:** Yes there are conflicts, but they don't go to the material or fundamental issues that are before the court. You can also use your discovery evidence to reduce/eliminate conflict.

You only have **one shot at a summary trial**, you need leave of the court for another application (***9-7(16)***).

SPECIAL CASE

The parties to a proceeding may concur in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the **opinion of the court** (***Rule 9-3***). Court will only grant judgment with consent of the parties (***9-3(5)***). *Not commonly used.*

POINT OF LAW

A point of law **arising from the pleadings** in an action may, by consent of the parties or by order of the court, be set down for hearing (***Rule 9-4***). You're focused on the **pleadings**, you're not supposed to be focusing on the facts, *ex. is this a valid cause of action?* (***Alcan Smelters Case***).

ALTERNATIVES BEFORE TRIAL

OFFERS TO SETTLE

Offers to settle (***Rule 9-1***) are a critical way that you can encourage or otherwise try and encourage the other side to resolve a matter before going to trial. When the other side is being difficult, offers to settle can play a crucial role in getting them to the table. When a party is successful, they get awarded costs (based on a tariff schedule). An **offer to settle** is designed to put **more risk** on the other party to encourage them to settle before the trial.

An offer to settle must: (i) be made in writing by a party to a proceeding, (ii) be served on all parties of record, and (iii) contain the following sentence: "The *[party(ies)]*, *[name(s) of party(ies)]*, reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding" (***Rule 9-1(1)***). *So the offers remain secret. When the judge grants the final judgment, they say "this is my judgment for costs unless there is something else you want to tell me", code for: are there any offers you want to bring to my attention?*

In a proceeding in which an offer to settle has been made, the court **may** do one or more of the following: (a) **deprive a party of any or all of the costs**, including any or all of the disbursements, in respect of all or some of the steps taken (b) **award double costs** of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle (c) award to a party, in respect of all or some of the steps taken, **costs to which the party would have been entitled had the offer not been made** (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, **award to the defendant the defendant's costs** in respect of all or some of the steps taken (***Rule 9-1(5)***).

Factors to consider: the court may consider: (a) whether the **offer to settle was one that ought reasonably to have been accepted** (b) the relationship between the terms of settlement offered and the final judgment of the court (*$99 vs. $100*) (c) the relative financial circumstances of the parties (*little old lady vs. insurance company*) (d) any other factor the court considers appropriate (***Rule 9-1(6)***).

A plaintiff who accepts an offer to settle for a sum within the jurisdiction of Provincial Court under the ***Small Claims Act*** (*$25,000*) is **not entitled to costs**, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in SC (*ex. defamation can only be brought in SC*) (***Rule 9-1(7)***).

*Ex. Plaintiff makes an offer to settle for $100,000. The defendant says no. The plaintiff then gets a judgment for $150,000. The defendant clearly should have accepted that offer. The plaintiff is already getting their costs. But now, they **may get** double costs (or any other order under 9-1). If the judgment gets to be less than the offer, the offer has no impact.*

*Ex. Defendant makes an offer to settle for $100,000. The plaintiff says no. (1) The plaintiff then gets a judgment for $75,000. The plaintiff clearly should have accepted that offer. Because the plaintiff got judgment, normally they **may get** their costs. **But** because the defendant made an offer, the plaintiff gets their costs up to the offer, then the defendant gets their costs subsequent to the offer. (2) If the plaintiff's case gets dismissed, the defendant would be getting their costs. But now, they **may get** double costs.*

ALTERNATE DISPUTE RESOLUTION

Trials are the most time-consuming, unpredictable, and expensive ways to resolve problems.

JUDICIAL SETTLEMENT CONFERENCE

If, at any stage of an action, **the parties of record jointly request** a settlement conference by filing a requisition in Form 17 **or a judge or master directs** that the parties attend a settlement conference, the parties must attend before a judge or master who must, in **private** and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding (***Rule 9-2(1)***). *This happens mostly when there is squabbling during interlocutory applications.*

Advantages: (1) Basically a mediation, but it's before a judge or master, so its cheaper (2) It is without prejudice (3) It is private

Proceedings at a settlement conference **must be recorded**, but no part of that recording may be made available to or used by any person without court order (***Rule 9-2(3)***). *This happens rarely.*

The judge who presides at a JSC must not preside at the trial unless all parties consent (***Rule 9-2(3)***).

MEDIATION

Mediation is a "without prejudice" coming together of the parties with an unbiased third party who will act as a facilitator in the discussion between the parties. When the parties agree to mediate, they will agree on a mediator, and split the costs of the mediation.

Notice to Mediate Regulation

A **notice to mediate** (*p. 879*) allows one party to serve on another party a **mandatory requirement** that they attend mediation, which they still have to split the costs for. **So, you have an ability to force an unreasonable party into a mediation.** Counter-intuitively, this sometimes actually works.

Difference from summary trial: there is no forced decision in a mediation. You have to agree to settle.

ARBITRATION

Unlike mediation, arbitration is **only available by agreement between the parties**, either through a contract or a subsequent agreement between the two parties (or legislation). You can't force an arbitration on someone.

You can't force arbitration, but what you can say is, "*before we go down this **public** regime, let's try arbitration"* which is private and more flexible.

Advantages: (1) It is usually quicker (2) You can choose the adjudicator (can choose someone with experience in the area of your dispute) (3) Some argue it is cheaper (this is debatable, in arbitration, you're paying for the space you're using, the arbitrator, etc) (4) It is private (5) It is somewhat **more difficult to appeal an arbitration decision** than a trial decision – you have to get leave of the court to appeal a final decision from an arbitrator, and there is a higher test. *This could be an advantage or disadvantage* (6) You have more control over the process. The parties can agree on some of the rules (7) There is more discretion as to how costs will be recovered (*in an arbitration, parties can agree that the successful party can recover all costs, not based on a tariff – unlimited recovery*) (8) Flexibility

HEADED TO TRIAL

*If you're going to trial, first thing you want to **look at is the pleadings**. The pleadings are important for framing your case. Go back and take a look at the material facts that have been pled and what the case is that is before the court.You want to figure out **what you have to prove**, where does the onus lie on particular issues. Make a check list of the key facts that you have to prove. You also want to think about **what documents you need to present at trial** and arrange those. Best practice is to arrange with opposing counsel some sort of joint book of documents. Along with that, you should have a **document agreement,** which explains how you will be using those documents and why you will be using them. If you are presenting documents, you need to consider the implications of **"hearsay" evidence**. Medical records are inadmissible for the truth of their contents. Who is going to produce that evidence? If it's going to be a live witness, are they going to testify willingly or will you have to subpoena them or get an order that they attend trial? Are they an adverse witness?*

DEPOSITIONS

You can use **evidence from a deposition** (transcript or video-taped). By consent of the parties of record or by order of the court, **a person may be examined on oath** before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial (***Rule 7-8(1)***). *Note: this is not very common, but is an important tool. Usually deposition evidence is used if you think that person is not going to be able to attend trial (due to timing, illness, outside of jurisdiction, etc).*

In determining **whether to exercise its discretion to order an examination** under subrule (1), the court must take into account (a) the convenience of the person sought to be examined, (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence, (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial, (d) the possibility and desirability of having the person testify at trial by video conferencing or other electronic means, and (e) the expense of bringing the person to the trial (***Rule 7-8(5)***). *Note: if the person is **outside of Canada,** can use **Rule 7-8(11): letter of request**).*

Other forms of Evidence: (1) *viva voce* testimony (2) interrogatories (3) transcript of pre-trial examination of witness (4) physical examination (5) admissions (6) depositions (7) affidavit evidence (8) expert evidence

TRIAL MANAGEMENT CONFERENCE

Unless the court otherwise orders, a trial management conference must take place at least **28 days before the scheduled trial date,** at a time and place to be fixed by a registrar (***Rule 12-2(1)***).

Before you get to the TGC, you must file and serve a **trial brief** in Form 41 at least 7 days in advance (***Rule 12-2(3)***). It **sets out the main issues** for the court and the **parties' positions** with respect to those issues. It also **sets out the witnesses** each party plans to call, how long you expect your direct examination to take, how long you expect your cross-examination of the other side's witnesses to take. It also **sets out the documents** each party plans to rely on. It also **sets out the authorities** each party plans to rely on.

The judge presiding at the TMC may make various orders (upon application by a party or on their own) regarding: the plan for how the trial should be conducted, *ex. who goes first?* (***Rule 12-2(9)(a),*** *General rule: party with onus goes first (**Rule 12-5(72)**). It is rare that the court would allow the defence to go first, see **Vernon v. BC Liquor Distribution Branch** **2010 BCSC**, wrongful dismissal case, defence wanted to go first, judge denied the application*); amendment of pleadings (***Rule 12-2(9)(c)***); admissions of fact at trial (***Rule 12-2(9)(d)***, *sometimes will order that parties exchange notices to admit*); document agreements (***Rule 12-2(9)(e)***); time limits for evidence (***Rule 12-2(9)(f)***); experts (***Rule 12-2(9)(i)***, *may orders that the parties' experts confer to determine and report on those matters on which they agree and those matters on which they do not agree – done when the judge thinks there is going to be a battle of experts*); providing a summary of the evidence that they expect witnesses to give (***Rule 12-2(9)(g)***, *can ask for this if you're nervous about a witness on the other side is going to say*); request for affidavit evidence (***Rule 12-2(9)(h)***); anything that will make the the trial more efficient (***Rule 12-2(9)(q)***). Judge can also adjourn the trial (***Rule 12-2(9)(l)***).

A TMC judge is prohibited from (a) hearing any application for which affidavit evidence is required (*it is somewhat uncertain what evidence can be heard with/without affidavit evidence, see **Vernon v. BC Liquor Distribution Branch** **2010 BCSC,** defence argued that affidavit evidence wasn't required and the judge disagreed*) or (b) making an order for final judgment, except by consent (***Rule 12-2(11)***).

EVIDENCE AT TRIAL

NO EVIDENCE APPLICATION

At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that **there is no evidence to support the plaintiff's case** (***Rule 12-5(4)***). If there is a **material issue** on which there is no evidence presented. Even if you think the plaintiff *has* put in evidence on all the material facts, but there is some question about it, particularly on a contentious issue, you may want to think about bringing the application anyway. *Common issue that attracts no evidence application:* ***causation****.* The court will determine whether there is *some* evidence on the issue, not the ultimate question of whether the it meets the test on a balance of probabilities.

INSUFFICIENT EVIDENCE APPLICATION

At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that **the evidence is insufficient to make out the plaintiff's case** (***Rule 12-5(6)***). This is really the defence saying, we think the court should adjudicate the matter on the facts presented – *have they proved their case*. **If you bring this application, you can't call evidence as the defence!** This is used if the plaintiff has already called all your witnesses, and you don't have much more to say. You have be pretty confident to make this application. It is not commonly used.

NOTICE TO PRODUCE

By serving a notice in Form 43 at least 2 days before a trial, a party of record **may require any other party of record to bring to the trial** (a) any document listed by the other party in a list of documents prepared under Rule 7-1, and (b) any physical object in the other party's possession or control that the party serving the notice contemplates tendering at the trial as an exhibit, but the notice must identify the object (***Rule 12-5(8)***).

WITNESSES

The court may permit a party to examine a witness (i) by the **use of leading questions**, (ii) by **referring the witness to a prior statement** made by the witness, whether or not made under oath, (iii) respecting the **interest of the witness**, if any, in the outcome of the proceeding, or (iv) respecting any relationship or **connection between the witness and a party** (***Rule 12-5(29)(a)***). Court may also permit a party to cross-examine a witness, either generally or with respect to one or more issues (***Rule 12-5(29)(b)***).

Adverse Witnesses

"Adverse party" means a party who is adverse in interest (***Rule 12-5(19)***). If a party wishes to call as a witness an adverse witness, the party must **serve on the adverse party a notice in Form 45** together with proper witness fees **at least 7 days before** the date on which the attendance of the intended witness is required (***Rule 12-5(21)***). The party calling an adverse witness is entitled to cross-examine the witness (***Rule 12-5 (26)***, *i.e. you can ask leading questions, although, in practice, you can lead your witness in direct examination on non-controversial issues*).

TRIAL PROCEDURES

The court may order that one or more questions of fact or law arising in an action be tried and determined before the others (***Rule 12-5(67)***). The court may also order that different questions of fact arising in an action be tried by different modes of trial (***Rule 12-5(68)***, *ex. by summary trial*).

Addresses to the jury or the court:

(1) the party on whom the onus of proof lies makes an **opening statement** (***Rule 12-5(72)(a)***), bringing the issues and explain what the witnesses are going to say (*but be careful – the evidence may not end up giving that evidence*) (2) the opposite party, if that party announces his or her intention to give evidence, makes an **opening statement** (***Rule 12-5(72)(b)***); (3) at the close of all of the evidence, the **party who began may address the jury or the court**, and the **opposite party may then address the jury or the court** and the party who began may then **reply** and the court may allow the opposite party to be heard in **response to a point raised in the reply** (***Rule 12-5(72)(c)***);

JURY TRIALS

Jury trials are rare in civil cases because: (a) they are expensive, (b) they take time (*selection, instruction, etc*). Jury trials are generally seen as being unpredictable, so most counsel will stay away from jury trials.

There are some trials which **must be heard without a jury**: (a) administration of the estate of a deceased person, (b) dissolution of a partnership or taking of partnership or other accounts, (c) redemption or foreclosure of a mortgage, (d) sale and distribution of the proceeds of property subject to any lien or charge, (e) execution of trusts, (f) rectification, setting aside or cancellation of a deed or other written instrument, (g) specific performance of a contract, (h) partition or sale of real estate, (i) custody or guardianship of an infant or the care of an infant's estate, or (j) a proceeding referred to in Rule 2-1(2) (***Rule 12-6(2)***).

If you want a jury trial, you file and serve a **notice requiring jury trial** within 21 days after service of the notice of trial but at least 30 days before trial (***Rule 12-6(3)***).

The other party can apply for an **order that the trial or part of it be heard by the court without a jury** on the ground that (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury, (ii) the issues are of an intricate or complex character, or (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action (***Rule 12-6(5)(a)***), or on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2) (***Rule 12-6(5)(b)***) (**but** can't do this for defamation, false imprisonment and malicious prosecution cases).

EXPERTS' REPORTS

In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a **duty to assist the court** and is not to be an advocate for any party (***Rule 11-2(1)***). **Expert certification:** If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she (a) is aware of the duty referred to in subrule (1), (b) has made the report in conformity with that duty, and (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty (***Rule 11-2(2)***). ***So you want to make sure that your expert is not argumentative, is not hypothesizing, and does not answer the ultimate issue.***

An expert's report that is to be tendered as evidence at the trial must be signed by the expert, **must include the certification** required under Rule 11-2 (2) and must set out: expert's name, address, area of expertise; qualifications, employment, educational experience in area of expertise; **instructions provided to the expert** in relation to the proceeding; **nature of the opinion** being sought; the expert's opinion; reasons for the opinion, including: facts, assumptions, research conducted, list of documents relied upon (***Rule 11-6(1)***).

The party who has produces an expert report must make the report or any documents related to the report available for the other party if requested to do so by that other party (***Rule 11-6(8)***). (*?*)

Requirements for Admission of Expert Opinion (***Mohan***)

(1) Relevance: Requires finding of *both* logical relevance and a determination that the benefits of the evidence (weight, materiality, reliability) outweigh the costs (confusion, "mystic infallibility"). The opinion must be so related to the fact at issue that it has some tendency to help solve it. **(2) Necessity in assisting TF:** Evidence is necessary because it is not expected to be within the common knowledge and experience of TF. **(3) Absence of exclusionary rule:** Evidence cannot run afoul of exclusionary rules of evidence separate and apart from the opinion rule itself, *ex. can't rely on hearsay (i.e. if report relies on second hand evidence. Judge may still allow the report, but it may be given less weight)*. **(4) Properly qualified expert:** There is a concern that the evidence will be misused, given more weight than it should, treated as "virtually infallible". This could distort the fact-finding process. ***Test:*** a properly qualified expert has "acquired special or peculiar knowledge through study or experience."

An expert report can be challenged by the other party on any of the above-mentioned grounds. One way to challenge an expert report: You can require the other side to produce the expert at trial, so you can cross-examine them (***Rule 11-7(3)***).

Privilege: All communication before the expert's report is tendered is **privileged**. Once you tender the report, you are waiving privilege over the report and possibly certain aspects of the file. However, communications with counsel on other issues in the case, arguably, should remain privileged.

Appointment of joint experts: Experts can be jointly appointed by the parties (or by the court) (***Rule 11-3***).

FAST TRACK & EXPEDITED LITIGATION

In certain limited circumstances, Rule 15 allows for an alternative to a full trial (***Rule 15-1***). For relatively simple matters that are less than $100,000 (or one of the other provisions below), this rule allows you to bring an application to have Rule 15 apply to the proceeding. If you bring this application, the other side has no choice, ***Rule 15*** is **mandatory**.

But: Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of $100,000 (***Rule 15-1(3)***). *So if the property was worth $80,000 but has now increased to $120,000, the court can still award the full damages.*

Rule 15-1(1) This rule applies to an **action** if (*mandatory*):

(a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the **total of the following amounts is $100,000 or less**, exclusive of interest and costs:
  (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss
  (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
  (iii) the fair market value, as at the date the action is commenced, of (A) all real property and all interests in real property, and (B) all personal property and all interests in personal property claimed in the action by the plaintiff,

(b) the trial of the action can be completed within **3 days**,

(c) the parties to the action consent, **or**

(d) the court, on its own motion or on the application of any party, so orders.

Rule 15 provides for a number of advantages that are designed to limit the use of the normal pre-trial rules so as to reduce the cost and the length.

In the event of a **conflict between this rule and another rule**, this rule applies (***Rule 15-1(5)***). Classic example: examinations for discovery (***15-1(11)***): you only have 2 hours to carry out examinations for discovery, whereas in the normal rules, you would have 7 hours.

This rule ceases to apply to a fast track action if the court, on its own motion or on the application of any party, so orders (***15-1(6)***).

CPC required: A party to a fast track action **must not serve** on another party a notice of application or an affidavit in support of an application unless a case planning conference or a trial management conference has been conducted in relation to the action (***15-1(7)***, *exceptions to this rule are in* ***15-1(8)***). The point of a CPC is to bring structure to the action so there is more certainty. So until you have a CPC, you can't go around filing applications.

Right to a jury is not available on a fast track proceeding (***Rule 5-1(10)***).

At most, your action will take 8 months, whereas trials can take 1–2 years: If a party to a fast track action applies for a trial date within 4 months after the date on which this rule becomes applicable to the action, the registrar must set a date for the trial that is **not later than 4 months** after the application for the trial date (***Rule 15-1(13)***).

If trial will require more than 3 days: If, after the TMC, the TMC judge thinks the trial will take more than 3 days, the TMC judge (a) may **adjourn the trial** to a date to be fixed as if the action were not subject to this rule, and (b) is not seized of the action (***Rule 15-1(14)***) – *note: this rule seems to contradict* ***15-1(1)***.

Costs: Unless the court otherwise orders or the parties consent, and subject to *Rule 14-1(10)*, the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows: (a) if the time spent on the hearing of the trial is one day or less, $8 000; (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9 500; (c) if the time spent on the hearing of the trial is more than 2 days, $11 000.

COSTS

Remember: costs drive litigation! Default: costs go to the successful party (***14-1(9)***).

"Costs" include disbursements and legal costs. **Disbursements**, if **necessarily or properly incurred or**, are meant to be recovered on an *incurred basis* – you get full indemnification (***14-1(5)***, *subject to proportionality considerations under 1-3(2)*). **Legal costs** are not meant to give you full indemnification; they get assessed under party and party costs (***14-1(2)***). *Default* for legal costs is by tariff found in ***Appendix B*** (*p. 560*).

***Appendix B*:** There is a scale A, B, and C. *Default* for most litigation is Scale B (matters of ordinary difficulty). The value of the units for A: $60/unit, B: $110/unit, C: $170/unit.

Special costs are designed to be more closely representative of the full indemnity of your actual solicitor-client costs (***14-1(3)***).

Application costs: Costs are usually not recovered until the proceeding has completed. So even if you are rewarded costs in an application along the way, the other side does not pay those costs until the whole proceeding is over (***14-1(13)***). The final line in any order will determine how costs are to be resolved. *Default for applications*: the successful party will get costs, in any event of the cause.

"Costs to the plaintiff, in any event of the cause" * most common*
In an application, the default is that the successful party will get costs of the application *in any event of the cause.* This means, even if the party doesn't win the lawsuit at the end of the day, they are still entitled to costs for these applications.

"Costs to the plaintiff, in the cause"
This means, the plaintiff is awarded the costs of the application, but they are only entitled to costs for that application, if they win the lawsuit at the end of the day.

"No costs"
This means each party will bear their own costs with regards to that application.

"Costs to the plaintiff in the amount of $500, in any event of the cause" **not common**
The judge can also order a lump sum for costs, payable at the end of the litigation.

"Costs payable to the plaintiff forthwith" **exception: used to punish or discourage inappropriate conduct**
This means costs are payable now – exception to rule that costs are calculated at the end of proceeding. This is almost always used as a punishment, when an application brought is just really stupid.

"Costs in the cause" ** most common**
When its a legitimate application and both parties were reasonable, judge may order that the costs just go into the hopper (*the cause*), and when the court determines at the end of the day who gets costs, that person will also get the costs from this application.

"Costs payable as special costs" **exception**

Setting off costs: If there have been a number of different cost determinations on applications during the course, the court may resolve it all at the end of the day. Ex. If the plaintiff is successful and is awarded costs on Scale B, if along the way, there were "*costs to the defendant in any event of the cause,*" the costs of that application are calculated and **set off** against the costs awarded to the plaintiff. But note: if there were "*costs to the defendant in the cause*," since the defendant did not win, the defendant does not get these costs, but neither does the plaintiff because they didn't win on that application.

Bill of costs: At the end of the day, the winning party sends over the **bill of costs** to the other side, which sets out the units and amounts being claimed by that party, which often gets negotiated until an agreement is reached. The units you can claim are usually pre-set (*based on activity, per day, etc*).

If the parties can't agree on costs, you need to go before the **registrar**. You need: (1) an order that awarded you costs, (2) an appointment, (3) the bill of costs, (4) and evidence supporting your claim of costs, can be *viva voce* (usually by the lawyer) or affidavit (most commonly used when justifying disbursements). Registrar will look at totality of evidence (*concept of proportionality (**1-3(2)**)*) – this is an art, not a science!

Small claims: A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the ***Small Claims Act*** (*i.e. less than $25,000*) is **not entitled to costs**, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders (*common ex. defamation can only be brought in SC*) (***Rule 14-1(10)***).

A party is not disentitled to costs merely because the party's lawyer is an employee of the party (*ex. in-house lawyer*) (***Rule 14-1(11)***). Also applies if the party is unrepresented. So, if I'm unrepresented and I win, even though I haven't spent any money on legal fees, I'm still entitled to the tariff items under the schedule.

If you take **default judgment**,the costs that are recoverable are a reduced level of costs set out in ***Appendix B*** (***p. 569: Schedule 2***).

If you have a **fast-track proceeding**, you get modified levels of costs.

Costs orders serve many functions. They indemnify successful litigants; deter frivolous proceedings and defences; encourage parties to deliver reasonable offers to settle; and discourage improper or unnecessary steps in litigation (***Skidmore v Blackmore* 1995 BCCA**).

Special Costs

Special costs are a category of costs payable to a party. Special costs are more or less what solicitor and client costs were under the old schedule. Special costs are meant to provide a much higher indemnity than ordinary costs (*i.e. party and party costs*). They are not necessarily the fees that the solicitor claimed from his own client, they are fees that a reasonable client would have to pay to a reasonably competent solicitor to do the work for which the costs are claimed (***Bradshaw Construction LTd v Bank of Nova Scotia* 1991 BCSC**). *The test is what would be reasonable but the best evidence to show what would be reasonable would be your bill to your client.*

Special costs are intended to "resemble closely" the actual legal fees charged by a lawyer to his or her own client (***Lee (Guardian ad litem of) v Richmond Hospital Society* 2005 BCCA**)

Test for recovery of special costs: Special costs may be ordered for reprehensible conduct falling short of scandal or outrage. It is misconduct deserving of reproof or rebuke, and is reprehensible (***Garcia v Crestbrook Forest Industries Ltd* 1994 BCCA,** *reduces the standards of what you have to prove in order to be ordered special costs*). *Ex. If you are fighting abut stupid stuff, taking an unreasonable position. Ex. When fraud is alleged, special costs are always involved at the end of the day, either way.*

Security for Costs

This is a tool that is available to the defendant. You are seeking that the plaintiff provide security for the cost that you as the defendant expect to incur during the course of the proceeding. It is designed to be used when there is **real risk** that the plaintiff will not be in a position, if they lose, to pay the defendant their costs.

Test for ability to obtain security for costs: The purpose of ordering security for costs is to provide a fund for the payment of costs of parties who succeed against impecunious opponents. The amount to be ordered as security should be determined having regard to all of the circumstances (***Fat Mel's Restaurant Ltd v. Canadian Northern Shield Insurance Co* 1993 BCCA**). *Normally, when you are seeking security for costs, you go through Appendix B and state which of the items you expect to be incurring during the course of the litigation.*

The court has a **complete discretion** about whether to order security for costs. The discretion should be exercised after a **consideration of all relevant circumstances**. Security for costs: (a) may be ordered every if there is a possibility that the party against whom the order is sought may be deterred from continued participation in the proceeding (*in essence, it could act like a stay*) (b) will be ordered unless it can be proven that security is sought as an instrument of oppression to stifle a legitimate claim (c) should be ordered without the court first having 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 (e) may be ordered even if the application for security is made late in the proceeding (*although most of the time, the application is brought early on*) (***Kropp v Swaneset Bay Golf Course Ltd* 1997 BCCA**). *You request security for costs by way of application under Rule 8: notice of application, affidavit estimating costs, etc.*

APPEALS & REVIEW OF DECISIONS

You have an automatic right to appeal a master's decision to a judge within 14 days.

Decisions from a Supreme Court Judge

If it is a **final order** (*ex. trial, 9-6 summary judgment, 9-7 summary trial*), you have an **automatic right** to appeal within 30 days. Your appeal will be heard by a 3-judge panel of the Court of Appeal.

If it is an **interlocutory order**, then you must seek leave from a single Court of Appeal justice within 30 days. To get leave to appeal to the Court of Appeal usually requires an **error of law**. The Court of Appeal will not generally interfere with discretionary findings, unless it is outside the range of reasonableness. If you do get leave, your appeal will be heard by a 3-judge panel of the Court of Appeal. If you are denied leave, you can appeal that decision to a 3-person panel.

Decisions from a Court of Appeal Judge

If you're looking to overturn a previous finding of the Court of Appeal, you need to ask the court for a 5-judge panel. A regular panel of the Court of Appeal cannot overrule a precedent unless they go to 5 judges.

If you want to appeal a Court of Appeal decision, you must seek leave (in most circumstances) to appeal to the Supreme Court of Canada within 60 days. That leave is heard by 3 judges of the SCC. If they grant leave, your appeal will be heard by a 5-, 7-, or 9-judge panel of the Supreme Court of Canada. The **test** for leave to appeal to the Supreme Court of Canada: Broad test of **public importance** (*ex. something that is of national importance, competing Court of Appeal decisions that needs to be resolved*).

The **exceptions** to the leave process standard to the Supreme Court of Canada: in a Criminal proceeding, if you get a dissent at the Court of Appeal, you have an automatic right to appeal to the SCC.

So, if you don't get what you want, keep on trekkin'! But note the cost ramifications of this. You can use it to back the other side into a corner and give you what you want.

APPENDIX A: SAMPLE NOTICE OF CIVIL CLAIM

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

ABC LTD.

Plaintiff

and:

DEF INC.
XYZ CORP.

Defendants

NOTICE OF CIVIL CLAIM

"Boilerplate Stuff"

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The plaintiff, ABC Ltd., is a company duly incorporated in BC with a 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 office 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 DEF 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, however, the mufflers 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 to 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. Alternatively, the defendant DEF was negligent in providing the wrong mufflers (you get the idea).

THE PLAINTIFF'S ADDRESS FOR SERVICE IS:

Dated: April 16, 2012

UBC Law LLP.
Per: "signature of *Me*"
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 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 1: Defendant's Version of the Facts

1. Explain the Facts

Division 3: Additional Facts

1. The Defendants 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 the term or termination date of any lease applicable to the Property, as alleged or at all.
2. Further, and in the alternative, in general response to the whole of the notice of civil claim, if any representations were made to the Plaintiff, or any agent or representative of the Plaintiff, *blah blah blah.*

Defendant's Address for Service:

Dated: April 16, 2012

Per: "signature of *Me*"
Solicitor for the Defendant

APPENDIX C: SAMPLE AFFIDAVIT

This is the 1st affidavit of *John Smith* in this case and was made on April 16, 2012

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 within 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 verify beleive the same to be true.
2. I am authorized to swear this Affidavit on behalf of ABC Ltd.
3. *And go on with your story*

THE DEFENDANTS

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

RECORDS RELATING TO "*xyz*"

6. ABC Ltd. maintains numerous records regarding [*xyz*].

BREACH OF CONFIDENTIALITY BY DEFENDANTS

7. On [*date*], *Joe Blow* informed me and I believe it to be true that [*xyz*].

POTENTIAL HARAM FROM DISCLOSURE

8. I am concerned that [*xyz*].
9. I make this Affidavit in support of an injunction application, among other things, to prevent disclosure of the Records and their 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 16, 2012.

"Signature of *Me"*
A Commissioner for taking Affidavits for British Columbia

My Name
[Name of Commissioner (please print)]

"*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 16th Day of April, 2012

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 March, 2011, and on hearing Jane Bunting, counsel for the Plaintiff, and on reading Affidavit #1 of Janice Kimmel sworn March 10, 2012;

[ ] 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 [*xyz*].
2. The Honourable Madam Justice Zimmer shall remain seized of the Plaintiff's application;
3. Costs shall be in the cause.

APPROVED AS TO FORM

"Signature of *Me*"
My Name
Counsel for the Plaintiff

By the Court
"Signature of *Registrar*"
Registrar

APPENDIX E: TOOLS

Themes to keep in mind

- Proportionality (*Rule 1-3(2)*)
- Costs drive litigation! (*Rule 14*)

Changes in the rules

- Document discovery (*Rule 7-1*)
- Offer to settle (costs) (*Rule 9-1*)
- Proportionality (*Rule 1-3*)

Professional Responsibility Obligations

- PCH Chapter 1: duties of a lawyer
- PCH Chapter 4: avoiding questionable conduct
- PCH Chapter 8: *ex parte* applications
- PCH Chapter 11: default judgment
- PCH Appendix 1: affidavits

If someone is not playing nice

- Non-compliance (*Rule 22-7*)
- Non-compliance for enforcement of an order (*Rule 13-2(7)*)
- Non-compliance for witness notice (*Rule 12-5(25)*)
- Default judgment (*Rule 3-8*)
- Dismiss/strike a pleading (*Rule 9-5*)
- Interlocutory Applications (*Rule 8*)
- Contempt of court (*Rule 22-8*)
- Offer to settle (*Rule 9-1*) – *to put risk on an unreasonable defendant*
- Forced mediation (*see p. 879*)
- CPC (*Rule 5*)

Someone is going to destroy evidence

- Interlocutory injunction (*Rule 10-4*)
- Anton Pillar order (*Rule 10-1*)
- Mareva order
- Order without notice (*Rule 8-4*) – (*note PCH*)

Ways to avoid a full trial

- Summary proceedings (*Rule 9-6 summary judgment, 9-7 summary trial*)
- Settlement (*Rule 9-1 offer to settle, Rule 9-2 judicial settlement conference*)
- Alternative dispute resolution
  - Mediation – Notice to Mediate (*p. 879*)
  - Arbitration
- Fast track and expedited litigation (*Rule 15*)

Exceptions to viva voce evidence

- Answers from interrogatories (*Rule 7-3*)
- Admissions (notice to admit) (*Rule 7-7*)
- Transcript from deposition (*if you think witness won't be at trial*) (*Rule 7-8*)
- Read in transcript from examination for discovery (*but only your own*) (Rule 7-2)
- Transcript from pre-trial examination (*Rule 7-5*)