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CIVIL PRO 469 – SPRING 2015

Pre-claim – claim – pre-trial – trial – after trial

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**Code of Professional Conduct for British Columbia (“the BC Code”)**

**CHAPTER 2 – Standards of the Legal Profession**

A lawyer is a minister of justice, and officer of the courts, a client’s advocate, and a member of an ancient and learned profession

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| **2.1 Canons of Legal Ethics, Lawyer owes** **duties**:  **2.1-1 To the State:** a lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.  **2.1-2 To Courts and Tribunals:** 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.  **2.1-3 To the Client:** duty to bring professional skills and knowledge and act in the client’s best interest. A lawyer should obtain sufficient knowledge of relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client’s cause.   * 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 with fairness * Abide by the law * Defend in criminal cases * Do not divulge client’s info * Don’t co-mingle own money and clients money * Are entitled to be paid a reasonable amount of money * Professional is a branch of the administration of justice, not just about money, * Don’t summit own affidavit * Must point out to unrepresented client that you are not their lawyer.   **2.1-4 To other Lawyers:** to act with courtesy and good faith.  **2.1-5 To Oneself:** when acting as an advocate, a lawyer must not abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party; duty not to act based on false pretense or malice. |

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| **Chapter 3 Relationship to Clients**  **3.2-5**  A lawyer must not, in an attempt to gain benefit for a client, threaten, or advise a client to threaten: (a) to initiate or proceed with a criminal or quasi-criminal charge; or (b) to make a complaint to a regulatory authority. |

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| When seeking an ex-parte order, you have a duty to represent both sides of the case. |

1. INTRODUCTION TO THE RULES OF COURT

There are two types of proceedings: 1) action = proceeding brought by notice of a civil claim, and 2) petition proceeding.

* Proceeding = action, petition, requisition
  + Action – Plaintiff 🡪 Defendant
  + Petition – Petitioner 🡪 Respondent

1.1 OBJECT OF RULES

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| **Rule 1-3 of the Supreme Court Civil Rules Object of Rules**  (1) **The object of these Supreme Court Civil Rules is to secure the just, speedy, and inexpensive determination of every proceeding on its merits**  (2) **Proportionality TEST -** conducting the proceeding in ways that are proportionate to  (a) the amount involved in the proceeding,  (b) the importance of the issues in dispute, and  (c) the complexity of the proceeding. |

Proportionality is an overarching consideration that informs the interpretation and implementation of the Civil Rule **[Kim v Lin].** The application of the proportionality test depends on the facts of a case.

* + Even though riles might provide for multiple medical exams, a smaller injury may not require multiple visits to multiple docs **[Kim v Lin].**
  + Court can knock down an **expert fee** if it is large in proportion to the claim itself [**Stapleton]**
    - Party was trying to recover expert fees of $36,000 when case was only $100,000- court knocked it down to $20,000
* Court can consider **economic concerns of parties** [**Boss power: monetary value, the general/public/policy/individual value of the case: “[**t]he essential question is usually: was an expense or disbursement necessary at the time it was incurred.” The above test can be used to justify any application]

1.2 INTERPRETATION / TIME

**Rule 1-1 of the Supreme Court Civil Rules – Interpretation**

**“action”** – proceeding started by a civil claim.

**“document”**  - includes a photograph, film, recording of sound, record of a permanent or semi-permanent character.

“**pleading**” – means a NOCC, a response to civil claim, a reply, a counterclaim, a response to counterclaim, 3rd party notice or response to 3rd party notice.

**“proceeding”** – means an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, states case under rule 18-2.

\***can also look at annotations to see if any cases have interpreted the term**

**Interpretation Act**

**S.25 calculation of TIME or age**

25(2) if the date for doing an act falls on a **holiday** – then the time is extended to the next day that is not a holiday

25(4) if the time is expressed as **clear days, weeks, months or years,** OR as “at least” or “not less than” a number of days, weeks etc, then the **first and last days must be excluded**

25(5) any time expressed other than in (4) must exclude first day and include last day

**s.29 expressions defined** “holiday” – includes Sunday, xmas, good Friday, easter Monday, dec 26, Canada day, victoria day, BC day, labour day, remembrance day, new years.

**Rule 22-4 of the Supreme Court Civil Rules**

**22-4(1) computation of time** – unless contrary intention, if a period of **less** than 7 days is set out, then holidays are NOT counted

**22**-**4(2)** the court may **extend or shorted** any period of time, **even if the application for the extension is made AFTER the period has expired**

* + - **I.e.** even if you let the time expire, you can still be granted an extension

**22-4(3)** – can be extended by **consent: both formal and informal consents are sufficient.**

**22-4(5)** – despite this rule, a D or R can apply to have a proceeding dismissed for **want of prosecution // 21 and 35 rule:** the opposing side has to respond to the civil claim with 21 days after notice and 35 days for document disclosure.

**22-4(6) attendance** – attendance before official reporter within ½ hour following the fixed time is sufficient

Onus is on Applicant to **give evidence** to justify extending time [**Tung Wise]**

* Parties generally work out time between them by consent
* Extensions are liberally granted

Two factors: 1) Prejudice (in not granting vs granting) and 2) Whether justice overall will be served.

INDIGENT STATUS - Rule 20-5

* Court can waive certain fees if a party is indigent
* Ex receiving benefits under *Employment Assistance Act*
* Can make order before or during proceedings
* (1) court wont grant if it thinks the claim or defence (a) discloses no reasonable claim or defence, (b) is scandalous, frivolous or vexatious, or (c) is otherwise an abuse of process

CHANGE OF LAWYER

Rule 22-6 of the Supreme Court Civil Rules

**(1)** party can (a) change lawyers, (b) engage a lawyer, or (c) discharge their lawyer and represent themselves,\*but in any change, until proper **copies of notice of change** have been delivered, the other side is entitled to act as if nothing has changed – ex send files to old lawyers office

**Client always has total right to terminate:** a client can elect to represent him/herself or by another lawyer.

Lawyer doesn’t have complete freedom to terminate the relationship

Has duties to the client

Client must have time to retain and instruct new counsel so **timing is key\***

To get off record, lawyer files a **notice of intention** to withdraw – other side has 7 days to object – if no objection then you file **notice to withdraw**

* + if they object, have to go to court

When withdrawing need to **maintain privileged information**

* (2) – Order that lawyer has ceased to act
* (3) – Order on application of lawyer
* (4) – Notice of withdrawal
* (5) – Filing of objection
* (6) – Procedure if no objection filed
* (7) – Service of notice of withdrawal
* (8) – Service of documents after withdrawal
* (9) – Procedure if objection filed
* (10) – Substituted service
* (11) – Service of copy order

**Code of Professional Conduct – Withdrawal Chap 3.7**

* + 3.7-1 a lawyer must not withdraw from representation of a client except for **good cause and on reasonable notice**
  + **3.7- 2** If client refuses to accept **reasonable advice given on a significant point**, then you are entitled to talk about withdrawal
    - or if client is deceiving lawyer, persistently unreasonable or uncooperative in a material respect
  + (3) non-payment of fees
  + (4) withdrawal from criminal proceedings
  + (7) obligatory withdrawal – have to withdraw if client is telling you to act contrary to ethics, or you are not competent to continue to handle the matter
  + (8) manner of withdrawal – lawyer must do best to facilitate transfer to new lawyer
  + (9.1) confidentiality

NON-COMPLIANCE – Rule 22-7

Courts want actions to proceed, so very rarely will non-compliance nullify a proceeding. In general, the court treats non-compliance as irregularity.

Instead, will treat non-compliance as an **irregularity** that courts should rectify so long as it does not give rise to an injustice **[International Forest Products:** justice is not barred by a technicality. Also see Tung Wise**].**

**Powers of the court** – if rules are not complied with, court can

* + (a) set aside a proceeding, wholly or in part
  + (b) set aside any step taken, or a document or order made
  + (c) allow an amendment under 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 rules

Consequences of certain non-compliance

* + Without limiting any other power of the court under these Rules, if a person, contrary to these Rules and without lawful excuse,
    - (a) refuses or neglects to **obey a subpoena or to attend at a 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,**
    - (e) refuses or neglects to attend for or submit to a **medical examination,**
  + then
    - (f) if the person is the **plaintiff**…the court may dismiss the proceedings, and
    - (g) if the person is a **defendant**…the court may order the proceeding to continue as if no response to civil claim or response to petition had been filed.

**Nayyar :** P was refusing to answer questions on examination for discovery and then did not bring an application within 7 days of discovery for determination as to the questions with which P took issue. Also, P did not serve D with his trial brief before case management conference. Disobeyed several other orders

Tow step **TEST**:1) Has there been non-compliance?and 2) Has there been willful disobedience of a court order or is there a lawful excuse?Onus is on party who allegedly failed to comply to give **adequate explanation for non-compliance**

The court may not go that far to grant extension or relief. The court is likely to look at the faults involved. The court distinguished “refusal” from a “negligence”. Striking a claim or defence is a blunt draconian tool to be used sparingly.

* + Here, there was a **wanton disregard** for the court rules with no adequate attempt to present a lawful excuse or explanation

***Cheal* :** Isolated or a pattern. The court prefer to have the matter heard on its merits if it is just to do so.

### WANT OF PROSECUTION

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| **Rule 22-4 (5**) – **Want of prosecution**  Despite this rule, a defendant or respondent may apply to have a proceeding dismissed for want of prosecution without service a notice of intention to proceed in Form 44.  **Rule 22-7 – Effect of non-compliance**  **dismissal for want of prosecution:** court can order proceeding dismissed if, on application, it appears there is want of prosecution in a proceeding |

If a petitioner files a claim and then does nothing to pursue it, D can file an application seeking dismissal for want of prosecution

**Court wants to decide case on merits rather than a technicality so will rarely find in favour of D [International Forest Products, also see Tung Wise].**

**Factors** courts will consider for granting a dismissal (**Gemex Developments v Sekora].**

* + - **(a)** length of delay and whether it was inordinate
    - **(b)** any reasons for the delay offered in evidence or inferred from the evidence including:
      * whether the delay was intention or tactical
      * whether it was product of negligence, illness or some other cause
      * ultimately, is it excusable in the circumstances?
    - (c) whether the delay has caused serious prejudice to the defendant in presenting a defence, and if so, whether it creates a substantial risk that a fair trial is not possible at the earliest date it could get back on track
    - (d) whether justice requires a dismissal

2. PRELIMINARY CONSIDERATIONS

**OUTLINE:**

**2.1 concept of costs: costs drive litigation.**

**2.2 limitation periods**

**2.3 form**

**2.4 Jurisdiction – Court Jurisdiction and Proceedings Transfer Act**

## **2.1 concept of costs: costs drive litigation**

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Have to think about the cost of the trial, ability to recover / pay. **Generally, costs go to the successful party.**

But even if you win, you likely won’t recover all of your costs

* + You get **an award of costs** – that doesn’t mean that you will **recover** those costs from the other party
  + Also, costs are paid on a schedule: **tariff**, not fully based on what you *actually* spent

Costs are broken into

* **(1) LEGAL FEES** – actual fees paid to lawyer
  + Not dollar for dollar – paid under a **schedule – APPENDIX B**
  + Usually get ~50% of costs
* **(2) DISBURSEMENTS** – other out of pocket costs: court fees, photocopying, filing etc
  + Only reimburse those disbursements that are reasonably and necessarily incurred
  + \***so this CAN be dollar for dollar recovery – full recovery**

**TEST:** proportionality – court will consider:

* + Size of the claim
  + Complexity of the proceedings
  + Number and importance of issues
  + The financial circumstances of the party

**SETTLEMENT** [exam]– always need to think about settlement. If you take less earlier you might avoid litigation, expenses, fees etc.

## **Limitation periods: Limitation Act is included in the form book.**

The general rule is 2 years from the point of reasonable discovery.

* + Breach of contract – 6 years
  + Personal injury – 2 years
  + Max is generally 30 years

Can get around limitation periods when filing **counterclaim or file in a claim that is already going**

**\*\*If there is an issue / doubt – FILE NOW AND AMEND LATER\*\***

* + Then you will be inside the limitation period, and amendments are easy to get

**Limitation Act**

**S.3 limitation periods**

* + (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

(a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

(b) for trespass to property not included in paragraph (a);

(c) for defamation;

(d) for false imprisonment;

(e) for malicious prosecution;

(f) for tort under the Privacy Act;

(g) under the Family Compensation Act

(h) for seduction;

(i) under section 27 of the Engineers and Geoscientists Act

(3) actions with **10 year limitation period** – trusts and trustees

(4) actions **with no limitation period**

(5) any actions **not specifically addressed in this Act or another** are subject to a **6 year limitation period**

**S. 4** **Counterclaim or other claim or proceeding**

(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,

(b) third party proceedings,

(c) claims by way of set off, or

(d) adding or substituting a new party or defendant

under any applicable law, with respect to any claims relating to or connecting with the subject matter of the original action

* + **\*this is how you can get around a limitation period!**

**S. 5**  **Effect of confirming a cause of action**

(1) If, after time has begin to run with respect to a limitation period set by this Act, but before the expiration of the limitation period**, a person against whom an action lies confirms the cause of action**, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the time period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

* + - E.g. if borrow money and promise to pay back Jan 1 – don’t pay back = breach and clock starts running – if during the 6 years you email stating that you know you owe money and are going to pay it back, the limitation period starts as of the date of that confirmation
    - \*Can’t confirm after the expiration of the time period (i.e. after the 6 years for debt claim for breach of contract)]

**S. 6** **Running of time postponed**

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is **postponed** as provided in subsection (4):

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the Family Compensation Act;

(h) for breach of trust not within subsection (1).

(4**) Time does not begin to run** against a plaintiff or claimant with respect to an action referred to in subsection (3) **until the identity of the defendant or respondent is known to the plaintiff or claimant** and those facts within the plaintiff’s or claimant’s means of knowledge are such that a **reasonable** **person**, knowing those facts and having taken the appropriate advice that a reasonable person would seek on those facts, would regard those facts as showing that

(a) an action on the cause of action would, apart form the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(b) the person whose means of knowledge is in question ought, in the person’s own interests and taking the person’s circumstances into account, to be able to bring an action.

**Time does not start running until a reasonable person should have known that the act occurred\*\*\*\*\***

where there is an unknown cause of action (ex faulty construction that you don’t notice until 20 years later) your time starts when you notice

**S.7 If a person is a minor or incapable**

(2) If, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period set by this Act is **postponed** so long as that person is under a disability

If a permanent disability, would appoint a guardian ad idem to bring the case

If under 19, time does not start running until person turns 19

**s.8 Ultimate Limitation Period – 15 years [**a cap that provides certainty]

3. COMMENCING AN ACTION

## **Form of proceeding**

There are three forms of proceedings: (1) Action, (2) Petition, and (3) Requisition.

1. Action: commended by a notice of civil claim – leads to trial.
2. Petition proceeding is commenced by a petition and it leads to hearing.
3. Requisition: a document filed, asking the court to do something that is relatively straightforward and doesn’t involve any contested facts.

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| **RULE 2-1**  **Commencing proceedings by notice of civil claim**  (1)Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding **must** be started by the filing of a notice of civil claim under Part 3.  **Commencing proceedings by petition or requisition**  (2)To start a proceeding in the following circumstances, a person **must file a petition** or, if Rule 17-1 applies, a requisition:  (a) 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;  (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;  (c) 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;  (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;  (e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;  (f) the relief sought is for payment of funds into or out of court;  (g) the relief sought relates to land and is for  (i)   a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,  (ii)   a declaration that settles the priority between interests or charges,  (iii)   an order that cancels a certificate of title or making a title subject to an interest or charge, or  (iv)   an order of partition or sale;  (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege. |

1. **Notice of Civil Claim** – this is the **default\*.** A NOCC starts an action, which leads to a trial unless the matter settles.

**2. Petition –** petition brings an issue before the court for a **full determination on the merits** without having a full trial, because there are no contested facts. A petition proceeding is heard in chambers, based on affidavits and written arguments

If concerns regarding to facts arise, you will want to **convert a petition to a trial.**

**TEST:** is petition format suitable to determine all issues? **Rule 2-1**

1. Whether there is a dispute over the facts which make it more suitable for full trial
2. If full discovery necessary – cannot use petition because in petition judge makes a decision only based on affidavit evidence
3. Not suitable when there are **credibility** concerns because its based on affidavit evidence
   * + - If one isolated concern, can agree to let other side cross that one person, but the rest will be done by written argument
4. Not suitable if seeking damages

Rule 2-1(2) – Petitions **-** A person whishing to bring a proceeding referred to in Rule 2-1(2) by filing a petition must file a petition in Form 66 and each affidavit in support. E.g. interpretation of bylaws 2-1(2)(c).

**3. Requisition – Rule 17-1**

A doc you file asking court to do something that is straightforward and doesn’t involve contested facts or law.

## **Jurisdiction: is BC the proper place for you claim?**

**Court Jurisdiction and Proceedings Transfer Act**

Two key questions

1. **Jurisdiction Simpliciter** - do you have basic jurisdiction? Connection to BC: **s. 3 of the CJPTA**

2. ***Forum non conveniens*** – even if correct jurisdiction, court can still throw out case if its not the most appropriate forum: best and most convenient place to litigate: **s. 10 of the CJPTA**.

**S. 3 Territorial Competence** – can we take this case on basic jurisdiction?

A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the court of the proceeding that person submits to the court’s jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) the person is ordinarily resident in BC at the time of the commencement of the proceedings, or

(e) there is real and substantial connection between British Columbia and the facts on which the proceeding against that person is based

**S. 10 Real and Substantial Connection**  - can we take this case?

Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, **a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding**

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in **property in British Columbia** that is immovable or movable property,

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property in British Columbia of the deceased person, or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

(d) is brought against a trustee in relation to carrying out a trust in any of the following circumstances:

(i) the trust assets include property in BC that is immovable or movable property and the relief claims is only as to that property;

(ii) that trustee is ordinarily resident in BC;

(iii) the administration of the trust is principally carried on in BC;

(iv) by the express terms of a trust document, the trust is governed by the law of BC,

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in BC,

(ii) by its express terms, the contract is governed by the law of BC, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser’s trade or profession, and

(B) resulted from a solicitation of business in BC by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in BC

(g) concerns a tort committed in BC,

(h) concerns a business carried on in BC,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in BC, or

(ii) in relation to property in BC that is immovable or movable property,

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in BC,

(k) is for enforcement of a judgment of a court made in or outside BC or an arbitral award made in or outside BC, or

(l) is for the recovery of taxes or other indebtedness and is brought by the government of BC or by a local authority in BC.

Class Actions

Class Actions are used when a large group of people share the same grievance forming a class of plaintiffs who can collectively bring a claim to court. Class actions are guided by the **Class Proceedings Act.**

**PROCESS:**

1. NOCC - 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.
   1. You don’t necessarily need identical issues of fact or even identical issues of law – if they are similar enough, the court may certify the proceeding. C
   2. ertification 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)].**
2. Response
3. Certification hearing [**CPA s. 4] –** crystalize legal issues
   1. Judge is looking to see if this is the right kind of case to be a class proceeding. There must be:
      1. A cause of action is disclosed in the pleading [**CPA s. 4(1)(a)].**
      2. An identifiable class of 2+ people [**CPA s. 4(1)(b)].**
      3. Common issues among the people in the class [**CPA s(4)(1)(c)]**
      4. A class proceeding is the best way to deal with the case [**CPA s(4)(1)(d)]**
      5. Someone willing to lead the case as a representative plaintiff [**CPA s. 4(1)(e)]**
      6. 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)**
   2. Stages of the class proceeding is set out in **CPA s. 11**
   3. **Opting out/in:** if you are 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 into a BC class action [**CPA s. 16(2)].**

If the action is not certified as a class proceeding, the claim can move forward as a normal proceeding.

PETITIONS – RULE 16-1, 2-1

**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.

**When petitions are used:**

When facts are not issue; there are no credibility concerns; not seeking any damages; unusually only matters that are simply at the plain discretion of the court upon hearing the evidence or authorized by statute.

**RULE 2-1(2)** governs when a petition **must be filed**:

* 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)];**
* the proceedings is bought in respect of an application that is authorized by an enactment to be made to the court [**RULE 2-1(2)(b)]**
* 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)]**
* re administration of an estate [**RULE 2-1(2)(d)]**
* re guardianship of an infant [**RULE 2-1(2)(e)]**

**PROCESS [RULE 16-1]:** must file a petition in **Form 66,** and provide **supporting affidavits** setting out enough facts to support the relief sought [**RULE 16-1(2)]** and attaching, as exhibits, all of the **documents** they think the court needs to determine the issue.

**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 [**RULE 16-1(3)].** The respondent must file a response to petition with 21/35/49 days of being served [**RULE 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 [**RULE 16-1(5)].**

**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]**

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| **SOUTHPAW CREDIT 2012** |

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| **STRATA PLAN No. 1086 v Coulter** |

3. Defining an Action

**OUTLINE:**

**3.1 five types of pleadings – RULE 3-7**

**3.2 notice of civil claim**

**3.3 renewal of notice**

**3.4 Service**

## **3.1 Five types of pleadings [RULE 3-7]: 1) NOCC, 2) response to a NOCC, 3) reply to a new issue + FORM 7, 4) third party notice filed by the defendant, 5) response of the third party**

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|  |
| --- |
| **Rule 1-1 of the Supreme Court Civil Rules – Interpretation**  **“action”** – proceeding started by a civil claim.  “**pleading**” – means a NOCC, a response to civil claim, a reply, a counterclaim, a response to counterclaim, 3rd party notice or response to 3rd party notice. |

**Pleadings serve 4 main functions**

1. Clearly and precisely identify issues in dispute

2. Give each side fair notice of the case it has to meet so it can prepare evidence for trial

3. Inform the court of the events / issues in the action

4. Permanent record of the dispute – issues and facts

Pleadings inform and structure discovery and trial process. A judge will refer to the pleadings to understand the issues at hand and to decide potential remedies. To this end, a legal counsel should constantly update pleadings through the case.

**Pleading amendment is liberally granted** unless prejudicial to the other party.

**Pleadings** should contain **MATERIAL FACTS** and not evidence [**RULE 3-7]**.

**Jones v. Donaghey**(BCCA 2011) – material fact is the **ultimate fact**, sometimes called the ultimate issue, **to the proof of which evidence is directed**. It is the fact put in issue by the pleadings.

Facts that prove the facts at issue, or prove another fact that tends to prove the fact in issue, are **evidentially irrelevant facts**

\*know the difference between a material and irrelevant fact

**RULE 3-7(1)** - Pleadings do NOT contain **evidence** of how you are going to prove the facts

* + Ex say “A was speeding”, not “because the skid mark was 60 feet, A was speeding”

**Rule 3-7**

**(1) – Pleadings must not contain evidence**

A pleading must not contain evidence by which the facts alleged in it are to be proved.

**(2) – Documents and conversations**

The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and theprecise words of the documents or conversations must not be stated, except insofar as those words are themselves material.

[Paraphrase – only quote if exact wording is important]

**(3) – When presumed facts need not be pleaded**

A party need not plead a fact if

(a) the fact is presumed by law to be true, or

(b) the burden of disproving the fact likes on the other party.

**(4) – When performance of a condition precedent need not be pleaded**

**(5) – Matters arising since start of proceeding**

A party may plead a matter that has arisen since the stat of the proceeding

**(6) party must not plead an allegation of fact or new ground or claim inconsistent with previous pleading**

**(7) but (6) does not mean party cannot make arguments in the alternative or to amend or to apply for leave to amend a pleading**

You cannot have inconsistent claims in your pleading. “in the alternative”

**(8) – Objection in point of law**

**(9) – Pleading conclusions of law**

**(10) – Status admitted**

**(11) – Set-off or counterclaim**

**(12) – Pleading after the notice of civil claim**

**(13) – General relief**

A pleading need not ask for general or other relief.

**(14) – General damages must not be pleaded**

If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.

**(15) – Substance to be answered**

If a party to a pleading denies an allegation of fact in the previous pleading of the opposite party, they party must not do so evasivelybut must answer the point of substance.

**(16) – Denial of contract**

If a contract, promise or agreement is alleged in a pleading, a bare denial of it by the opposite party is to be construed only as a denialof fact of the express contract, promise or agreement alleged, or of the matters of fact from which it may be implied by law, and not asa denial of the legality or sufficiency in law of that contract, promise or agreement.

**(17) – Allegation of Malice**

(18-24) – When particulars necessary etc.

## **NOCC [RULE 3-1] –** to start an action – the types of questions and discovery process are dictated by the **material facts** mentioned in the pleadings.

A notice of civil claim must do the following:

(a) set out a concise statement of the **material facts** giving rise to the claim;

(b) set out the **relief sought** by the plaintiff against each named defendant;

(c) set out a concise summary of the **legal basis** for the relief sought;

(d) set out the **proposed place of trial**;

(e) if the plaintiff sues or a defendant is sued in a **representative capacity**, show in what capacity the plaintiff sues or the defendant is sued;

(f) provide the **data collection information** required in the appendix to the form;

(g) otherwise **comply with Rule 3-7**.

Key elements:

**1. Identify the parties**

**2. Status of the parties**

* + - corporations, individuals etc

**3. Establish jurisdiction of the court**

* + - May be as simple as address or provided for in the contract

**4. What, where, when and how things happened**

**5. Legal basis**

* + - Why is this before the court

**6. Relief sought** - what are you asking for

**Form:**

**1. Statement of Facts**

* + - “**Style of cause”**
    - Set up the parties, how they came to the relationship, why they are in front of court
    - Only include facts you want to **prove** in your case
    - Sets up jurisdiction
    - Don’t be more specific than you need to be – ex say “injuries” not specific injury
    - Certain **boilerplate** terms that come after SOC to make it a valid document
      * On EXAM just write “boiler plate”

**2. Relief Sought** – declaration, damages, injunction

* + - For each relief sought, there should be a material fact pled as a legal basis
    - State relief sought against each named D

**3. Legal Basis**

* + - ***Why*** should the court do what you request
    - Is there a statute violated?
    - Cause of action should be clear under this section, and should give court ability to do what you ask
      * Ex if a **legal test** to be met 🡪 set out the test and why this case meets it
    - If the law is **unsettled**, plead it the way you want it to be, then go to court and explain but make sure that it creates a cause of action
    - Clearly identify questions of dispute between the parties which are to be determined by the court
      * Gives fair notice to D about the case to meet
      * Sets **limits** on what the court will hear
      * Provides a permanent record of the issue
  + Think about facts and how you will **prove them**
    - If you don’t know how you will prove a fact in court, it shouldn’t be in there
    - If you later have proof, you can amend the pleadings
  + What is the **least** you need to prove to establish your cause of action
    - Ex say D was driving in excess of speed limit, rather than exact speed
  + Don’t plead underlying facts that are not in issue

## **Renewal of Notice [RULE 3-2]**

NOCC is only valid for **one year [RULE 3-2(1)].**

If you don’t serve within **1 year** it will expire unless you get an **extension**

* + Apply for extension before 12 months, ***especially if there is a limitation period issue***
  + If there is no limitation period, can just start a new action
  + **3-2(1)** court can order renewal of 12 months if P applies ***before or after*** original expires
  + **3-2(2)** court can order **further** 12 months if P applies **within** 12 month renewal period
  + **3-2(3)** unless otherwise ordered, renewal period begins on day of order
  + **3-2(4) service** – a copy of each order granting renewal must be served *with* the renewed notice of claim

If delay is the fault of the lawyer, the court will likely extend

**Sutherland v. Macleod** BCCA 2004 – this rule is concerned with the rights of parties, not conduct of lawyers

* + Overarching objective is to see that justice is done

**Imperial Oil v. Michelin**BCCA 2008 – factors to consider in renewal/extension

1. Whether the application to renew was made promptly

In determining whether P acted promptly, the relevant time is the time elapsed from the date P learned the writ had not been served to the date of application

* + - Where D has notice of the action within the time prescribed by the ruls for service, only a compelling case of prejudice should defeat its renewal unless P’s conduct in causing the delay is **egregious**

2. Whether D had notice of the claim *before*  the writ expired

3. Whether D was prejudiced

* + - ex is D unable to collect evidence/witnesses because P waited so long

4. Whether the failure to effect service was attributable to D

5. Whether P, as opposed to his solicitor, was at fault

## **3.4 Service [PART 4 RULES[ - personal, ordinary, substitutional**

**RULE 4-1 Address for service**

4-1(1)(a) and (b) Party must have lawyer’s office as address, or their own if they are not represented. Address for service is usually stated in pleadings.

* **RULE 1-1** address for service and accessible.

**RULE 4-2 Ordinary Service** – docs normally served by ordinary notice unless otherwise ordered

Unless the court otherwise orders, ordinary service of a document is to be effected in any of the following ways on a person who has provided an address for service in a proceeding:

(a) by leaving the document at the person’s address for service[[1]](#footnote-1);

(b) by mailing the document by ordinary mail to the person’s address for service[[2]](#footnote-2);

(c) subject to subrule (5) of this rule, if a fax number is provided as one of the person’s addresses for service, by faxing the document to that fax number together with a fax cover sheet[[3]](#footnote-3);

(d) **if an email address is provided** as one of the person’s addresses for service, by emailing the document to that email address.[[4]](#footnote-4)

**RULE 4-3 Personal Service** – someone delivers the document to the person or company

**(1)** – Unless the court otherwise orders or these Rules otherwise provide, the following documents must be served by personal service in accordance with subrule (2):

(a) a **notice of civil claim**;

(b) a **petition**;

(c) a **counterclaim** if that counterclaim is being served on a person who **is not a party of record;**

(d) a **third party notice** if that their party notice is being served on a person who is **not a party of record;**

(e) a **subpoena** to a witness who is not a party of record;

(f) a **subpoena** to a debtor under Rule 13-3;

(g) a citation referred to in Rule 21-5;

(h) a notice of intention to withdraw under Rule 22-6 if that notice is being served on the person who was being represented by the lawyer who filed the notice;

(i) any notice of application under Rule 22-8 for an order for contempt;

(j) any document not mentioned in paragraphs (a) to (i) of this subrule that is to be served on a person who is not a party of record to the proceeding or who has not provided an address for service in the proceeding under Rule 8-1(11);

(k) any other document that under these Rules is to be served by personal service.

**(2)** – Unless the court otherwise orders, personal service of a document is to be effected as follows:

**(a) on an individual, by leaving a document with him or her;**

(b) on a **corporation**,

* + - (i) by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation,
    - (ii) by leaving a copy of the document with the city clerk or municipal clerk,
    - (iii) by leaving a copy of the document with the manager, cashier, superintendent, treasurer, secretary, clerk or agent of the corporation or any branch of agency of the corporation in BC, or
    - (iv) in the manner provided by the Business Corporations Act *…*

**Lawyers can agree on a certain type of service – ex say service to law office is OK**

**Substitutional Service –** used when you have D evading service or who cannot be found

**RULE 4-4 Alternative Methods of Service**

**Evasion** – if you have evidence of their address, may be able to get an order that says posting to the door is enough

**Impracticable –** if D is in a coma or in jail

**RULE 4-5** – **Service Outside British Columbia**

* + (1) – Service outside British Columbia without leave
  + *An originating pleading, petition or other document may be served on a person outside BC without leave in any of the circumstances enumerated in* **section 10 of the Court Jurisdiction and Proceedings Transfer Act***.*
  + **10(3)** any other case, you need to obtain **leave of the court**

**RULE 4-6 Proving Service**

* + (1) – Proof of service
    - By filing an affidavit of personal service in Form 15 or ordinary service in Form 16, or by the person filing a response
  + (2) – Proof of service by sheriff
  + (3) – Service on a member of Canadian Armed Forces
  + (4) – Admissibility of other evidence of service

**RULE 4-7 Relief** – if service is alleged to be **ineffective**

* + If a document has been served in accordance with this Part but a person can show that the document
    - (a) did not come to his or her notice,
    - (b) came to his or her notice later than when it was served, or
    - (c) was incomplete or illegible, the court may set aside an order, extended time, order an adjournment or make such other order as it considers will further the object of these Rules.

RESPONDING TO AN ACTION

**OUTLINE:**

**4.1 Responding to a NOCC**

**4.2 Counterclaim**

**4.3 Default judgment**

**4.4 Change of parties**

**4.5 Multiple claims // multiple parties**

**4.6 Rely to New Issues**

**4.7 Third Party Claims**

**4.8 Particulars**

**4.9 Striking pleadings**

**4.10 Amending pleadings**

**4.11 Discontinuance or withdrawal**

**Rule 3-3** **Response** – statement of defence; set-off = as defendant, can claim right to set-off some claim what would allow you to reduce the amount of the plaintiff’s claim

**Rule 3-4** **Counterclaim** – when D is making own claim against P and potentially others

* + Counterclaim does NOT need to be **connected** to NOCC
  + Rationale is to avoid multiplicity of proceedings involving same people

A judge’s main opportunity to evaluate and understand a claim is through pleadings. A response to NOCC or a counter claim should be a standalone claim. Don’t just deny everything. Paint a picture for the judge.

**3-3(8)** any facts in NOCC that are NOT admitted, denied or stated to be outside the knowledge of the D, are **deemed to be outside D’s knowledge**

* The response **frames your case**
* If you do not raise the issue in your response, you usually cannot raise it at trial, because its unfair to the other side, they need to know.

**FORM 2 - Parts**:

* + 1. Response to civil claim facts
    - Which are you admitting /denying
      * Be careful about what you admit – once you admit something it’s hard to go back
      * If you deny facts you don’t need to deny so the plaintiff has to prove things they shouldn’t (e.g. address, date of accident), the court may award extra costs against you if you are making things difficult
      * When you deny, you have to give your denied version of those facts (3-3(2)(a)(ii))
    - Any facts you have no knowledge of
    - May be additional facts you want to put forward (3-3(2)(a)(iii))
  + 2. Response to relief
  + 3. Response to legal basis

**Rule 3-3** **RESPONDING to a NOCC**

**3-3(3)** After service of NOCC, D has **21 days to respond, 35 days for US parties, 41 days for parties from other jurisdictions.** However, parties can consent to an extension. In the alternative, extension is liberally granted by the court.

* + Includes any new facts important to adjudicating the claim and a response to the claim

**Rule 3-3 (1)** to respond to NOCC, D must file a response and serve it on P

**RULE 3-3 (2)** – **Contents** of response to civil claim

A response to civil claim under subrule (1)

(a) must

(i) indicate, for each fact set out in Part 1 of the notice of civil claim, whether the fact is

(A) **admitted**,

(B) **denied**, or

(C) **outside** the knowledge of the defendant,

(ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant’s version of that fact, and

(iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim,

(b) must indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,

(c) must, if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, and

(d) must otherwise comply with Rule 3-7.

Rule 3-4 COUNTERCLAIM

(1) must file counterclaim within the time set out for filing of a response. SEE **3-3(3)**

(2) if counterclaim raises questions about *someone other than P*, D can join them as a party in the counterclaim

(3) P will still be called P, D will still be D, and any other person joined will be called **“defendant by way of counterclaim”**

(4)(a)must serve it within time set out for filing and service of response

* + - (b)(i) and (ii) if adding another person, must serve them a copy of the filed CC and a copy of the filed NOCC within 60 days

(5) – Response to counterclaim

(6) – Application of rules

(7) – if P’s claim is stayed or dismissed, **D’s counterclaim can still proceed**

(7.1) – apply for **severance** if it appears CC ought to be dealt with separately from NOCC

(8) – Judgment

DEFAULT JUDGEMENT – Rule 3-8

If one side does not provide a **response**, i.e. 1) D doesn’t file response to NOCC, 2) P doesn’t file a response to CC, or 3) If fail to reply to 3rd party notice, the other side can take **default judgement** against you once 21 days expires.

But lawyers have a **professional responsibility** – ***Code of PC* – CH 7 – *responsibility to other lawyers***

**7.2-2** A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client’s rights

* + If you are planning on taking default judgment you have to **notify the other side!**
  + Tell them you are relying on the 21 day period
  + This duty only applies when there is a lawyer involved in the other party.

Results of the default judgment is based on the NOCC – so make sure it is accurate

* + If relief requested in NOCC is a **fixed amount** that is what you get **(3-8(3))**
  + If it is not ascertainable/fixed/specified, it must be assessed **(3-8(5))**

The party must show:

* + (a) proof of **service** of NOCC on that D
  + (b) proof that D has **failed** to serve a response
  + (c) a requisition endorsed by **registrar** with a notation that no response to CC has been filed by D, and
  + (d) a draft default judgment in **FORM** 8

RULE 6-2 CHANGE OF PARTIES

### CHANGE OF PARTIES – Rule 6-2

Can add, remove, or substitute parties by agreement or by application to the court.

ANY party can apply to have someone added or removed **(7)** but may only add a plaintiff with their **consent** **(10)**

(1) if party dies or becomes bankrupt, or corporate party is wound up 🡪 the proceeding may still continue

(2) effect of death

(7) – Adding, removing or substituting parties by order

At any stage of the proceeding, the court, on application by any person, may subject to subrules (9) and (10),

(a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person’s participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claims in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

**(8)** procedure if party added, **(11)** effect of order

### PARTNERSHIPS – Rule 20-1

(1) partners may sue or be sued in the firm name 🡪 if they were partners at the time the alleged right or liability arose

(2) service is effected by leaving the doc with (a) a person who was a partner at the time the right arose, or (b) leaving it with someone at the firm who appears to manage the partnership business

(3) a response by a partnership **must be in the name of the firm**, but a partner or a person served as a partner may file a response and defend in the person’s **own name, whether or not names in the original pleading or petition**

### PERSONS UNDER DISABILITY – Rule 20-2

This provision deals with mentally incompetent and minors

(2) proceedings must be brought by ***litigation guardian***

(3) anything required to be done by or invoked against a party under disability must (a) be done by LG on party’s behalf, or (b) be invoked against them through LG

(4) unless LG is the Public Guardian and trustee, they must act through a **lawyer**

(10) if a party **becomes mentally incompetent** court will appoint LG

(12) if a party attains legal age of majority and is therefore no longer under a disability they (a) file an affidavit confirming this, and (b) serve it on all parties

(13) that filed affidavit under (12) means (a) party assumes conduct of their claim or defence and (b) style of proceeding must no longer refer to a LG

(17) no settlement or compromise of the claim is binding without **court approval**

MULTIPLE CLAIMS AND PARTIES – Rule 22-5 – being tried a the same time vs. consolidation

**(1) Multiple Claims**

* subject to (6), a person may join several claims in the same proceeding

**(2) 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;
  + (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**;
  + (c) the court grants **leave** to do so.

**(3)** if someone else is entitled to the relief P is claiming, P MUST join them as parties to the proceeding, and if they don’t consent to be plaintiff/petitioner, must be joined as **defendant / respondent**

(6) – 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 or hearings or make any other order it considers will further the object of these Rules.

***Shah v. bakken*** BCSC 1996 – **factors** to consider in discretion under this rule

* + Whether there is a **common question of law or fact** so that it is desirable to dispose of both at the same time
  + Avoidance of multiplicity of proceedings
  + Saving of time and expense
  + Inconvenience to the parties
  + Whether one action is at a more advanced state
  + Whether an order results in delay of trial and so to prejudice one party

***Merritt v. Imasco Enterprises*** BCSC 1992 – 2 questions to consider for applications

***1.*** Do common claims, disputes and relationships exist between the parties?

* + - This is disclosed by pleadings

2. Are they so interwoven as to make separate trials **undesirable and fraught with economic expenses?**

* + - Determined by reference to the pleadings and matters outside the pleadings including savings in pre-trial procedure, reduction in trial days, inconvenience to parties, and savings in witness time and fees

REPLY TO NEW ISSUES – Rule 3-6

Plaintiff ONLY replies to D’s response if it brings up something **NEW** that warrants a reply

(1) P may, within **7 days after response to NOCC has been served,** file and serve on all parties a **reply**

* ***Certus v ICBC*** – pleadings subsequent to the response are discouraged except a reply that necessarily and relevantly confronts the defence

THIRD PARTY CLAIMS – Rule 3-5

If D thinks someone else should be involved in proceedings, they can file a 3rd party notice. A third party can also file third party claims

Used when you are claiming against someone for **contribution or indemnification**

1. **Contributing** to what D has to pay (share of the damages)

2. **Indemnifying** the D from what he has to pay (pay all damages)

Sets out claims against 3rd party and why they should be involved

* + Ex material facts that justify indemnification like an insurance agreement

Only comes into play, outside of costs, if **plaintiff is successful**

* + If claim fails, 3rd party notice falls away

(1) **– Making a third party claim**

A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

(a) the party is *entitled to contribution or indemnity* from the person in relation to any relief that is being sought against the party in the action,

(b) the party is entitled to relief against the person and that *relief relates to or is connected with the subject matter of the action,* or

(c) a question or issue between the party and the person

* + (i) is substantially the same as a question or issue that relates to or is connected with
    - (A) relief claimed in the action, or
    - (B) the subject matter of the action, and
  + (ii) should properly be determined in the action.

(1.1) P is allowed to make a third party claim if they are a defendant to a counterclaim

(2) 3rd party does not have to already be a party to the original action

(4) **leave** – can always file (a) with leave of court, (b) **42 days** after receiving NOCC or CC

(7) 3rd party notice must be served on them **within 60 days** of filing

(9) if 3rd party wants to dispute, they must (a) file a response to the 3rd party notice, and (b) serve a copy of the filed response on all parties of record

(10) when response to 3rd party notice NOT required

PARTICULARS – Rule 3-7(18-24)

***Hayes Heli-Log Services*** BCCA 2006

* + Particulars will be ordered when it is necessary to **delineate the issues between the parties**.
  + Different form discovery because particulars are not used to obtain information about how an issue will be *proven*
  + The purpose of particulars is to **inform the other side of the nature of the case it has to meet, to prevent surprise at trial, to enable the other side to determine what evidence is necessary to prepare for trial, to limit the generality of pleadings, to limit and decide issues for purposes of discovery and trial, and to tie the hands of the party providing particulars**

(18) particulars are **necessary** when - party pleading relies on **misinterpretation, fraud, breach of trust, wilful default or undue influence**, or if particulars may be necessary, full particulars with dates and items if applicable, must be stated in the pleading.

(19) – If the particulars required are **lengthy**, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in separate document before or with the pleading.

(20) – Particulars need only be pleaded to the *extent that they are known at the date of pleading*, but **further particulars**

(a) may be served after they become known, and

(b) must be served within 10 days after the demand is made in writing*.*

(21) – Particulars in libel or slander

(22) –The court may **order** party to serve further and better particulars of a matter stated in a pleading

(23) – *Before* applying to the court of particulars, a party must **demand them in writing** from the other party.

(24) demand for particulars **does not operate as a stay of proceedings or give an extension of time**, but a party *may apply for an extension of time for serving a responding pleading on the ground that the party cannot answer the originating pleading until particulars are provided.*

SCANDALOUS, FRIVOLOUS OR VEXATIOUS MATTERS – Rule 9-5[[5]](#footnote-5)

Rule 9-5 is often relied upon in cases where relevant law is not longer applicable.

If D believes P’s claim is scandalous, frivolous or vexatious 🡪 can apply to have all or part struck

**(1)** **Striking Pleadings -** At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses **no reasonable claim or defence**, as the case may be,

(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

**(3)** if **registrar**, on filing a document, thinks it may be subject to an order under (1) 🡪 can (a)(i) retain all copies, and (a)(ii) refer the doc to the court, and (2) court may make order under (1)

**(4)** if court makes order under **3(b),** (a) **registrar** must notify the person who filed the document, (b) the person has **7 days** to apply to the court, and (c) the court may confirm, vary or rescind the order

**\***may also strike pleadings under **rule 3-7** 🡪 specifies where you MUST have particulars, failure to provide may result in a claim being struck

***Citizens for Foreign Aid Reform*** BCSC 1999

* + Any doubt on the plain and obvious test must be **resolved in favour of permitting the pleading to stand**
  + The court proceeds on the assumption that all facts pleaded are true. Weakness of the case is no ground to strike. The sole question is whether the plaintiff presents a question fit to be tried
  + A scandalous allegation will not be struck if it is relevant to the proceedings.
  + A pleading is ‘**unnecessary’** or ‘**vexatious’** if it does not go to establishing the plaintiff’s cause of action or does not advance a claim known in law
  + A pleading is ‘**frivolous’** if it is unsustainable because of the doctrine of estoppel

***TNR Gold Corp*** BCSC 2011

* + It must be **clear** that the facts do not present a reasonable cause of action or defence

AMENDING PLEADINGS – Rule 6-1

Amendments are usually *liberally* granted.

If amendment is **reasonable**, onus shifts to other side to say why it should not be granted. This is a **high threshold”**:

(a) it would be prejudicial//undue delay and (b) it is unnecessary.

(1)(a) Until notice of trial is set or case planning conference is held, you are entitled to **one free amendment**. (b) After that, has to be by (i) court leave, or (ii) consent/agreement.

(4) **service** – party who amended must (a) serve, via ordinary service, the amended pleadings on all parties, and (b) if it is the *originating* pleading, must file, by *personal service,* a copy on any person (i) served the original, and (ii) who has not filed a responding pleading

(5)(a) party served with amended pleadings may amend **any pleadings he filed in response to the original version, but only with respect to any matter raised by amendments** (b)must file and serve amended response within **14 days of being served.**

DISCONTINUANCE [FORM 36] AND WITHDRAWAL [FORM 37] – Rule 9-8

**Discontinue** – when you drop your claim (NOCC)

* + Any time before notice of trial is filed, P may discontinue *whole or part* of their claim by filing a notice of discontinuance (1)
    - Once notice of trial *is* filed, need to get consent of parties or with leave of court (2)

**Withdrawal** – when you withdraw your defence (R to NOCC)

* + D can withdraw defence any time they want by filing notice of withdrawal and serving it (3)
  + Once D withdraws whole/part response, P can continue as if D never served a response or only a partial response (7)

(8) Alone, discontinuance is NOT a defence in a subsequent proceeding

* + ie D cannot say “since P dropped the case before, I didn’t do it”

These are different than **dismissal** – done with prejudice, cannot bring the case again

* + Dismissal IS a defence in the future

**Costs** – generally, whomever discontinues/withdraws has to **pay the other sides costs up to the time of service (4)**

* + If they try to start up the same claim again *before* they have paid those costs, court may order a stay until the costs are paid
  + \*so P can start the claim again, just might have to pay

(5) if P discontinues whole/part of an action to which 3rd party has been joined, the 3rd party is entitled to costs and may apply to court for direction as to who should pay them

BUILDING YOUR CASE – DOCUMENTS

OUTLINE

Discovery and Inspections of Documents [RULE 7-1]

Lists of Documents

Privilege

Non-Party Documents

|  |
| --- |
| **EXAM – categorize documents in 4 ways**   1. **7-1(1)(a)(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;** 2. **7-1(1)(a)(ii) – all other documents to which the party intends to refer at trial** 3. **documents relate to questions in the action [documents that you produce due to a later court application or court order]** 4. **documents – privileged: date of document, description of document, ground for privilege** |

PROFESSIONAL RESPONSIBILITY RELATED TO DOCUMENT DISCOVERY

Must ensure you are meeting your production obligations - lawyer is ultimately responsible for what is disclosed

Must educate your client on the scope of production and their obligations

Serious consequences to you and your client if you fail to meet disclosure obligations

Counsel must be an active party of disclosure – must monitor production and compliance

Also, lawyers are the best judge of what is or is not relevant

“It is the responsibility of counsel to ensure that the client has been properly advised as to the disclosure that is required and that disclosure has been provided consistent with client instructions and the Rules. This does not mean that counsel is required to lay hands upon and review each document to be disclosed. In a case with large documentation, counsel may be required to provide a detailed description of their own assurance measures taken including instructions to paralegals, oversight employed, review of counsel methods, and verification means used to ensure that proper disclosure has occurred.” [**PRO-SYS Consultants Ltd v Infineon Technologies AG].**

Disclosure is an **ongoing** responsibility [**Sunnar v U-Haul].**

## **DISCOVERY AND INSPECTION OF DOCUMENTS – RULE 7-1**

**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**, and

(ii) all other documents to which the party intends to refer at trial [**RULE 7-1(1)].**

Also see **Dhugha v Ukardi**

Discovery A party will only be held to have documents within its power or possession and control if it holds a majority interest in a company. However, “power” is broader than “control”, and includes the right of access to documents of a sibling company within a broad corporate structure. [**Sunnar v U-Haul].**

**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].** The concept of materiality requires the court to focus on material issues in dispute in order to determine if the proffered evidence advances the party’s case [**Biehl v Strang].**

**Request for additional documents RULE 7-1(11):** if a party who has received a list of documents believes that the list should include documents or classes of 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 or classes of documents required under, the party, **by written demand** that identifies the additional documents or classes of documents with **reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed**, may require the listing party to

(d) amend the list of documents,

(e) serve on the demanding party the amended list of documents, and

(f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

**Edwards v Ganzer -** proportionality principle to the request of further production of documents, reasonable basis for one to conclude such documents exist and such documents could advance the case. This is to avoid fishing expedition.

In addition, **7-1(10)** If a party who has received documents believes that the list omits documents or a class of documents that *should* have been disclosed under (1), the party may, **by written demand**, require the party who prepared the list to:

(a) amend the list of documents

(b) serve on the demanding party the amended list

(c) make originals ready for inspection

**Documents not in possession of party:** if it is in your power and control to request production of documents from the 3rd party, you must do so [**Sunnar v U-Haul].** “Control”: enforceable right to obtain the document from the person who has actual possession of them [**Nikolic v Olsen].** If that doesn’t work, court can order 3rd party to produce docs [**RULE 7-1(18)].** Document are then released to the party, who can review them, take out anything privileged, and then produce them to the other party, e.g. medical records [**Halliday v McCulloch].**

**Court order of production of documents [RULE 7-1(17)]**

**Response to demand for docs or additional docs – 35 days [RULE 7-1(12)]**

**Non-compliance:** If a party who receives a demand under 7-1(10) or (11) does not comply with the demand, you may apply for an order from the court compelling production [**RULE 7-1(13)].** The court will then either excuse or order compliance with the rule [**RULE 7-1(14)].** 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. Court will consider proportionality in determining whether additional documents should be produced.

**Edwards v Ganzer -** proportionality principle to the request of further production of documents, reasonable basis for one to conclude such documents exist and such documents could advance the case. This is to avoid fishing expedition.

## PRIVILEGE **RULE 7-1(6)**

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: (**Main grounds for privilege

**(1)** **solicitor-client privilege**

* + - Just having a lawyer present is not enough for privilege

**(2)** **litigation privilege**

* + - Protects work done by counsel, work done by counsel in the litigation process, includes communication with 3rd parties, letters/emails between client and lawyer, exerts, claims analysts etc

**(3) Without prejudice communication** – when you give an offer to settle to the other side “without prejudice,” it means they cannot show that offer in court

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

If the other party calls full disclosure on privileged documents, they can make an application to have the documents produced to the court. The court may review the documents to determine if it is privileged [**RULE 7-1(20)]**.

Court may order party to swear an affidavit verifying a list of documents [**RULE 7-1(18)] –** rarely used.

***Hodgkinson v. Simms***

* + **The need for full disclosure will rarely displace privilege**
  + Where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled and required, unless the client consents, to claim privilege for such collection and refuse production
  + Copies of documents which were created for the dominant purpose of litigation may be privileged even though, in some cases, the originals are not

***Gardner v. Viridis Energy INC*** 2012 BCSC 1816 – **privileged lists**

* + principles of listing privileged docs
    - doc must be sufficiently described so that if challenged it can be considered by a judge in chambers
    - cannot “bundle” documents – have to list each separately

## IMPLIED UNDERTAKING

***Doucette*** SCC 2008 – **implied undertaking not to use documents for anything else**

If breached, other lawyer is obligated to report it to the law society

Information obtained on discovery is subject to an **implied undertaking that it will not be used by the other parties except for the purpose of that litigation** unless and until the scope of the undertaking is varied by court order **or a situation of immediate and serious danger** occurs

The undertaking continues after settlement or until trial if the adverse party incorporates answers or documents obtained on discovery as part of the court record. This undertaking is subject to legislative override

**Breach** = a stay or dismissal of a proceeding, striking a defence, or contempt proceedings

BUILDING THE CASE: TESTIMONY – only for parties on record!

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)].**

Each party of record to an action must (a) make himself or herself available, or (b) if any 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: the court will look at how you have been suing the 7 hours. .

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 **at least 7 days** [**RULE 7-2(13)]** before the examination for discovery: serve notice [serve: RULE 4-5**].** 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.

**WHO:**

**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)].**

* **MacDonald:** there is a prima facie right of the examining party to examine the representative of choice. The court does have discretion, on application of the opposing party, to substitute another name; however, it is not enough to say that another representative had more knowledge. The exercise of discretion must run on a balance of prejudice. In the absence of overwhelming prejudice, the court should defer to the choice of the examining party. Lack of knowledge must be linked to prejudice before it will defeat the primary choice.
* **Rainbow Industrial Caterers:** there is discretion in the court to override the prima facie right to examine a representative of choice in order to achieve fairness and a balance between parties.
* **Rogers:** outside legal counsel retained by a bank is not examinable as an officer or agent of the bank.
* **Dann:** in the case of multiple parties who have a commonality of interest, they will in the first instance usually be restricted to examining **a single representative of the corporate party** whom they are adverse in interest. If that representative fails to provide adequate information, the discovering parties may apply for leave to examine a second representative.
* **Mentally incompetent person [RULE 7-**2(9)]

**WHERE:** the examining party will go to the lawyer’s office of the other party OR court report’s office [**RULE 7-2(11)].**

**PURPOSE OF EXAMINATION FOR 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

**The party doing the examination is the ONLY one that can use the transcript!** The party can use the transcript to (1) impeach the witness if they contradict themselves on the stand and (2) read in evidence from transcripts in the form of Q&A.

**Scope of examination for discovery is broad – RELEVANCE –** 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 [**RULE 7-2(18].**

* **SunLife v Kempell:** the question of relevance is determined by pleadings. NOTE: pleadings can be constantly amended.

**OBJECTIONS:** generally, the examined party have to answer all questions unless the representing lawyer objects, which is rare. If the question relates to an matter that is not in the pleading, and is not reasonably related to an issue in question, counsel can object to the question [**More Marine Ltd v Shearwater Marine Ltd].** Objections must be stated on the record [**RULE 7-2(25)].** Objections: (1) relevance, (2) privilege, (3) question of law, (4) opinion/speculation, and (5) lack of clarity/misleading.

You can ask the witness for names of others for more information. Witnesses must make inquires and inform themselves if required by the situation, examination may be adjourned for this [**RULE 7-2(22)].** Response can be by way of a letter [**RULE 7-2(23)].**

* **Gardner –** reasonable preparation depends on the nature of the case, the amount involved, the importance of the issues in dispute, the complexity of the proceedings, and the time and expense involved in preparation.

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

**RESTRICTIONS ON EXAMINATION: [RULE 7-2(17)]:** During day of discovery, lawyer and their witness should not be talking about the evidence or the case. If the examination goes over one day, at the end of the day you can talk to your witness client (but need to inform the other side). [**see Fraser River Pile].**

* **Re-examination** is restricted to two situations: 1) unclear, and 2) correction.

**IMPLIED UNDERTAKING –** similar to document discovery, the evidence obtained through examination for discovery can only be used in the action unless a contrary court order is issued to permit the use in another proceeding.

**OTHER RELATED POINTS – 1)** the court is unlikely to give summary judgment unless both parties have had an opportunity to conduct examination of discovery.

**NON-COMPLIANCE**

If a party fails to attend the discovery session and refuses to answer any questions, the case is not necessarily dismissed, although the rule stipulates a consequence of dismissal. The court is likely to give the party another chance.

**[International Forest Products:** justice is not barred by a technicality. Also see Tung Wise**].**

FILLING IN THE GAPS – PRE-TRIAL EXAMINATION OF WITNESS – non-party of record

Pre-trial examination of witness is conducted before trial to help you to decide if you would like to call that witness for trial. Evidence obtained from pre-trial examination cannot be used in trial.

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, but court may (a) order that person be examined on oath on the matters in question in the action, and (b) either before or after the examination, order the examining party pay reasonable lawyer’s costs of the person relating to the application of the examination [**RULE 7-5(1)].**

Pre-trial examination is impossible unless the court grant your application [**RULE 7-5(3)].**

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 of discovery is broad: RELEVANCE and not defined by pleadings [**see Sinclair, also see Yemen].**

* **Coates:** the fact that a witness is willing to proceed by written questions and answers is not a complete answer to an application under this rule when the witness has been unresponsive. The fact that a witness says that he has no recollection is no barrier, especially when the witness is key to material events. The scope of examination will not be limited to questions for which there were not responsive answers.

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 – e.g. a list of yes-no questions.

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 [**RULE 7-3(4)]**. But if throughout the proceedings, if they discover something new in response to that question, they have a continuing obligation to respond.

FILLING IN THE GAPS – 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 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)].**

FILLING IN THE GAPS – notice to admit

Admission 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 trust 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 // an improper or in adequate response = deemed admission [**Skillings]**
2. Admit the fact
3. Specifically deny the truth of fact or authenticity of document [**RULE 7-7(2)(a)]**
4. Set out reasons you cannot make the omission [**RULE 7-7(2)(b)]**
5. Object on basis of relevance or privilege [**RULE 7-7(2)(c)]**

Admit fact that you should admit, or court can order you to pay the cost of proving that fact [**RULE 7-7(4)].**

Be careful what you admit. It is difficult to withdraw an admission [**RULE 7-7(5)(b)]:** a pleading, petition, or response to petition [**RULE 7-7(5)(c)]** except with leave of the court [see **Hamilton]**.

Keeping the proceedings on track – interlocutory procedures

**1. Interlocutory Applications to get an order from the court, and it is that order from the court that will direct certain things to happen.**

Any application that occurs after the filing of NOCC but before trial is interlocutory. For example, 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 court’s involvement [**RULE 8].** If you are seeking a dismissal for non-compliance under RULE 22-7, you do it by bringing a notice of application under RULE 8-1.

Other examples of interlocutory applications: application to produce document [RULE 7-1 (10, 11, 12)], third party production of document [RULE 7-1(18)], adjournment, injunction application, deposition [RULE 7-5, 7-3], jury notice, addition of another party.

**Notice of interlocutory application –** a legal document sets out what you are seeking, the legal basis for what you are seeking [**RULE 8-1(4)].** The legal arguments will come from whatever RULE you are relying on. The factual basis to support the application comes in the form of **affidavit.** Note that not all applications require affidavit, e.g. RULE 9-5 strike a pleading. Affidavits are generally used for interlocutory applications, but in trial, you use viva voce evidence.

Hearsay evidence is permitted for regular, interlocutory applications, where you are not seeking a final order.

If the application is less than 2 hours, you can set it down for a date and go to chambers. If it is more than 2 hours, you have to call the court registry to 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 [RULE 9-7]. Business day = a day that the court registries are open for business.

**Types of interlocutory applications –**

1. Contested application + Oral Hearing [RULE 8-1(9)] – a response to application can be made by the other side within 5 days and then go to court to argue about it.
2. Consent application + Desk Hearing [RULE 8-3] – a consent application provision allows parties to file an application for an order by way of requisition (no need for notice application). Every party involved must sign a consent order [RULE 8-3(2)].
3. Ex Parte Application + Desk Hearing [RULE 8-4] – allows you to ask the court to bring an application without notice to the other party. Usually because there would be prejudice to you if you give notice, i.e. the other will do something prejudicial to you. **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.
4. Urgent application [RULE 8-5] – 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).

**2. Affidavits** – 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: e.g. if someone dies). It is sworn before a person authorized to take an affidavit. **RULE 22-2.**

When you receive a general denial on the NOCC, you may want to bring interlocutory application and force the other side to swear on specific issues.

**CONTENT –** the affidavit includes (1) the facts in support of the application and (2) documents (as exhibits).

Hearsay evidence is permitted for regular, interlocutory applications, where you are not seeking a final order (e.g. summary trial, petition, dismissal, judgment). The affidavit is not supposed to include arguments or speculation, it is only supposed to contain evidence (whether direct or hearsay).

**PCC – professional duties –** the lawyer must not sear an affidavit or take a solemn declaration unless the deponent: (a) 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 affirms 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 it made under oath, and (f) signs the documents, or if permitted by statute, swears that the signature on the document is that of the deponent.

**3. Chambers –** chambers is where applications are heard [RULE 22-1].

Only at trial are witnesses allowed [RULE 22-1(4)]. In chambers, evidence is presented as affidavits [RULE 21].

Chambers has broad powers [RULE 22-1(7), (2)]. Application under non-compliance is also an interlocutory application [RULE 22-7].

22-1(4)(e) – gather evidence.

22-1(7)(d) – order a trial of chamber proceeding.

**4. Maters and appeals from masters [RULE 23-6]**

In general, a master can hear any interlocutory applications [power of a master: see RULE 8-5, 22-1]. In addition, a master does not have jurisdiction to make a final order, though a master can made decision based on consent, default order, matters that are not contested …

If you have been in front of a judge as to an interlocutory application, you need to go to CoA. You need to first appeal in front of a CoA judgment in chamber to seek leave to appeal and then go to trial.

Appeal a masters’ decision – RULE 23-6

* Notice (10)
* Form of appeal – 14 days
* Master, registrar or special referee – (8)

A leave to appeal application is not a stay of application. After trial, yes.

RULE 8-5 application for stay

**5. Case planning conference RULE 5**– streamlining the process to help the case to move forwards [RULE 5-3]: the court will look at the proceedings to ascertain the issues, status of the pleadings [applications by counsel, see **FORM 20** case plan proposal wrt discovery, examination, dispute resolution, list of witness, trial length, trial date …].

Case planning conference orders are interlocutory. They are relatively easy to bring. No requirement for affidavits evidence [5-3(2): exception 5-3(6)]. CPC is a 30 minute meeting with a judge/master.

If you want to split the case into two sections: main issues + damages – argue this in the case planning conference.

The result of a case planning conference may include court orders. If the court orders are not complied with, you can rely on non-compliance procedural issues [**dismissal/striking a pleading (9-5); contempt (22-8), non-compliance (22-7)]**. Another way to pressure the other side.

If you need affidavits, you need to submit an in chamber application. You should not do this at the case planning conference.

**Parti v Pokomy –** Presumption: you cannot use the transcript of the case planning conference in trial.

5-2(7) is designed to foster full and candid discussions about all aspects of the action in which the conference is held. An order permitting the use of a conference recording must only be made where there are reasonable – compelling – grounds for making the order. A use order will not be made where the applicant for the order wants a conference recording only for educational purposes.

**Leer and Four L Industries v Muskwa Valley Ventures – joint expert witness**

Determination of share values for closely held companies – income, assets, values to a third party… valuation can be a huge issue for the outcome for the litigation.

Valuation can be expensive.

Up to the plaintiff to prove valuation.

Proportionality – rely on submissions of counsels and pleadings

**FORM 20 –** the plaintiff will send in the case proposal first and then the defendant.

ORDERS & INJUNCTIONS

**OUTLINES**

1. **Orders + Enforcement of Orders**
2. **Without Notice Orders + Professional Obligations**
3. **Interlocutory Injunctions** 
   1. **Anton Pillar Order**
   2. **Mareva Injunction**
4. **Pre-Judgment Garnish Orders**

**1. ORDRES [RULE 13-1] + ENFORCEMENT**

**Orders** are how the court articulates what has decided at the conclusion of an application [**RULE 13-1]. An order is binding from the moment it is pronounced.**

**Reduce to writing:** clear and unambiguous. Any party can draft the order [**RULE 13-1(1)],** but generally speaking, the successful party will prepare the order. It is easy when the judge/master gives written reasons for judgment. 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).

**Dispute over the terms of the order**: you can apply to the registrar to “settle the order”. This is where clerk notes can become very useful, and can be used to support your argument for what the order should be.

Court can order someone’s signature to dispensable for the sake of efficiency, e.g. self-represented litigants.

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

A judge may endorse an emergency application and the endorsed application becomes an order.

**The slip rule –** once the order is entered into the system, the judge or master has no further functions in the application. The slip rule generally applies in typo correction situation. The key is what is intended by the judge [**Pankiw].**

**Enforcement of orders [RULE 13-2]:**

* If there is any ambiguity in the order, the court would not enforce it.
* **Remedy for non-compliance on a specific performance order:** if a mandatory order or an order for a 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. Most enforcements costs are awarded on a tariff.
* **RULE 22-7 compliance rule**
* **RULE 22-8 contempt of the court**

Step 1: establish that the party in contempt has actual knowledge of the order: signature on the application demonstrates actual knowledge even if the order has yet to be served [**RULE 22-8(14)];** Step 2: evidence showing that the person is in contempt and the form of evidence is affidavits; Step 3: seek for another order.

* **RULE 13-2: enforcement or orders**
  + **13-2(6)** execution by or against person not a party
  + **13-2(22 – costs**

**2. Without notice orders = ex parte application**

**Ex Parte Application:** this application allows you to ask for court to bring an application without notice to the other party [**RULE 8-4).** Usually because there would be prejudicial to the applicant. **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 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 top 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, (1) your order may be set aside, (2) there may be cost ramifications, and (3) the Law Society will be displeased.

**3. Interlocutory Injunctions – inhibitory or mandatory [RULE 10-4] // TOOLS to protect evidence: 10-1 Anton Pillar, 10-4 Injunction, 10-4 Mareva Injunction, Pre-judgment Garnishing Orders: bring these application early**

**Undertaking as to Damages [RULE 10-4(5)] applies to injunction, Anton Pillar and Mareva –** this creates a cause of action for the wrong granting of the interlocutory injunction

Permanent injunction comes from final order in the context of petition and summary judgment. Permanent injunction must be sought as relief.

Injunction can be permanent and interim. Interlocutory injunction is interim and it is effective until the beginning of a trial. Interlocutory injunction is available under rules and is sought via applications during the course of a proceeding. Injunction is an equitable remedy and is granted based on discretion [**RULE 10-4**]. Granting injunction is part of the inherent jurisdiction of the courts. As a general rule, a judge hears an interlocutory injunction application.

**Test for Injunctions – general 3-part test [RJR MacDonald]**

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 are seeking an injunction, you are saying, if you do not grant this injunction, you 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].** But note: if it is 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 cannot prove irreparable harm, an interlocutory injunction will not be granted.

1. 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 [**CBC]**
   1. The adequacy of damages if the remedy is not granted (related to irreparable harm)
   2. The likelihood that if damages are awarded, they would be paid
   3. The preservation of contested property (whether there is something specific that the party is fighting about)
   4. Other factors affecting whether harm from the granting or refusal of the injunction would be irreparable
   5. The strength of the applicant’s case
   6. Public interest
   7. Maintaining status quo
   8. Any other factors affecting the balance of convenience and justice

**Anton Pillar Orders: recovery or preservation of property [RULE 10-1]**

Recovery or preservation of property order **[RULE 10-1]** 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].** This goes one step farther than an injunction. While they do not authorize forcible entry to private property, targets of the orders are exposed to contempt proceedings if permission to enter is refused[ [**Celanceses]**. .

An Anton Pillar Order is always done without notice.

Parties against whom Anton Piller orders are made need to be protected in three ways:

1. by ensuring that the orders identify the things to be seized and provide safeguards for dealing with privileged documents, among other things;
2. by requiring the appointment of vigilant, independent solicitors to supervise the execution of orders
3. by expecting parties executing the orders to show self-restraint

**TESTS –** Anton Piller orders should only be made in “**truly … exceptional**” circumstances: only in an extreme case where there is grave danger of property being smuggle away or of vital evidence being destroyed

1. the applicant has demonstrated “a strong prima facie case”
2. the damage the application will suffer from the target’s alleged misconduct is serious
3. there is convincing evidence that the target possesses incriminating documents or things and
4. there is a real possibility that the target may destroy the documents or things before the court discovery process can do its work

**XL –** the court is serious in expecting parties to adhere to the exacting requirements of Anton Piller orders.

**MAREVA INJUNCTION [RULE 10-4] – freezing judgment to protect asset, otherwise the asset may be transferred out from the jurisdiction.**

**Sekisui – a real risk that the assets are going to be moved out of the jurisdiction –** an application for a Mareva injunction must

1. make **full and frank** disclosure of all material matters
2. give particulars of his claim, the grounds for it and its amount
3. fairly state the points made against his claim by the defendant
4. show some ground for believing that the defendant has assets in the jurisdiction
   1. though as long as the party has sufficient connection to the jurisdiction, the court may order worldwide injunction
5. show some ground for believing that the defendant has assets in the jurisdiction
6. show some ground for believing that the defendant has assets in the jurisdiction
7. show some ground for believing that there is a risk of the assets being removed before judgment is satisfied
8. give an undertaking in damages, supported in suitable cases by a bond or security

Mareva Order has a high threshold. 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, (b) there is a real risk of removal or diminishment of assets from the jurisdiction to avoid judgment.

**4. Pre-judgment Garnishing Orders – without notice application – desk order + Court Order Enforcement Act 3(2)(c), 3(2)(d)**

Three part test – 1) they have assets, 2) they owe you liquidated sums, 3) pay that amount to court.

The defendant can apply to have the order set aside for usually 2 reasons: 1) there wasn’t meticulous compliance with the requirement set out in the act and 2) it is not just and equitable [heart surgery money].

**No undertaking to damages.**

SUMMARY PROCEEDINGS – the court is generally interested, in avoiding a full trial if possible, so the court encourages summary proceedings [Inspiration Management Ltd].

**OUTLINE**

1. **Summary judgment**
2. **Summary trial**
3. **Special case**
4. **Point of law**

**1. SUMMARY JUDGMENT [RULE 9-6]** – to have your case dismissed or part of your case dismissed – an alternative to trial.

Summary judgment is designed for cases where there is not really a bona fide trial issue or bound to lose essentially.

You rarely bring a summary judgment on its own. You will argue 9-6 summary judgment:: there is no basis, there is no claim but if there is any doubt, lets 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 the court usually will order a summary trial or question of law.

Summary trial application is likely to be rejected if the action is supposed to be heard in the presence of jury.

**2. SUMMARY TRIAL [RULE 9-7] = a trial on affidavits**

**Summary trial [RULE 9-7]** is used when there is a bona fide trial issues (so 9-6 is out) 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 interlocutory application [**RULE 8],** the other side is responding, and you are both bringing affidavits to support your respective positions.

* **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)].**

**Application 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.

**Evidence at summary trial** is not presented through viva vocd 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)].**

**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)].**

**Three Possible Responses:** 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) **objection, at the hearing,** to the trial but be prepared to argue the case in case it is not dismissed. However, the court has ultimate discretion to hear the case on full trial.

**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 or (ii) the summary trial application will not assist the efficient resolution of the proceeding [**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 a summary trial [RULE 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 have 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]**

**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 (e.g. 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].**

**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 or you can bring it at the summary trial. Court may ask you 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.** 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.** 
   1. **Resolution –** the court may order a cross-examination of the person who swore the affidavit [**RULE 9-7(12)].** This is usually only done if it is a clear 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.
   2. **Resolution –** the conflicts don’t go to the material or fundamental issues that are before the court.

**Withdraw: Kassam** – the applicant can withdraw the application. This can be compared to the trial process. After a trial date is set, one party cannot unilaterally withdraw from the trial process: consent is needed or a court order is required.

**One shot at a summary trial –** you need leave from the court for a second application [**RULE 9-7(16)].**

**3. 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** [**RULE 9-3(5)].**

**4. 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 are focused on the pleadings, you are not supposed to be focusing on the facts, e.g. is this a valid cause of action [**Alcan Smelters Case].**

ALTERNATIVE BEFORE TRIAL

**OUTLINE**

1. **Offers to settle**
2. **Alternate dispute resolution**

**1. OFFERS TO SETTLE [RULE 9-1]**

Although RULE 9-1 sets out the framework to settle, the parties don’t need to rely on RULE 9-1 to settle. **RULE 9-1** provides certainty, creates leverage, avoids costs and promotes settlement.

**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 [parties], [names of the parties], reserves 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 of 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 (c) the relative financial circumstances of the parties (d) any other factor the court considers appropriate [**RULE 9-1(6)].**

**2. ALTERNATIVE DISPUTE RESOLUTION**

**JUDICIAL SETTLEMENT CONFERENCE –** if at any stage of an action, the parties of record **jointly request** a settlement conference by filing 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)].**

* **Advantages:** (i) basically a mediation, but it’s before a judge or master, so it is cheaper, (ii) it is without prejudice (iii) 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)].**
* 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:** one party to serve on another party a **mandatory requirement** that they attend mediation, which they still have to split the costs for.
* **Mediation vs. summary trial –** no forced decision in a mediation: effectively a settlement agreement.

**ARBITRATION –** only available by agreement between the parties, either through a contract or a subsequent agreement between the two parties. CANNOT FORCE A ARBITRATION

* **Advantage:** (i) quicker, (ii) you can choose the adjudicator, (iii) cheaper?, (iv) private, (v) it is somewhat more difficult to appeal an arbitration decision than a trial decision – you have to get a leave of the court to appeal a final decision from an arbitrator and there is a higher test, (vi) you have more control over the process, (vii) more discretion as to how costs will be recovered, (viii) flexibility.

HEADED TO TRIAL

**OUTLINE**

1. **Depositions**
2. **Trial Procedure**
3. **Evidence at Trial**
4. **Jury Trails**
5. **Experts’ Reports**

**1. DEPOSITIONS – RULE 7-8**

**Alternative to oral testimony –** notice to admit, interrogatories, discovery transcript, depositions, physical examination, affidavit evidence, and expert evidence. When credibility is at issue, oral testimony is required.

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 trial [**RULE 7-8(1)].**

Depositions are not commonly granted and they are allowed only if justice is required: it would be unjust and inconvenience for the witness to testify at trial; the witness is not available to testify at trial due to death, out of country. **TWO PART TEST: Quinn v Hurpherd:** just and equitable to depose the witness and the statements are related to critical points.

In determining **whether to exercise its discretion to order an examination** under **RULE 7-8(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(3)].**

If the person is outside of Canada, can use **RULE 7-8(11): letter of request.**

**2. TRIAL PROCEDURE -** in **BC,** the trial process is lawyers-driven.

**12-1: how to set trial for hearing**

NOCC 🡪 response.. 🡪 phone or online to set a date. The parties generally agree to a date and the length of trial.

If unilaterally, notice of trial [12-1(3)]: trial date + trial length + place of trial.

**NOTICE of trial** must be filed a notice of trial in **FORM 40** to secure the date.

12-1(7) – if trial date is unacceptable for one party, within 21 days after service of notice of trial, (a) request a case planning conference, or (b) make an application to the court to have the trial rescheduled.

* New witness surfaces 🡪 you may need to adjourn the trial and reschedule it.

**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 TMC, 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 just presiding at the TMC may make various orders [upon application by a party or on their own] regarding:

1. Who goes first – **RULE 12-2(9)(a)**
2. Amendment of pleadings [**RULE 12-2(9)(c)]**
3. Admissions of fact at trial [**RULE 12-2(9)(d)]**
4. Document agreements [**RULE 12-2(9)(e)]**
5. Time limits for evidence [**RULE 12-2(9)(f)]**
6. Expert [**RULE 12-2(9)(g)]**
7. Request for affidavit evidence [**RULE 12-2(9)(h)]**
8. Anything that will make the trial more efficient [**RULE 12-2(9)(q)]**
9. Judges 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 or (b) making an order for final judgment, except by consent [**RULE 12-2(11)].**

**Trial Record – RULE 12-3(1) –** trial record contains everything that is relevant to the proceeding: pleadings, particulars served under a demand together with the demand order, case planning order, any order relating to the conduct of the trial, any document required by a registrar under subrule (2).

The party needs to file trial record at least **14 days** before but no more than 28 days before the scheduled trial date.

**Trial Certificate – RULE 12-4 and FORM 42 –** to demonstrate what the party is ready to go to trial. The trial certificate must be filed at lease 14 days before but not more than 28 days before the scheduled trial date [**RULE 12-4(2)].**

12-4(3) – content of the certificate

12-4(5) – no one files tc, the trial is adjourned.

12-4(6) – a party who fails to file a trial certificate is not, without leave of the court, entitled to make further applications. Court order is required!!! Restriction on the parties’ ability to file more applications.

**3. EVIDENCE AT TRIAL – 12-5 –** this rule does not apply to summary trials under RULE 9-7 **12-5(1)**

**EVIDENCE:** oral testimony, notice to admit [FORM 26], interrogatory, examination of discovery [read-in to impeach witness], expert’s report

**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 case [**RULE 12-5(4)]:** if there is a material issue on which there is no evidence presented.

**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)].**

**If you bring this application, you cannot 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 to be confident to make this application!

**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 proceedings, or (iv) respecting any relationship or connection between the witness and 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)]. **RULE 12-5 applies to**

adverse party and a person who, at the time the notice is served, is a director, officer, partner, employee, or agent of an adverse party.

Notice to call adverse witness [**FORM 45 + proper witness fees]** **– 7 days** before the date on which the attendance of the intended witness is required on which the attendance of the intended witness is required.

* Go through the adverse witness rule to get to a director, officer, partner, employee, or agent of an adverse party. + attendance of the trial
* Subpoena the person directly

**(25) non-compliance + court intervention:**

If a person called as a witness in accordance with subrule (21) or (22) refuses or neglects to attend at the trial, to be sworn or to affirm, to answer a proper question put to the person or to produce a document that the person is required to produce, the court may do one or more of the following:

(a) grant judgment in favour of the party who called the witness;

(b) adjourn the trial;

(c) make an order as to costs;

(d) make any other order it considers will further the object of these Supreme Court Civil Rules.

**4. JURY TRIAL – RULE 12-6**

12-6(1) Subject to subrule (3), a trial must be heard by the court without a jury.

**Trials that must be heard without a jury RULE 12-6(2)**

(a) the administration of the estate of a deceased person,

(b) the dissolution of a partnership or the taking of partnership or other accounts,

(c) the redemption or foreclosure of a mortgage,

(d) the sale and distribution of the proceeds of property subject to any lien or charge,

(e) the execution of trusts,

(f) the rectification, setting aside or cancellation of a deed or other written instrument,

(g) the specific performance of a contract,

(h) the partition or sale of real estate,

(i) the 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).

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)].**

If you want to avoid a trial by jury, you need to apply for an order that the trial or part of it be heard by the court without a jury on the ground **RULE 12-6(5)**

(a) within 7 days after service 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, or

(b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

**5. EXPERT’S REPORTS**

**11-6 experts’ reports**

**TWO PART TEST: 1)** establish the admissibility of experts’ reports and 2) presenting evidence

1. One party prepare the expert opinion in a written form = evidence in chief // the court does allow a brief examination in chief [limited examination]
2. Pass to the other party
3. Objection? Accept the report?
4. Cross examine by the other side? The expert needs to be present at trial.

In giving an opinion to the court, an expert appointed under RULE 11 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 Certificate:** 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.

**Make sure your expert is not argumentative, is not hypothesizing, and does not answer the ultimate issue.**

**Requirements for the Report: Expert Report** that is to be tendered as evidence at the trial must be signed by the expert, must include **expert certificate,** 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 [**11-6(1)].**

**11-6(3):** service of report 84 days in advance

**11-6(4):** responding report from the other side 42 days in advance

**11-6(10) –** notice of objection to expert opinion evidence – if you are to reject the report, you need to give notice.

**11-6(8) –** requirement to make the evidence file available.

**Production of documents**

11-6(8)Unless the court otherwise orders, if a report of a party's own expert appointed under Rule 11-3 (9) or 11-4 is served under this rule, the party who served the report must,

(a) promptly after being asked to do so by a party of record, serve on the requesting party whichever one or more of the following has been requested:

(i)   any written statement or statements of facts on which the expert's opinion is based;

(ii)   a record of any independent observations made by the expert in relation to the report;

(iii)   any data compiled by the expert in relation to the report;

(iv)   the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion, and

(b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report,

(i)   if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request, or

(ii)   in any other case, at least 14 days before the scheduled trial date.

**11-6(9) -** The person who is required to serve the report or supplementary report of an expert under this rule must, promptly after the appointment of the expert or promptly after a trial date has been obtained, whichever is later, inform the expert of the scheduled trial date and that the expert may be required to attend at trial for cross-examination. Let you expert know the trial date.

**Admissibility of Expert Opinion [Mohan]**

1. **Relevance –** balancing exercise **–** decided by a judge
   1. **Prejudice:** misused and distort the fact-finding process.
   2. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents – more weight than it is worth.

**R v Melaragini**

1. Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
2. Is the jury likely to be overwhelmed by the “mystic infallibility” of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?
3. **Necessity in assisting the trier of fact –** if on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. // outside of common knowledge
   1. What is required is that the opinion be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a judge or jury.
   2. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.
4. **The absence of any exclusionary rule –** e.g. propensity of the accused
5. **A properly qualified expert - test for expertise – the expert does not need to be the best one in the field. An expert can gain experience through academic experience, work experience …** TEST: more knowledge than the average people.

**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.

**Appointment of joint experts – by parties or by the court RULE 11-3.**

Default judgement

Professional conducts/responsibilities of lawyers are the overarching principles of civil procedure. For instance, if the opposing party fails to respond with 21 days of the delivery of NOCC and the plaintiff side is ready to accept a default judgment, the plaintiff side must give notice to the opposing party that the plaintiff is ready to accept the default judgment.

Drafting Exercise - I

|  |  |
| --- | --- |
| FORM 1  (RULE 3-1(1)) | No.  Vancouver Registry |

|  |  |  |
| --- | --- | --- |
| Between: |  |  |
|  | JOHN WOOD | Plaintiff |
|  |  |  |
| and: |  |  |
|  | INSURANCE CORPORATION OF BRITISH COLUMBIA, LUKE FAST, and HER MAJESTY THE QUEEN IN RIGHT OF THE CITY OF VANCOUVER |  |
|  | MIKE FACT, BMW CREDIT CANADA INC.  Defendant may also “third party” the city | Defendants |

**NOTICE OF CIVIL CLAIM**

Boiler Plate

**CLAIM OF THE PLAINTIFF**

**PART 1: STATEMENT OF FACTS – material facts**

**PART 2: RELIEF SOUGHT**

**PART 3: LEGAL BASIS**

**Part 1: STATEMENT OF FACTS**

**The Parties**

|  |  |
| --- | --- |
| 1. | The Plaintiff, John Wood, a carpenter who resides in the City of Vancouver, in the Province of British Columbia.  The Plaintiff is a carpenter and resides at 15-5784 Oak Street, in the City of Vancouver, in the Providence of British Columbia.  Carpenter: material fact – relevant to damages. |
| 2. | The Defendant, Insurance of Corporation of British Columbia, is a provincial Crown corporation duly incorporated pursuant to the laws of the Province of British Columbia, with its registered and records office located at … Vancouver, British Columbia. |
| 3. | Defendant, Mike Fast, resides at 635 Park Lane, Richmond, British Columbia.  BMW is the owner  Mike is the lessee  Luke is the driver |

**South West Marine Drive**

|  |  |
| --- | --- |
| 4.  5. | South West Marine Drive (“SW Marine Drive”) lacks bike lane infrastructure.  Due to the absence of pedestrian controlled intersections and heavy vehicle traffic, it is difficult for pedestrians and bikers to cross SW Marine Drive. |

**The Collision**

|  |  |
| --- | --- |
| 6. | On and about January 25, 2013, the Plaintiff biked on the north sidewalk of SW Marine Drive, which is adjacent to the westbound traffic lane. |
| 7. | At all material times, the Plaintiff was not wearing a helmet nor riding at a high speed. |
| 8. | The Defendant, Mike Fast (“Fast”), operated a 2008 BMW M6 (“Car”), registered to Fast’s father, Luke Fast. |
| 9. | The Defendant, Fast, idled the Car at the west-facing driveway of a FuelCo gas station, located at the north-west corner of the intersection of SW Marine Drive and Oak Street. |
| 10. | The idled Car was not blocking the sidewalk. |
| 11. | Once the Plaintiff arrived in front of the idled Car, the Car accelerated and collided with the Plaintiff. |
| 12. | The force of the impact pushed the Plaintiff onto the street. The Plaintiff’s bike then landed on top of him. |
| 13. | During impact, the Car’s front licence plate collided with the bike’s pedal, was caught in it, and was severed from the Car. |

**The Injury and Damage**

|  |  |
| --- | --- |
| 14. | On the same day of the collision, the Plaintiff visited a hospital and was diagnosed with a broken right arm, a fractured collarbone, and a sprained left ankle. |
| 15. | The Plaintiff’s injuries resulted in reduced mobility and diminished creativity, which in turn prevented the Plaintiff from being employed as a carpenter. |
| 16. | The subsequent unemployment situation caused a financial and emotional burden on the Plaintiff’s relationship with his spouse.  About helmet – you don’t need to mention this. NOCC is the opportunity for you to present your story. The no helmet is for the defendant to bring up. If you have anything to say about the helmet, you can see it in the reply.  For special damages, you need to make a plea.  General pleading: see 12 + 13  For motor vehicle damages, you need to plea under PART 7 of the Regulation.  For NOCC, there are no obligations to mention anything that is unfavorable to your case. |

**Part 2: RELIEF SOUGHT**

|  |  |
| --- | --- |
| 17. | The Plaintiff seeks the following relief:   1. general damages and special damages, 2. costs; and 3. such further and other relief as this Honourable Court may deem just.   A declaration that the Plaintiff is entitled to the Benefits.  Alternatively, damages for breach of a contract of insurance  General damages  Special damages  Costs  Interest pursuant to the Court Order Interest Act, RSBC 1996, c 79  Such further and other relief as to this Honourable Court may seem just.  You can also set this part according to parties. |

**Part 3: LEGAL BASIS**

|  |  |
| --- | --- |
| 18. | The Defendant, Fast, was negligent in not taking all reasonable steps or due diligence before driving onto sidewalk. |
| 19. | The Defendant, City of Vancouver, failed to exercise its fiduciary duty pursuant to section 2 of Local Government Act in constructing cycling infrastructure on WS Marine Drive.  Negligence  Vicarious liability  The Collision was caused in party by the negligence of the Defendant Mike Fast, particulars of which are as follows:   1. failing to keep a proper or any lookout 2. failing to stop the vehicle immediately before driving onto the sidewalk (“Sidewalk”) extending across the private driveway of the Gas Station, and the Plaintiff pleads and relies on the provisions of s. 176(1) of the Motor Vechile Act……   The Collision was caused by part by the  Add a paragraph to connect the negligent act and the injury – causation.  John’s injuries were caused by paragraph 1-3.  **FORM is important to know too! You need to choose the right parties and right form!**  For petition – all of the evidence is set out in the petition pleading.  NOCC – no evidence but only material facts  Relief sought can include: injunctive relief, declaration, cost, damages, interest. |

Drafting Exercise - II

This is the 1st affidavit of *Janice Kimmel* in this case and was made on May 15th, 2015.

**IN THE SUPREME COURT OF BRITICH COLUMBIA**

|  |  |  |
| --- | --- | --- |
| Between: |  |  |
|  | LAKEVIEW HOSPITAL | Plaintiff |
|  |  |  |
| and: |  |  |
|  | MOUNTAINVIEW CHRONICLE, TIMOTHY ULYETT, and VICTORIA WILLIAMS | Defendants |

**AFFIDAVIT**

I, Janice Kimmel, of [address], Chief Executive Officer of the Lakeview Hospital, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chief Executive Officer of the Lakeview Hospital (“Hospital”) in Vancouver, British Columbia, the Plaintiff in the within action, and as such has 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 believe the same to be true.
2. I am authorized to swear this Affidavit on behalf of the Lakeview Hospital.

**THE DEFENDANTS**

1. Defendant, Timothy Ulyett, is a nurse and a former employee of the Hospital.
2. Defendant, Victoria Williams, a reporter with the Mountainview Chronicle.

**RECORDS RELATING TO EXPERIMENTAL TRANSPLANT SURVERY**

1. The Hospital offers experimental transplant surgery.
2. The Hospital maintains numerous records regarding the experimental surgery.
3. Such records contains the names, addresses, and country of origin of patients; the names of treating physicians and staff; the nature of the patient’s condition; the name and location of origin of the donor patient; any financial records; the date and time of the surgery; and the outcome of the surgery.
4. The records are kept separate from all other hospital records; they are stored in a locked filing cabinet and on a secure hard drive.

**BREACH OF CONFIDENTIALITY BY DEFENDANTS**

1. On March 7th 2015, Defendant Williams forwarded an e-mailing containing three pages of records relating to experimental transplant surgery to me.
2. The original email was sent to Williams by Defendant Ulyett.
3. When Ulyett sent the email to Williams, Ulyett was an employee of the Hospital.
4. As an employee of the Hospital, Ulyett signed a letter acknowledging the importance of maintaining the confidentiality of records and received ongoing confidentiality training.
5. I advised Williams in writing as to the nature of the records.

**POTENTIAL HARM FROM DISCLOSURE**

1. I am concerned that the disclosure of records relating to the experimental transplant surgery would threaten the personal safety of those named in the records. Over the past several months, the Hospital has received reports of death threats against patients, doctors, and staff engaged in the experimental surgery. A copy of such reports is included in my affidavit and marked as Exhibit “A”.
2. I am also concerned that the disclosure is a breach of privacy legislation.
3. 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 the Hospital, 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 Hospital should pay such damages.

Signature of Me

A Commissioner for taking Affidavits for British Columbia

My Name

Signature of Kimmel

Points for style of cause, documentary evidence, i.e. exhibits, background information, reasonable case to be tried.

Heading demonstrating the test for application, e.g. injunction, anton pillar….

1. Service by **delivery** is deemed to be completed on day of service if left before 4pm on a day that is not a Saturday or holiday. [↑](#footnote-ref-1)
2. Service by **mail** is deemed to be completed – same day one week later. [↑](#footnote-ref-2)
3. When documents may be served by fax – if 30 pages or long, must be served btwn 5pm & 8am unless parties agree. [↑](#footnote-ref-3)
4. When service by fax or email is deemed to be completed – day of service if before 4pm on a day that is not a Saturday or holiday. [↑](#footnote-ref-4)
5. Another tool – mention all of the tools covered in class in your exam. [↑](#footnote-ref-5)