CIVIL PROCEDURE, LAW 469.001 — BROOK GREENBERG/JOËLLE MICHAUD — COURSE OUTLINE

1. September 11, 2017 – Lecture 1 - Introduction

Pleadings	Discovery	Pre-Trial	Trial	Post Trial
NOCC **(R. 3-1)** Petition **(R. 16-1)** Service **(R.4-1 to 4-2)** R. to NOCC **(R. 3-3)** Counterclaim **(R. 3-4)** 3rd Party Notice **(R. 3-5)** Reply to 3-3 **(R. 3-6)**	Doc Disclosure **(7-1)** XFD **(R. 7-2)** Interrogatories **(7-3)** Notice to Admit **(R. 7-7)** Particulars **(R. 3-7(18-24))**	Interlocutory Applications **(R. 8-1 to 8-5 and 22-1)** Garnishing Orders (*Court Order Enforcement Act)* Injunctions **(R. 10-4)** Case Planning Conference **(R. 5-1)** Mediation & Offer to Settle Summary Disposition **(R. 9-5 & 9-6)**	Summary Trials **(R. 9-7)** Trial Rules **(R. 12-1 to 12-6)**	Orders **(R. 13-1)** Costs **(R. 14-1)** Appeals

2. September 18, 2017 – Lecture 2 - Civil Procedure: Principles & Professional Obligations

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

- **R 22-7**–Unless the court otherwise orders, a failure to comply with Rules shall be treated as an irregularity and **does not nullify a proceeding**, a step taken or any document or order made in the proceeding.
  - Cases should be decided on their substance, not technical defects or wilful breach of rules.

Rule 1-3(2) — **Proportionality:** the Object of **1-3(1)** applies in a manner commensurate with:

- Amount involved: 1-3(2)(a); importance of issues in dispute: 1-3(2)(b); complexity of proceedings: 1-3(2)(c)

Barristers & Solicitor's Oath — all lawyers in BC are required to promise:

- not to promote suits on frivolous pretences
- not to pervert the law to favour or prejudice anyone
- to act in all things truly and with integrity

Code of Professional Conduct for British Columbia (the BC Code) - annotated **(link to full code)**

- Chapter 2 Standards of the Legal Profession — **2.1-1**: to the State; **2.1-2**: to courts/tribunal; **2.1-3**: to client; **2.1-4**: to other lawyers; **2.1-5**: to oneself; **2.2**: integrity
- Chapter 3: Relationship to clients — **3.1**: competence; **3.2**: quality of service; **3.3**: confidentiality; **3.4:** conflict of interest; **3.5**: preservation of client's property; **3.6**: fees & disbursements; **3.7:** withdrawal from representation
- Chapter 5: Relationship to the Administration of Justice (Chapter 5.1-1 to 5.1-6; 5.3; 5.4) — **5.1:** lawyer as advocate; **5.2:** lawyer as witness; **5.4:** communicating with W giving evidence **(page 23)**
  s. 5.1-1-[6]—>ex parte applications (without notice) require full & frank disclosure**—>page 40.**
  s. 5.1-2: DISHONESTY/DISHONOURABLE CONDUCT — PAGE 16
  s. 5.2-1: A lawyer who appears as advocate **must not testify or submit his or her own affidavit** evidence before the tribunal unless (a) permitted to do so by law/the tribunal/Rules of court/Rules of procedure of the tribunal; (b) the matter is purely formal or uncontroverted; or (c) it is necessary in the interests of justice for the lawyer to give evidence.
  s. 5.2-2: lawyer as a witness in proceedings cannot act as advocate on appeal, unless the matter about which he or she testified is purely formal or uncontroverted **Issue: waives privilege**
  5.4-2: interactions between solicitor & client examinee during XFD (page 22)
- Chapter 6: Relationship to students, employees, & others
- Chapter 7 Relationship to the Society and Other Lawyers (Chapter 7.2-1 to 7.2-11).
  - **7.2-1**: If another lawyer has been consulted on a matter, must not proceed by default in the matter without inquiry & reasonable notice —> **page 9**

Speech of McEachern, BC's CJ (1993) – balancing search for truth against practical realities (i.e., cost & timeliness)

- Competing values: litigation process must balance:
  - The effectiveness of the search for truth and a just result (generally associated with more process)
  - Against the practical realities of cost and timeliness (generally requires less process)
- "We cannot carry on… delivering a kind of Mercedes or Lexus judicial product where every issue is going to be litigated to the last warehouse full of documents, the evidence of countless experts, the longest imaginable cross-examinations and unlimited new causes of action"

Hryniak v. Mauldin **(2014) SCC — scope of cases where summary judgment is OK**

- Poor access to justice threatens the rule of law; proportionality must balance access with justice.
- Summary judgment allowed where:
  - (1) fair and just adjudication can be achieved;
  - (2) judge has process to make necessary findings of fact & apply law to facts;
  - (3) it's proportionate, more expeditious & less expensive means to achieve a just result.

Commencing Proceedings

- Two ways to commence proceedings as per **Rule 2-1:**
  - (1) **Notice of civil claim** (NOCC); (2) **Petition**
- Each option sets out the facts and legal basis for the relief sought from the court
- **R. 1-1** defines "action" as proceedings commenced by NOCC, not by petition (unless otherwise authorized by enactment or Rules); therefore, **default** presumption is a NOCC.

Notice of Civil Claim (NOCC) — Rule 3
Requirements of a NOCC

- Must be concise: *Sahyoun*
- Must disclose a reasonable claim, counterclaim, or defence: *National Leasing*
- Must include:
  - material facts giving rise to the claim (i.e., facts central to establishing the claim): R 3-1(2)(a); *Sahyoun*
  - The relief sought**:** R 3-1(2)(b); *Sahyoun*
  - The legal basis for the relief sought**:** R 3-1(2)(c). Legal basis for the claim must include identification by name of the cause of action or statute relied on by P: *Sahyoun*
  - Sufficient particulars for D to understand the case against him/her: *Sahyoun*
  - The proposed place of trial**:** R 3-1(2)(d)
  - Representative capacity, —> explain in what capacity P sues or D is sued: R 3-1(2)(e)
  - The data collection information required in the appendix: R 3-1(2)(f)

Sahyoun v Ho (2013) BCSC —**Rule 3-1/9-5** — sets out in detail the **purpose** & **principles applicable to** NOCCs
Matter: Application to strike/amend P's NOCC so it accords with Rules
Analysis: purpose of NOCC is to define the issues of fact & law before the court, identify material facts for each cause of action & to set out P's right or title, D's conduct, & the resulting damages (& must specify relief sought).
application to case at bar: while P had listed numerous statutes & authorities, he did NOT link them to the facts in a way that D could identify the cause of action;
Holding: P ordered to prepare an amended NOCC that accorded with Rules/principles.

Striking out Pleadings (Rule 9-5) — discussed in greater detail on page 34.

- The most commonly applied subsection is R. 9-5(1)(a) — i.e., pleadings disclose no reasonable claim or defence. The test under (a) is a very high one, and the application assumes that the facts as pleaded are true.
- R. 9-5(2) provides that no evidence is admissible on a R. 9-5(1)(a) application

Jerry Rose Jr. v UBC (2008) BCSC—Rule 9-5 — defective pleadings

Facts: P claimed numerous Ds had been conducting Invasive Brain Computer Interface Technology
Court: Pleadings set out potential cause of action, but strikes out pleadings b/c they do not set out who did what, when, where or how. Relief claimed bears no relationship to the allegations. No point allowing P to amend.

- held that P's claims had no prospect of success, disclosed no reasonable claim against any of the Ds, and are frivolous and vexatious, and may prejudice or embarrass the fair trial of the proceeding.

National Leasing v Top West (2011) BCSC —Rule 9-5— stringent test for striking out defective pleadings

Matter: D filed response to NOCC & counterclaim that was a garbled mess; P applied to strike out pleadings.
Analysis: If there's a hope of a defence, the Court isn't going to eliminate D's right to submit a defence
Holding: D's counterclaim struck (there's no possible counterclaim on the pleadings as filed); HOWEVER, D allowed to amend Statement of Defence —>there may be a glimmer of a defence.

Petitions:

- **R 2-1(2)** sets out when applications can be brought by petition or requisition (**R. 17-1**).
- **Filing requirement:** Rule **16-1(2)** requires the petition and all affidavits in support be filed
- **Service:** Both the petition and affidavits must then be served by personal service [**Rule 16-1(3)]**
- **Why** do we have proceedings by petition?
  - o Petition matters follow a different process that generally does not lead to a trial – proceed typically based on affidavit evidence
  - o Petitions go to hearings, not trials, so the process is faster and more contained – usually just seeking a declaration of some sort (petitions forego many of the pre-trial processes)
- **Converting Petitions to Actions:** The court retains discretion to have a petition matter transformed into an action [**Rule 22-1(7)]** petitions can be converted into an action if factual controversy requiring trial arises
  - **TEST** = whether there's a bona fide issue to be tried that cannot be resolved on summary basis (***Southpaw*** **on pages 27-28**- CHAMBERS section for factors to consider)
- **Response to a petition: 16-1(4):** 21 days if person resides in Canada // 35 days if in US // 49 days elsewhere

Limitation Periods —>refer to *Limitation Act,* S.B.C. 2012, c. 13, s. 1, 3, 6, 8, 21, 22 and 24.

- Most matters brought to court must be filed within a prescribed period
- Limitation periods can be found in various statutes
- In the absence of a specific statute, Limitation Act will apply.

Limitation Act:

- **S. 6**—>2 year "basic limitation period"(exemptions listed in **s. 3**)
- No claim can be brought 2 years after claim is "discovered" (Defined term in the Act).
- **S. 8**—>Claim is discovered when person discovered or reasonably ought to have known that:
  - they suffered injury damage or loss// it was caused or contributed to by D's act/omission// the Act/omission was that of D// the action would be appropriate mean to seek redress.
- **S. 3: exemptions:** limitation periods do not apply to claims involving sexual misconduct // assault or battery of a minor // claim for child/spousal support under a judgment
- **S. 21: ultimate limitation period is 15 years**

- ultimate limitation period runs from the date of the act or omission regardless of when damage is suffered and regardless of discoverability
- **S. 22: counterclaims and 3rd party claims** allowed if main claim was delayed b/c of discoverability
- **S. 24: extension if liability acknowledged** either in writing or by conduct (such as payment on a debt) extends both the basic and ultimate limitation periods.

Service and Delivery of Documents (refer to Rules 4-1 to 4-3 and Rule 4-6; *Orazio*; *Wang*)

- **Purpose:** ensure that parties to litigation get proper notice of proceedings that may affect their interest
- Rule **4-3(1)** NOCC or petition **must be served personally**, unless there is an order otherwise

Personal service [R 4-3(2)]:

- **(a)** For an **individual** you leave a copy of the document with him or her
- **(b)** For a **corporation**, accomplished by leaving a copy of the doc with:
  (i) the president, chair, mayor or other chief officer of the corporation; **(ii)** the city clerk or municipal clerk; **(iii)** the manager, cashier, superintendent, treasurer, secretary, clerk or agent of the corporation or of any branch or agency of the corporation in British Columbia, or **(iv)** in the manner provided by the BC *Business Corporation Act* [*BCA*] or any enactment relating to the service docs
  - ***BCA* s. 9:** service can be effected, via registered mail, to a BC company's registered office.

***Orazio v Ciulla* (1966) BCSC —Rules 4-1 to 4-3 — test for personal service (successful service)**
Facts: odd case where D's usual lawyer & P's lawyer shared office space. D's usual lawyer advised him of P's writ, handed D a copy, D handed it back & didn't tell current lawyer; later D claimed he wasn't served properly.
Holding: against D; the document must be delivered under circumstances which enable the Court to conclude that the person being served knew, or reasonably should have known that the document was a writ.

***Wang v Wang* (2012) BCSC — Rules 4-1 to 4-3— test for personal service (successful & unsuccessful service)**
Facts: 1st D served in restaurant, claimed he was drunk & didn't remember but photos of him reviewing the docs; 2nd D served while driving; process server stuck papers on D's windshield, she had no memory of it
Holding: 1st D; test for personal service met; 2nd D; no reasonable person would conclude that a stranger approaching a car in traffic & shoving papers under the windshield wipers would provide the person with an opportunity to realize they were being served with legal documents.

Ordinary service [R 4-2(2)]: After formal initial personal service, service can be effected by "ordinary service" by:

- **(a)** Leaving at the address for service **(b)** Mailing to the address; **(c)** Faxing to a fax number provided as part of the address for service; **(d)** Emailing to an email address provided as part of the address for service

Alternate service [R 4-4]: Used when the strict requirements for service cannot be complied with

- **Rule 4-4(1)** allows an alternate service order (ASO) where it is impracticable to serve OR if: **(a)** the person cannot be found after a diligent search; **(b)** is evading service.
- **Rule 4-4(2)** ASO must be served with the document to be served unless court says otherwise
- The form of alternative service is within the discretion of the court.
- Some common alternative service provisions include:
  - Posting at the courthouse; Posting on the door of a residence; Publishing notice in the newspaper;
  - Serving on someone else in contact with the person.

***Luu v. Wang* (2011) BCSC — Rule 4-4— test for alternative service (unsuccessful)**

Facts: P had obtained order for NOCC to be served via alternative service. D sought to have the order set aside. P's process server had attended D's home 3 times but was unable to serve (once thought he was speaking to D through door but it was D's father; D was out of town)
Issue: what is the appropriate test for substitutional service under the current Rules?
Ratio: in the test for alternative service, one of the following preconditions must be met:

1. it is impracticable to serve by personal service; **"impracticable**" means that serving personally will be so onerous or expensive as to be more trouble or expense than is reasonably justifiable in the circumstances.
   - Consider: $ value of claim, evidence of costs, difficulty or steps taken to serve D abroad (China)
2. the person cannot be found after a "diligent search" or is evading service

Holding: P failed to present necessary evidence supporting 'impracticability' to justify alternative service; also, P also couldn't show that D couldn't be found or was evading service; therefore, P's order was set aside.

- Court held that service has not been shown to be impracticable here because:
  - The claim was substantial (over 1 million)
  - There was no evidence introduced as to the cost of serving D in China
  - There was no evidence that reasonable steps had been taken to serve D
- Court held there was no evidence of diligent serve or D was evading service
  - P would not say that the D was evading service because he knew exactly where the D was
  - process server's evidence that D was evading service was based on false identification of D's father.

***Burke v John Doe* (2013) BCSC— Rule 4-4— test for alternative service (successful due to impracticability)**
Facts: P wanted to sue seven message board users for defamation; the only information available was their message board screen names & the message board did allow for private messages.
Holding: the court accepted that it was impracticable to serve the Ds given that their true identity was not known & there was no cost-effective means of discovering their identities.

- as the first branch of the test was satisfied, P was permitted to serve "slobberface" & the rest via private message and publication in a national Canadian newspaper.

Service (substitutional and *ex juris*) — Ex Juris = outside of jurisdiction

- In BC, you can sue as of right;
- To sue ex juris, you either need: (i) leave of the court **R 4-5(3)** and (ii) to fall within the ambit of **s.10** of the *Court Jurisdiction and Proceedings Transfer Act* [**R. 4-5(1)].**
  - **The grounds for service *ex juris* without leave** include actions relating to: **(i)** a proprietary interest in property in BC; **(ii)** a contract to be performed in BC or subject to the law of BC; **(iii)** a tort committed in BC; & **(iv)** an injunction against doing something in BC
  - These criteria are intended to ensure that a matter to be tried in BC, where a D is not present here, has a **sufficient connection to the jurisdiction**
- **R 4-5(2)** requires an originating pleading or petition served outside of BC without leave must state by endorsement the grounds on which service is based (you can state more than one ground)
- **How to serve a document *ex juris*: R 4-5(10**): you can serve documents *ex juris:*
  - **(a)** In a manner provided for in accordance with our Rules;
  - **(b)** In accordance with the law of the place service is made;
  - **(c)** Pursuant to the *Hague Convention* if the state is a signatory

Service Timing —>The time to respond to a NOCC is provided in **R 3-3** & to a petition is provided in **R16-4** as follows:

- 21 days if the person served resides anywhere in Canada;
- 35 days if the person served resides in the US;
- 49 days if the person served resides elsewhere

Renewal of NOCC

R 3-2(1) first renewal: original NOCC is in force for 12 months; if a D mentioned in a NOCC has not been served & application is made before/after the 12 months, court may order original NOCC to be renewed for up to 12 months

- **Test for renewal: *Swetlishnoff***
- ***Weldon:*** application for renewal is not the appropriate time to consider whether an action is bound to fail

Rule 3-2(2): **further renewals:** If a renewed notice has not been served, on an application during the currency of the renewed writ or notice, the court may order the renewal of the writ for a further period

Rule **3-2(4)** expressly provides that a renewed notice **prevents the operation of any statutory limitation period.**

***Swetlishnoff v Swetlishnoff* (2011) BCSC — R 3-2 — test for NOCC renewal**

Facts: P commenced an action, but did not serve Ds within 12 months; D sought to have action dismissed.

Analysis: the overarching objective is to see that justice is done; in this case, the application to renew was not brought promptly (last claim had expired 3 years ago); Ds was not aware of NOCC; D has suffered prejudice b/c of declining health; failure to serve not attributable to D's conduct, P deliberately decided not to pursue the claim

Holding: P's action dismissed as there's no reason to renew the NOCC;

Ratio: test for NOCC renewal:

- Was the application to renew the NOCC brought promptly?
- Did D have notice of the claim despite not being served?
- Has D suffered prejudice? —>prejudice: more than delay, must interfere w/ D's ability to mount a defence
- Was the failure to serve attributable to D's actions?

***Weldon v Agrium Inc.* (2012) BCCA —R 3-2 — test for renewal; merits of claim can be a relevant factor**

Facts: NOCC renewed once then served within renewal period; Ds applied to have claim set aside b/c claim was barred by *Limitation Act* & delay prejudiced Ds (witness had died & another retired; difficulty finding documents);

- Ds argued that the limitation period began running in January 1993 & the claim brought in July 2009; therefore, the claim was bound to fail unless there was evidence in support of a postponement argument.
- TJ held in Ps favour, declining to set aside the renewal order (key Q: was it in the interests of justice?).

Issue: is NOCC renewal application an appropriate point to consider if an action is bound to fail? **Not in most cases.**

Holding: affirmed TJ's ruling — the Court may consider merits when a claim is bound to fail; however, where evidence is required to conclude claim is w/o merit, application for renewal is NOT the time to consider merits.

- it would not serve justice to determine merits issue at this stage; also limitation issue not clear on its face.
- **Rationale:** a renewal application with its "very limited inquiry" into the merits was not the appropriate occasion to decide whether the NOCC was statute-barred since the injustice to P (effectively striking out the action at this stage) far outweighed any prejudice to D that might arise from the extension.

3. September 25, 2017 – Lecture 3 - Pleadings and Parties

General Rules of Pleadings (Rule 3-7)

- Rules apply to all pleadings as defined in **R.1-1** (i.e., NOCC; response to NOCC; counterclaim; response to counterclaim; third party notice; response to third party notice)
- Rule **3-7(1)** – **prohibits evidence** – you can only include facts, but not how you will prove those facts
- Rule **3-7(2)** requires the effect of any document or conversation to be stated briefly
  - Do not plead precise words of the document/conversation, unless the words are material themselves.
- Rule **3-7(6) cannot plead inconsistent allegations**, but R**. 3-7(7)** permits you to **plead in the alternative**.
  - Strange rule that more or less hinges on semantics. E.g., you can say: I was not driving the car. If, in the alternative, I was driving the car, I was not being negligent.
- R. **3-7(8)** permits one to raise an objection in law in a pleading (e.g., expiry of a limitation period).
- R. **3-7(9)** – you can only plead conclusions of law if the material facts supporting them are pleaded
- R. **3-7(12)** for pleadings after NOCC, a party must plead specifically any matter of fact or point of law that:

  - **(a)** the party alleges makes a claim or defence of the opposite party not maintainable,
  - **(b)** if not specifically pleaded, might take the other party by surprise, or
  - **(c)** raises issues of fact not arising out of the preceding pleading.
- Rule **3-7(15)** if a denial is made you cannot do so evasively, must answer the point denied in substance
- Rule **3-7(16)** deals specifically with the effect of a bare denial in respect of a contract (i.e., the contract itself is denied, not the legality, terms or sufficiency of the contract).
  - to be successful, also argue against the legality, terms or sufficiency ON TOP OF A BARE DENIAL

Particulars—detailed facts on which a claim is based (facts needed by other party to understand the case against it)

- Rule **3-7(18)** makes pleading "**full particulars" mandatory for claims in misrepresentation, fraud, breach of trust, willful default or undue influence**.
- Rule **3-7(20)** authorizes a **demand for further particulars**
- Rule **3-7(22)** authorizes the **court to order a party to deliver further and better particulars**.
- Rule **3-7(23)** requires a **demand be made in writing of the other party** before bringing an application for further and better particulars.
- Rule **3-7(24)** provides a **demand for particulars does not operate as a stay**, but a party can apply for one.

***Camp Dev Corporation v. South Coast BC…* (2011) BCSC — 3-7(22) — test for particulars**
Facts: D sought numerous particulars of the damages claimed by P; **Analysis:** the purpose of particulars is to:
- inform other side of nature of the case,
- prevent other side from being taken by surprise,
- enable other side to know what evidence is required,
- limit generality of pleadings, limit issues to be tried, and
- tie hands of the party so new issues can't be raised

Ratio: test for granting orders for particulars: whether "it is necessary to delineate the issues between the parties" with reference to the specific purpose of particulars
- Matters subject to evidence & assessment (not existing fact) not appropriate for an order for particulars

Holding: the particulars of actual costs incurred to that point should be provided.

Responses to NOCCs (R 3-3)
- Structure is similar to NOCC, but the facts section broken down into 2:
  - **(a)** D's version of facts alluded to by P & **(b)** D's chance to plead new facts
- D needs to respond to the relief sought: consent to, oppose, or no position taken.

3-3(1): filing a response – to contest action & avoid default judgment, D MUST file a response & serve P a copy
3-3(2): (a)(i) - **each fact must be admitted, denied, or outside knowledge**
o (a)(ii) - **no blanket denials** - D must set out own version of any denied facts
- For any fact denied, D's version of the fact must be proved

o (a)(iii) - **concisely set out additional material facts**
o (b) - indicate **position on relief sought** (consents, opposes, no position)
o (c) - state **reason for opposition to relief**, if any
o (d) - otherwise comply with **3-7** (pleadings rule)
R 3-3(8) — if a fact is not responded to, it is **deemed outside the knowledge of D**
R 3-3(3): time to file: 21/35/49 days, but **time can be extended with consent 22-4(3)**

Set-offs and Counterclaims [3-7(11)]
Set-off — a defence by D that reduces P's damages for something D has allegedly done. For example:

- ➢ where P claims for D's failure to pay, D could plead a set-off on the basis that because of P's late delivery the goods were worth less, thus the damages should be reduced by the value of the set-off.

A counterclaim — similar to set-off, but it's a **stand-alone** claim that could be brought by D as a separate action

- A counterclaim allows D to seek own damages (e.g., damages for late delivery instead of a set-off).

The practical differences between set-off & counterclaim:

- if P's claim is dismissed or discontinued, the set-off fails, but a counterclaim continues;
- counterclaim can result in damages being paid from P to D; set-off can only reduce amount owed by D to P

Counterclaims — governed by **R 3-4, fill out Form 3**

- **R3-4(2)** permits counterclaim **to join someone other than P if necessary to bring claim** against P & other.
- **R3-4(3)** deals with the **identification of the parties** in a counterclaim
  - original P is still called a P, extra Ds added by D are also called Ds.
- **R3-4(4)** provides a counterclaim **must be filed and served on all parties of record**
  - If the counterclaim is brought against someone other than P, D must personally serve the counterclaim and a copy of the filed NOCC.
- Rules **3-4(5) & (6)** — response to counterclaim is governed by the same Rules as responding to a NOCC.
- Rules **3-4(7)** a **counterclaim can continue even if P's claim is stayed**, discontinued or dismissed.
- **S. 22** of the **Limitation Act** allows counterclaims to continue even if they would otherwise be out of time, if the main action was delayed because of discoverability

Multiple Claims and Parties

- Rule **22-5(1)** provides that P can **join several claims in the same proceeding**.
- Rule **22-5(2) P can name two or more Ds in a single lawsuit** as long as:
  - there's a common question of law or fact;
  - there's common relief sought arising out of the same transaction; or
  - the court grants leave to do so.
- Rule **22-5(6)** a party can apply to **separate the trials** or hearings if joining **unduly complicates things**.
- Rule **22-5(7)** a **counterclaim or third party proceeding can be ordered to be tried separately**.
- Rule **22-5(8)** 2 separate actions can be consolidated into 1, or remain separate but be tried at the same time.

Partnerships as Parties (Rule **20-1**)

- R. **20-1(1):** Partners **can be sued in the name of the firm.**
- R. **20-1(2): Service** may be effected on a partnership by:
  - **(a)** leaving the document with a partner; or **(b)** or at the partnership office with someone who appears to manage/control the business
- R. **20-1(3):** A **response** to a pleading must be filed on behalf of the partnership, but individual partners may file their own response and defend in their own name.
- R.**20-1(4):** a party can require affidavit setting out the names & addresses of the partners at the relevant time
- R. **20-1(7):** An order made against a partnership **can be enforced against anyone** who:
  - **(a)** responded individually; **(b)** was served as a partner, but did not respond; **(c)** has admitted to being a partner; or **(d)** has been ruled to be a partner.

Parties Under a Disability (Rule **20-2**)

- R. **20-2(2):** Any person under a disability (including an infant) must commence or defend proceedings through a litigation guardian.
- R. **20-2(4):** a litigation guardian MUST act through a lawyer, except for the Public Trustee
- R. **20-2(10):** If a party **becomes incompetent** during litigation, the court MUST appoint a litigation guardian.

- R. **20-2(11):** The **court can remove or change a litigation guardian**.
- R. **20-2(12):** On attaining age of majority, a party may take over the matter if there is no other legal disability.
- R. **20-2(14):** A party **cannot seek to take a default judgment** against a person under disability without leave.
- R. **20-2(17):** The **court must approve settlements on behalf of a person under disability**

Challenging Jurisdiction (R. 21-8) — NOT EXAMINABLE; IMPORTANT WHEN IN PRACTICE

- R. **21-8(1)** permits a party to **dispute jurisdiction** by filing a "jurisdictional response" form.
- R. **21-8(2)**—a party can **apply for the court to decline jurisdiction** after filing the jurisdictional response form
- R. **21-8(3)** — a party can challenge service after filing the jurisdictional response form.
- R. **21-8(5)** — if a party brings an application or files a pleading that challenges jurisdiction within 30 days of filing the jurisdictional response, the party does not attorn (transfer) to the jurisdiction of the court
  - IOW, **if you file a jurisdictional challenge within 30 days, the party may then defend the case on its merits without attorning, pending a determination of the disputed jurisdiction.**
  - any step taken other than filing a jurisdiction response form prior to disputing jurisdiction may result in attornment to the jurisdiction of the court & loss of the ability to claim lack of jurisdiction.
  - If in doubt, file response form & dispute jurisdiction before doing anything else in the proceeding.

Default Judgments/DJ (R. 3-8)

- Ethical issues—>**Professional requirements: 7.2-1** of the Code of Professional Conduct: If another lawyer has been consulted on a matter, must not proceed by default in the matter without inquiry & reasonable notice.
- **3-8(1): applies if** P (or party making a claim) has filed & served a NOCC & D **has not responded in time**
- **The requirements for a default judgment under Rule 3-8(1) and (2) are:**
  - The **time to file a response has passed** & D has not done so **3-8(1) (a & b)**;
  - **Proof of service** of the claim is on D **3-8(2)(a)**;
  - **Proof of failure** to deliver a response (e.g., affidavit) **3-8(2)(b)**;
  - Requisition from the **registrar that no response has been filed 3-8(2)(c)**.
  - A draft default judgment order in Form 8: **3-8(2)(d)**
- Once a default judgment is obtained, if the claim is for a specific ascertainable amount, P may take judgment for that amount —> **3-8(3)**
  - If claim is for damages yet to be assessed, P may take judgment & have damages assessed by trial [R. **3-8(12)**] or by summary application [R. **3-8(13)**]
- The court may set aside or vary any DJ —> Rule **3-8(11)**

***Director of Civil Forfeiture v Doe* 1 (2010) BCSC — test to set aside default judgment — 3-8(11)**

Facts: P obtained DJ, which included a term that Ds could apply for the DJ to be set aside w/in 42 days of service; Ds wanted to file defence; P argued Ds didn't bring necessary application to set aside DJ within permitted time.
Issue: did Ds apply "to set aside" the DJ as required?
Ratio: Test for setting aside Default Judgment (Court adopts the ***Miracle Feeds*** test)

1. Did D wilfully fail to file a response to the claim?
2. Was the application to set aside the DJ filed as soon as reasonably possible?
3. Is there a meritorious defence?
4. Are the factors established through affidavit evidence?

NOTE: Failure to address one factor in the test does not necessarily mean application to set DJ aside will fail; also, the listed factors are non-exhaustive (tension with ***Doe 2***).
Holding: while D did not *technically* bring application, the intent to do so is clear & failure to apply was a mere deficiency; THEREFORE, Court allowed extension of time to apply to set aside DJ on basis of **R. 1(3)**, which ensures that proceedings are determined on their merits: "A modest extension of the time period… will further this end".

***Director of Civil Forfeiture v Doe* 2 (2010) BCSC — test to set aside default judgments — 3-8(11)**

F: same facts as ***Doe 1***, BUT different **issue**: whether to set DJ aside.

Holding: DJ NOT set aside; **Analysis**: D's ONLY satisfied the 2nd ***Miracle Feeds*** factor:

- Ds did NOT provide evidence explaining failure to file an appearance or statement of defence was not wilful or deliberate (**1st factor**)-->FATAL to Ds application.
- Ds did NOT demonstrate a meritorious defence/ case was worthy of investigation (**3rd factor**)
  - Ds mistakenly argued that P did NOT satisfy BOP— P does NOT need to prove anything as P already has lawful judgment; BOP is on D to present evidence if there is a trial, P would NOT be successful.
- Ds did not file admissible evidence (**4th factor**).
  - lacking in specificity and detail; & the quality of the affidavits themselves was inadequate

Ratio: Where D does NOT provide evidence explaining why no response was filed, the Court assumes service of the claim was deliberately disregarded, thus denies application to set aside DJ

- Above failure (1st factor) alone is FATAL to the application (holding is in tension with ***Doe 1***).

Combined analysis of *Doe 1* & *Doe 2*

Test: *Doe 1* (adopts test from *Miracle Feeds*)

- Did D wilfully fail to file a response to the claim?
  - In the absence of an explanation, will assume failure was deliberate: *Doe 2*
- Was the application to set aside DJ brought as soon as reasonably possible?
  - Technical failure to apply to set aside NOT fatal if intent to do so is clear: *Doe 1*
- Is there a meritorious defence?
  - Cannot be satisfied by relying on P's burden of proof. Must have some evidence of a defence: *Doe 2*
- Are each of these factors established through ADMISSIBLE affidavit evidence?

IMPORTANT:

- the listed factors are not exhaustive: *Doe 1*.
- Failure to address 1 factor in the test does not necessarily doom the application to set aside a default: *Doe 1*.
  - HOWEVER, as per Doe 2, wilful failure to file a response is fatal to application.

Amending Pleadings Rules (6-1 & 6-2)

- Two main rules: R. 6-1 and R. 6-2.
  - **6-1** is a general amendment rule: allows to amend pleadings EXCEPT adding a party
  - **6-2** allows for a change in the parties to an action.
- **6-1(1):** Permits a party to amend in whole or in part
  (a) Once without leave before: service of a Notice of Trial or a case planning conference
  (b) Any other time with: leave of the court or consent of all parties
- **6-1(2) and (3)** set out the technical process for how you make and identify amendments
  - **6-1(2): must indicate on the amended pleading the date the original version was filed**
  - **6-1(3):** any **deleted wording must be shown as struck out** and any **new wording must be underlined**
- **6-1(4): service: parties of record - within 7 days via ordinary service** // amended originating pleading must be served promptly by **personal service on parties who received original but have not yet filed a response**
- **6-1(5-7): response to amended pleadings -**
  - **(5)** after service of amended pleading, party can amend response, but only respecting matters amended in primary pleading — serve within 14 days //
  - **(6)** if there's no amended response, the original response is deemed to be the amended response
  - **(7)**if amendment is served on a new party, same timeline to respond as an original pleading
- **6-1(8): amendments of pleadings in the course of trial:** if an amendment is granted during a trial, you do not need an order and the amended pleading does not need to be filed or served.

***TJA v RKM* (2011) BCSC — (6-1) test for allowing an amendment to pleadings**

Facts: P brought defamation claim. D sought to have the claim struck out BUT failed. D then applied to amend Response to include the defences of truth, qualified and absolute privilege.

Holding: amendments allowed; **Analysis/Ratio:** test for allowing amendments (reference to PRIOR RULES)

- amendments allowed unless prejudice can be shown by the opposite party OR amendment will be useless.
- amendment will only be disallowed as "useless" in the clearest of cases where it is plain & obvious that the pleading will fail (i.e., pleading that discloses no reasonable claim or defence)
- liberal amendments allowed to ensure real issues are determined in litigation (i.e. decision on the merits).

R. 6-2: Change of Parties – Requires Leave

- **6-2(1)–(5):** deals with changes of parties in an action arising from changed circumstances – death **(1 & 2)** or bankruptcy **(1)**, transfer of interest to another party **(3 & 4).**
- **(7):** the most commonly invoked — deals with removing, adding or substituting parties - provides that at any stage of the proceeding an application can be brought ordering that a person:
    - **(a) cease to be a party**;
    - **(b)** be **substituted/added** where **(i)** that person should have been a party all along; or **(ii)** it is necessary to have the matter properly adjudicated;
    - **(c)** be added **where there is a question relating to that person as to the relief claimed/subject matter of the proceeding** if it would be **just & convenient** between the person & that party.

***Bedoret v Badham* (2012) BCSC— Amending or adding a party after limitation period (6-2(7)(c))**

Facts: P received advice from ICBC to file his claim against MV owner, instead of ICBC, which P did; after LP expired, MV owner denied any involvement; P sought to add ICBC as a party, but ICBC did not consent.

- **6-2** applications are generally contested upon LP expiry since P can simply start a new NOCC against a new D

Ratio: Factors to be considered in an application to add a party

- Extent of the delay in bringing the party into the action;
- The reason for and explanation of the delay;
- Degree of prejudice *caused* by delay — to all parties
- Extent of the connection b/w the existing claims and the proposed new cause of action.

Analysis: delay was modest (caused by ICBC), some reasonable delay caused by P having to investigate, prejudice to P would be significant, and existing claim and proposed cause of action directly related

Holding: ICBC was added as a party & the claim against the owner of the car was discontinued.

Adding a party – when you can't initially figure out who to name:

***Broom v The Royal Centre* (2005) BCSC —(6-1 vs. 6-2) Substitution of party OR amendment of a misnomer?**

Facts: P slipped & fell in mall; P's counsel couldn't determine party responsible before LP expiry, thus named 'john doe' & described them as party responsible for maintenance of the rug P tripped on

Issue: Was changing 'John Doe' to 'Maintenance Co' an amendment (**6-1**) or a substitution of party (**6-2**)?

Holding: if a party is sufficiently described in initial pleadings such that a reasonable person would know the pleadings applied to them, then the change is considered an amendment for misnomer, thus no leave required.

- IOW, the Court distinguished 'misnomer' (6-1) from change of party (6-2)
    - **Misnomer** occurs where someone deliberately mis-names a party, but describes the party in sufficient detail to indicate who the true party.
    - If you do NOT name or describe party in sufficient detail, substitution under **6-2** is required

4. October 2, 2017 – Lecture 4 - Class Actions, Third Party Proceedings and Case Planning

Class actions were introduced in BC by legislation, the ***Class Proceedings Act***

- The legislation allowed for an action to be brought on behalf of numerous Ps

- The legislation facilitates bringing small, but numerous related claims in one action.
- Anyone can commence a class proceeding, but having done so, you need an order certifying the action as a class proceeding (i.e., certification is a threshold question —>gatekeeper function of the courts)

Section 4**: class certification:** sets out the factors that must be satisfied for the court to certify:
- There is a cause of action;
- There is an identifiable class; - *have to be able to describe the group of Ps to be represented*
- There are **common issues** among the class members; *proceeding will resolve an issue that is common to all Ps – damages will often vary though*
- **s 4(2):** a class proceeding is better for the fair & efficient resolution of the common issues. Factors include:
    - common questions predominate over the individual questions —> favours class action
    - significant # of class members wish to individually control own actions —>favours individual actions
    - class proceedings involve claims that are subject of other proceedings—>favours individual actions
    - Are the other means of resolving the claims less practical or efficient; AND
    - Whether the class proceeding would create greater difficulties than there otherwise would be.
- There is a representative P who:
    - i. can fairly and adequately represent the interests of the class;
    - ii. has a workable plan for the proceeding; and
    - iii. is not in a conflict of interest.

***Tiemstra v ICBC* (1997) BCCA—certification criteria; efficiency threshold NOT met**

Facts: ICBC implemented policy to automatically reject certain claims. P brought class action arguing policy led to claims of around $500 which were not worthwhile for a single P to pursue. TJ rejected certification, P appealed.

Ratio: (i) is there a common issue? (ii) If yes is a class proceeding the most efficient means of dealing with issue?
- Certification as class action should resolve significant feature of the litigation

Analysis: the common question was whether ICBC could arbitrarily reject the claims, or should have considered each case on its merits —> here, the best case scenario for Ps was a declaration that their individual cases ought to have been considered by ICBC —>if YES, then, each class member would need to have an assessment of the merits
- but even if it was found that ICBC shouldn't have arbitrarily rejected those claims, each P would still have to individually pursue reassessment from ICBC, thus not efficient.

Result: Class proceeding not most efficient in this case

***Rumley v. British Columbia* (1999) BCCA — applying certification criteria vis-à-vis LP**

Facts: students abused over a lengthy period of time. Ps brought a class action on behalf of abused students & "secondary abuse victims" (i.e., people abused by abused students). Certification was denied, Ps appealed

Analysis: In relation to abused students, court considered….
1. Whether there was a common issue – Yes, negligence by school to prevent sexual abuse
2. Whether a class action was the most efficient and practical means of resolving the issues – Yes, in relation to sexual abuse claims, but not in relation to non-sexual abuse claims (LP exemption as per **page 3**)

Results: The common issue related to the sexual abuse claims was permitted to proceed (i.e., court certified a narrower class that shared a common issue —>students who attended school & suffered sexual abuse).
- Claims by secondary victims were barred by 2yr limitation period; also raised issues of proximity & foreseeability which were individual questions, not common. No certification.

Third Party Proceedings (governed by R 3-5)

What? 3rd party proceedings allow a party other than P to assert a claim against someone for that person's liability
- a 3rd party claim can be independent or dependent upon the cause of action between P & D, but there must be some connection to the underlying action

  - **Independent** – "I did it, but only because it was his/her fault"
  - **Dependent** – "it wasn't me, it was somebody else"
- **Summary**: If claiming somebody else caused the damage = 3rd party proceedings; if claiming P was partly responsible = contributory negligence defence

Why? — Purpose of 3rd party claims:

- avoid multiplicity of actions about the same subject matter (avoids inconsistent findings & limits inefficiency)
- Allows a third party to participate in defence of the underlying matter (e.g., if one D is judgment proof and doesn't actually raise valid defences, then the third party can advance them).
- Ensures issues are decided in proximity temporally so no party has the advantage of early judgment

3-5(1) and (2): permit a party, who is not a P to file a 3rd party notice against any party, whether or not they are already a party to the action

R. 3-5(1) (a) to (c): GROUNDS FOR BRINGING A 3RD PARTY CLAIM

A. Where the **party is entitled to a contribution or indemnity from the third party** in respect of the claim made in the action (e.g., an insurance company)
B. The party is entitled to relief against the third party **relating to or connected with the** original subject matter of the action (e.g., a maintenance company)
C. A question or issue relating to or connected with the relief claimed in the action or the subject matter is **substantially the same as the question or issue** between the party and third party and should be determined in the action (almost a mini class action)

3-5(3) notice: must file a third party notice in Form 5

3-5(4) provides **the timing**, a party may file a third party notice:

- a) at **any time with leave**
- b)without leave if filed **within 42 days after being served with a NOCC** or counterclaim

3-5(7) governs **service** of the third party notice; you must:

- serve on the third party **within 60 days of the third party notice being filed**:
  - the third party notice itself; AND
  - If they were not previously a party, all other pleadings delivered by any party.
- promptly serve on all other parties a copy of the third party notice (after you serve it on the 3rd party).

3-5(8) authorizes the court to set aside a third party notice.

3-5(9): 3rd party required to **respond** just as D would (Form 6+as per 3-7 + service) **unless 3-5(10)** applies

- claim is solely for contribution/indemnity under Negligence Act AND third party has already filed response to P's claim AND third party intends to rely on fact set out in that response, and no other facts

***Laidar Holdings Ltd. v Lindt…* (2012) BCCA — 3-5(8) — Criteria for allowing/striking 3rd party claims**

Facts: P leased property to D (to sell & distribute chocolate). D refused to take over lease after realizing zoning did not permit such use. P sued for rent. D counterclaimed for breach & misrep & also initiated 3rd party claim against leasing agents. D's leasing agent brought "4th" party claim against D's lawyers (Blakes) for failing in duty towards D

- Court refers to "4th party claim" for the sake of clarity, but there is really no such thing as 4th party claim. All claims brought via third party notice are third party claims.

Issue: whether 4th (actually 3rd) party claim could be brought against Blakes

Law/Analysis: ***Adams***--> 3rd party claim is barred if claim can effectively be raised as a defence against P's claim:

1) claim against 3rd party is legally attributable to P because of agency relationship
   - to get around the agency issue & claim against 3rd party, argue ***McNaughton v Baker***—>3rd party claim may be permitted where D can show that 3rd party owed them a separate duty not owed to P.
2) claim against 3rd party is for failing to assist P in mitigating damages —>mitigation is always P's responsibility.
   - Where the claim against a 3rd party may not be the responsibility of P, the claim will be permitted to stand.
   - if P is responsible for own loss, no claim for contribution or indemnity only reduction in damages (***Adams***)

Holding: upheld TJ's decision disallowing "4th party claim" against Blakes. Leasing agent hadn't argued that Blakes owed them a separate duty. Since Blakes were agents of D, under the principles in ***Adams***, any failure by them was attributable to D; such failure could be addressed as a defence to the claim itself.

***Steveston Inc v Bahi* (2013) BCSC — 3-5(8)— successful application 3rd party claim (separate duty under *Laidar*)**

Facts: P claimed bookkeeper defrauded it $860k. P claimed against D (accountants) for failing to discover. D initiated 3rd party claims against bookkeeper & directors of P, arguing they owed D separate duties. 3rd parties argued that Ds claim arose out of D's capacity acting for P (agency), thus should be raised as a defence, not a 3rd party claim.

Analysis: Test for granting leave to bring the third party claim is analogous to **R. 9-5**

- 3rd parties must establish that the 3rd party notice discloses no cause of action & is bound to fail.
- Facts pleaded are assumed to be true.

Holding: 3rd party notice was allowed to proceed because it was pleaded that the proposed 3rd parties owed a duty directly to D & they breached that duty by making misrepresentations.

- IOW, 3rd party had breached a separate duty by making misrepresentations to D in the action.

Contribution and Indemnity

- ***Negligence Act* s. 4** —> where loss is caused by two or more persons, the degree of fault is to be allocated.
- Where 2 or more are found at fault, they are deemed jointly & severally liable to P for the **full amount**.
  - refer to **page 48** for a more detailed analysis of apportionment under **costs.**
- Each wrongdoer can seek indemnification from the others in accordance with the apportioned liability.
  - IOW, a wrongdoer may have to pay the whole amount to P, regardless of their degree of fault, and then seek indemnity from the other wrongdoers.
- **R 21-9(1): indemnity** under the *Negligence Act* is **brought by 3rd party notice,** except as against a P
  - **against P, you bring a counterclaim.**
- **R 21-9(2): if a party wishes to claim contributory negligence against P,** D includes in the response to NOCC a defence based on a claim of contributory negligence.

Tucker v Asleson* (1993) BCCA — allocation of liability under the *Negligence Act

Facts: Liability for MVA was apportioned 1/3 to mother (driving), 1/3 to Crown for failure to sand road, & 1/3 to 2nd driver. Mother's insurer settled. On appeal 2nd driver's liability overturned & Crown was held 2/3 at fault.

- Crown argument: Ps settlement with mother/insurer severed the joint & several liability

Analysis/Ratio: distinction b/w joint and concurrent tortfeasors

- Joint tortfeasors act in concert with common purpose — one is the principal & the other vicariously liable — and have joint duty imposed on them (e.g., ER) —> **release of one releases all of them.**
- Concurrent tortfeasors are those that act separately but whose torts together contribute to the damage caused —> **release of one does not release the others; they may seek indemnity from others**

Holding: the Crown is a concurrent tortfeasor, thus still liable to P

***BC Ferry Corporation v T&N* (1993) BCSC — D has no right to recover from a 3rd party in a waiver settlement**

Facts: during settlement, P expressly released 3rd party from liability in a settlement (i.e., waived any amount from D attributable to the 3rd party); 3rd party sought to have D's 3rd party notice struck

- normally, a 3rd party is NOT automatically excluded from its share of fault, thus D could seek contribution & indemnity for 3rd party's fault.

Issue: can D recover from 3rd party in light of the settlement? **NO**

Analysis/holding: if P ONLY claims portion of loss attributable to D, D has no right of contribution from anyone else

- IOW, D cannot subsequently claim from 3rd party as a concurrent tortfeasor

Case Planning and Case Management (R 5-1 to 5-4**)**

Why? — PURPOSE: ***Parti:*** to have a full and candid discussion of a number of important aspects of the action

- Expanded case planning **was intended to be a significant aspect of litigation under the new Rules**
- **5-1(1): any party can request CPC** after pleading period expiry—>obtain date/time from Registry & file F. 19
- **5-1(2): COURT ORDERS CPC:** can happen at any stage of an action—>rarely happens
- **5-1(3): NOTICE:** The first case planning conference requires 35 days' notice, and then 7 days thereafter
- **5-1(5&6): CASE PLAN PROPOSAL:** once requested/ordered, each party MUST prepare proposal addressing:
    - document discovery; examinations for discovery; dispute resolution procedures; expert witnesses; witness lists; trial type & estimated trial length and preferred periods for the trial date.
- **5-2(2): ATTENDANCE:** case planning conference must be attended by each lawyer representing a party of record, and any unrepresented parties:
    - Must attend the first conference in person, and thereafter, by phone or videoconference
    - Failure to attend can have costs consequences [**5-3(6)]**
- **5-2(7) - RECORDINGS** - CPC proceedings must be recorded BUT only available by way of court order
- **5-3(1)** - **POWERS OF COURT - COURT HAS BROAD POWERS**: basically anything and everything to do with the case or previous CPC's // but limited by (2)
- **5-3(2)** - **PROHIBITED ORDERS** - judge/master cannot hear any application based on affidavit E - except under (6) // cannot make order for final judgement in action - except by consent
    - court cannot hear any application that requires evidence, or make an order for final judgment except by consent —>Often parties want to go in and have things resolved efficiently in a CPC, but if one of the parties does not consent then it cannot be resolved
- At the end of the CPC, a **MANDATORY CASE PLAN ORDER** is issued — **5-3(3)**
- **5-3(6)** - **NON-COMPLIANCE** - if party fails to comply with CPC order or the Rules --> court can make order under 22-7 (set aside proceedings, allow amendment, strike response, etc) or make order for COSTS

***Parti v Pokorny* (2011) BCSC — 5(2)(7) & Purpose of CPC**

Facts: D (in reality, ICBC) applied for CPC transcript for training purposes, not litigation-related purposes.

Issue: should D get transcript? **NO**

Analysis: there should be a good reason for transcripts of CPC to be issued, otherwise it may have a chilling effect on CPCs, which are supposed to be an opportunity for an open discussion.

- Purpose of CPC is to have a full and candid discussion of important aspects of an action.
- Court wary of unguarded comments at CPCs being used against parties; also, some privilege attaches to settlement negotiation.
- There should be a 'compelling ground' to order transcripts of CPC

Ratio: production of recordings will only be in exceptional cases & on compelling grounds because CPC's are meant to be candid & foster frank discussion —> may also be protected by settlement negotiation privilege

***Stockbrugger v Bigney* (2011) BCSC — 5-3(1) — POWERS OF COURT**

Issue: can a case plan order be filed without having a CPC? **YES**

Holding: a case plan order can now be filed by consent, which accords with the objectives of the Rules (**R 1-3**)

- IOW, parties may file case plan orders by consent w/out actually having a CPC

5. <u>October 16, 2017 – Lecture 5 - Discovery Procedures #1 (Documents)</u>

Discovery and Inspection of Documents (R 7-1)

- DOCUMENTS [1-1(1)]: has extended meaning & includes: photographs; film; recording of sound; any info of permanent or semi-permanent character; & any information recorded or stored by means of any device.
- **ETHICS OF DOC DISCOVERY**—crucial part of civil litigation b/c almost all matters proceed to discovery, yet not many make it to trial // discovery process rests mainly in the hands of the parties and is <u>self-policing</u>
- Lawyers have additional ethical considerations as <u>officers of the court</u>:

  - must review docs & make enquiries about suspicious disclosure ***Myers* on pg. 17**// look for gaps in the information since **a client cannot be expected to realize the scope of doc disclosure obligations**
  - duty to investigate & ensure proper document disclosure —>***XY* on page 17.**
  - Implied undertaking to keep docs disclosed for litigation confidential ***Hunt on page 20.***
  - **CPC 5.1-2** - lawyers must not knowingly assist/permit client to do anything dishonest/dishonourable

CONSEQUENCES FOR FAILURE TO DISCLOSE — knowingly providing inaccurate discovery can result in court orders:

- **22-7(2)** — set aside any step taken in the proceeding, set aside proceeding in whole or part, or dismiss proceeding or strike out response to CC and pronounce judgment OR
- less drastic consequences under **7-1(21)** — preclude the use of the impugned document as evidence at trial

OLD RULES vs NEW RULES

Peruvian Guano — **old standard** for disclosure was more expansive: required to provide all docs that may be relevant OR could lead to a relevant line of inquiry

- in the **modern era**, characterized by vast expansion in documentation, the result was that cost of document discovery became disproportionate to the litigation

New Rules — incorporates principle of proportionality — restricted documents to be discovered

- ***BG*** --> interesting effect - less documents disclosed, so more efficiency arises - BUT - the inefficiency has simply been shifted to document review!
- **Scope of doc disclosure & XFD is no longer the same:** in XFD, parties may canvass matters of potential relevance, while doc disclosure at Stage 1 is limited to docs which are material ***Kaladjian***
- two tier process for disclosure is meant to foster proportionality & cooperation between counsel ***XY***

Stage 1 Disclosure: documents tailored to pleadings

7-1(1) List of documents: has to be provided **within 35 days of the end of the pleadings stage of the action**

- PAST PRACTICE — all *potentially* relevant documents MUST be listed.
- PRESENT PRACTICE — one must list all documents that:
  - are or have been in the party's possession or control (**7-1(1)(a)(i)**) and
  - could, if available, be used by any party at trial to prove or disprove a material fact (**7-1(1)(a)(i)**)
    - ***Kaladjian:*** pleadings determine what is **material;**

7-1(2): List must include a brief description for each listed document

- ***GWL:*** list must provide a meaningful, reliable & complete disclosure and effective aid to retrieving the docs on inspection (e.g., thru' an ordered enumeration of the docs & some description of all relevant docs)

7-1(3-4): Insurance policies that may be triggered by a judgment MUST be disclosed

- BUT the policy is not to be disclosed to the court unless it is relevant.

7-1(6-7): Privilege must be claimed in the list.

- Must provide sufficient detail to allow the other side to assess the claim; **BUT**
  - ***Leung*** — every privileged doc MUST be listed individually without disclosing any privileged info.

7-1(8): Court can order a party to swear an **affidavit** verifying the list of documents

- ***GWL*** (court ordered affidavit verifying the list)

7-1(9): There is an obligation to **supplement a list** of documents: party must promptly amend list of docs if

- (a) it comes to their attention list is inaccurate or incomplete; **OR**
- (b) party obtains possession or control of new document that satisfies (1)
  - if there is a massive amount of docs, refer to ***GWL*** for enumerated list re: **7-1(1&2)**

***GWL Properties v WR Grace* (1992) BCSC — 7-1 — stage 1; court-ordered enumeration of documents**

Facts: P owned an office tower that had asbestos insulation manufactured/supplied by D; asbestos had to be removed causing loss & damage; D had provided a list with 621 itemized docs & 460 boxes of evidence with no

description of contents; Ps were provided access to boxes but they were very disorganized; in application, fact emerged that there was a 25,000 page "master list" of 12 million docs and a list of 40,000 privileged docs;

- P sought to have D's statement of defence struck out for having misled the court.

Result: D was required to list all relevant docs, and provide an affidavit verifying the list.

- Court ordered the existing list to be produced & with some description—i.e,. **7-1(9) requires that a list provide an ordered enumeration of the docs & some description of all relevant docs.** Grouping is allowed.
- List must provide meaningful/reliable/complete disclosure & effective aid to retrieving docs on inspection

***Myers v Elman* (1940) HL — R. 7-1 — lawyer professional & ethical obligations re: doc disclosure.**

Facts: Client had sworn false affidavit of docs.

Holding: Solicitor found guilty of professional misconduct for allowing the affidavit to be sworn

- client cannot be expected to know the scope of disclosure obligations; counsel has duty to oversee disclosure process & investigate as far as possible to ensure that document disclosure is properly provided.
- Under the new rules, counsel have an ethical obligation to ensure all docs that may prove or disprove a material fact are disclosed at "Stage 1", as well as any further disclosure ordered/agreed to at "Stage 2".

Stage 2 Disclosure: enhanced disclosure

- ***Kaladjian:*** stage 2 is a broader discovery & will generally require **some evidence** in support of the application

7-1(10): A party **can demand disclosure of documents that it says ought to have been included in the list.**

7-1(11): A party can **demand additional documents** provided they are described with sufficient particularity and the reason for their disclosure is given.

- party can make demand for docs that are within other party's possession/control + relate to action + are additional to those provided under (1) or (9)
  - Must describe documents — previously accessible under the old disclosure rules — with reasonable specificity (flexible standard) & give reason why they should be disclosed —> ***XY***
  - IOW, the ***flexible standard*** MUST take into account situations where a requesting party is unaware of & cannot identify relevant documents, particularly in cases of fraud or conspiracy.
- usually requires evidence in support of the application: *Kaladjian*
  - **Why?** To restrict "fishing expeditions" & permit a consideration of proportionality: *Kaladjian*
  - While generally evidence is required as to the existence of additional disclosures, such evidence will not always be available to a party.
  - The court must be wary of fishing expeditions, but also of impeding discovery of documents.

7-1(12): Response to a demand under **R. 7-1(10) or (11)** a party must respond within 35 days and either:

- Comply and make a supplementary list; Comply in part; or Provide an explanation why the documents or some of them are not being disclosed

R. 7-1(13): if the parties are still at odds an application can be brought for the further documents

R. 7-1(15) and (16): Parties must allow inspection and provide copies of listed documents.

***XY LLC v Canadian Topsires..* (2013) BCSC — reasonable specificity in 7-1(11) is a flexible standard**

Facts: P knew D, in a prior action, had failed to produce material docs & some had been deliberately altered; thus, P applied for disclosure of all relevant docs w/o describing them with particularity as required for Stage 2 disclosure.

- P argued that identifying with specificity the required disclosures would allow Ds to destroy or falsify them.

Analysis: discusses diff b/w "materiality" & "relevance" in doc disclosure, & the "two tier" disclosure process.

- The two tier process for disclosure is meant to foster proportionality & cooperation between counsel.
  - The first stage of disclosure is meant to be tailored to the pleading of material facts.
  - The second stage is broader, but discretionary and with pre-conditions.

- The requirement to identify docs w/ "reasonable" specificity is a **flexible standard.** May be difficult to identify in some circumstances (i.e., fraud & conspiracy) as evidence may not be available. XFD may help, but not necessary to do this before doc disclosure. **Duty of counsel to ensure proper doc disclosure is made**.

Holding: In this case, an Anton Piller order had already safeguarded many of the docs that P was worried D would destroy. Any further docs would have to be reviewed by D's solicitors – P could tell D's solicitors what further docs were being sought & count on their duty as counsel to ensure the docs are produced & not destroyed.

Non-party disclosure [7-1(18)]:

7-1(18) permits an **application for documents from a non-party**.

- ***Kaladjian:*** **Test for non-party disclosure:**
  - Documents sought must meet the materiality standard
  - If materiality is established, the court will order production by the non-party, **unless *Dufault* applies:**

  Dufault **exception*:*** doc is privileged OR interest of the non-party may be embarrassed/adversely affected:
  - weigh the probative value of the document against the negative effect on the non-party AND
  - determine whether it is more just to require production or not.

7-1(21): party may **not use a document** if they fail to make discovery of or produce it for inspection

- Failure to disclose can also trigger consequences under **R. 22-7 – effect of non-compliance (page 16)**

Kaladjian v Jose **(2012) BCSC — 7-1(18)— test for non-party disclosure**

Facts: MVA Issue; D accepted liability, only issue was damages & extent of P's prior injuries; P provided medical records in evidence, but D wanted her MSP claim history; P refused since it would not prove/disprove a material fact; D instead sought non-party disclosure from province MSP;

- Master's decision: rejected MSP disclosure b/c P had already provided medical records and there was no indication that she saw any other doctors; privacy is important.
- Appeal: D argued that the threshold for non-party disclosure should be the old relevance standard, NOT the materiality standard [**7-1(1)**].

Holding: the document disclosure regime had changed (i.e., Stage 1 & Stage 2); the purpose of the two-stage process is to give effect to the objectives of the Rules, particularly by applying the concept of proportionality.

Test for non-party disclosure under 7-1(18)

- Stage 1 Disclosure [**7-1(1)**] requires material fact; broader disclosure [**7-1(11)-(14)**] requires Stage 2
- To obtain broader "relevance" disclosure under **7-1(11) or 7-1(18)**, party must provide some evidence in showing why docs are necessary to the litigation
  - Such evidence will restrict "fishing expeditions" & permit a consideration of proportionality.

Dufault v Stevens… **(1978) BCCA — 7-1(18)— exceptions to non-party disclosure (privilege & adverse effect)**

Facts: P sought records from hospital & MSP relating to her own medical records; D did not oppose P's application but wanted the same disclosure contemporaneously; during trial, chambers judged refused to order that D was entitled to non-party disclosure of documents that P was granted the right to receive

Analysis: in seeking non-party disclosure, the applying party has to show why the requested disclosure is material.

- if this standard is met, the court may order production unless privileged or if interests of the non-party may be embarrassed or adversely effected.
- In order to determine whether court should refuse production b/c of non-party's interest, court MUST
  - (a) weigh the probative value of the doc against the negative effect on the non-party, AND
  - (b) determine whether it is more just to require production or not.

Holding: D should have production of the docs as there was no claim that the hospital may be embarrassed by production. The only potential embarrassment was P's & that's not an appropriate basis for refusing production

PRIVILEGE: principal exception to disclosure

(1) SOLICITOR-CLIENT PRIVILEGE (***Keefer***)

- **Presumption** that the solicitor provided the fullest description of the privileged docs as possible (***Leung***)

***Keefer Laundry v Pellerin* (2006) BCSC — canvases the various forms of privilege**

Analysis: party asserting privilege bears onus of establishing privilege by filing affidavit evidence in support of claim.

- **Solicitor-client privilege:** while litigation needs NOT be contemplated, NOT every communication is privileged. **Test: (1)** *Is it a communication b/w lawyer & client?*
    - **(2)** *Does the communication entail giving/seeking legal advice?*
    - **(3)** *Is the communication intended to be confidential?*
- **litigation privilege:** Litigation privilege is distinct from solicitor-client privilege & is narrower in scope
    - **Purpose:** applies to comm & docs btw clients & 3rd parties where dominant purpose is litigation.
        - docs need NOT be confidential
    - **Test:** (i) must show litigation was ongoing or reasonably contemplated when doc was created; & (ii) the dominant purpose of the doc was litigation, based on an examination of all of the circumstances and the evidence filed in support of the claim of privilege.
- **Solicitor's brief privilege**:
    - **Purpose:** relates to lawyer's strategy and preparation for litigation.
    - **Test:** Privileged if lawyer was exercising professional skill and judgement in assembling the docs

(2) LITIGATION PRIVILEGE (***Shaughnessy***)

- **Purpose** (***Keefer***)**:** Applies to comm & docs b/w clients & 3rd parties, dominant purpose of which is *litigation*
- **Test** (***Keefer***)**:** Must show that:
    - **(1)** Litigation was ongoing or reasonably contemplated when the doc was created
    - **(2)** The dominant purpose of the doc was litigation, based on an examination of all circumstances & evidence filed in support of the claim of litigation priv (***Shaughnessy Golf***)
- **Use of docs outside litigation:** Argue either ***Kyoquot*** or ***Hunt* —>**
    - ***Kyuquot***—decision permitted P to make any use of docs it wished; ***Hunt*** reversed ***Kyoquot***—>there's an implied undertaking of confidentiality re: docs disclosed in litigation

***Shaughnessy GCC v Uniguard Services* (1986) BCCA — litigation privilege**

Facts: fire burned down golf course clubhouse after D's security guard had a party; insurers had conduct of litigation,

- P claimed litigation privilege over adjuster reports
- D applied for an order to disclosure the reports, arguing the reports had not been created for litigation as their dominant purpose (i.e., reports had been prepared in the ordinary course of business)

Analysis: litigation privilege attaches to docs created for dominant purpose of litigation

Holding: some reports were not created with the dominant purpose of litigation; privilege did not apply to those

- the existence of suspicious circumstances is not enough to cover all reports with litigation privilege.
- requires an examination of the true purpose of each individual report.

(3) SOLICITOR BRIEF PRIVILEGE (***Hodgkinson***); **also in *Delgamuukw* (pg. 45)**

- solicitors can prepare to advise/conduct proceedings with complete confidence that any protected info/material they gather from clients & others for this purpose & any advice they give won't be disclosed to anyone w/o client's consent (***Hodgkinson***)
- **Purpose** (***Keefer***)**:** To prevent a party from seeing the other side's strategy; allows lawyer to make full investigation & properly prepare for litigation
- **Test:** Whether lawyer has exercised professional skill & judgment in assembling docs (***Hodgkinson; Keefer***)

***Hodgkinson v. Simms*, (1988) BCCA — solicitor's brief privilege**

Facts: after substantial research, P's solicitor obtained copies of doc; D became aware & sought disclosure of the doc

- P's argument: D could obtain the doc themselves if they wanted; getting it from P would reveal their strategy.
- D's argument: original doc wasn't privileged so P's copy shouldn't be.

Analysis/majority holding: Full disclosure is important, preserves goals to prevent ambush & foster settlement; there's no concern of ambush here where Ds could just as easily make inquiries & obtain the impugned documents

- **Test for solicitor brief privilege**: whether the doc or communication was brought into existence with the dominant purpose to obtain legal advice or aid in the conduct of the litigation
- Where a lawyer exercises legal knowledge, skill, judgment and industry to assemble a collection of relevant docs for litigation, privilege will attach; held to be the case even though the originals are not privileged.
  - IOW, the privilege arises from the selection process.

Dissent: **1-3(1)** requires matters to be determined on their merits: only with full disclosure & limited privilege claims can this goal be fulfilled; also, if the original documents are not privileged, the copies ought not to be.

- concludes that D may indeed be taken by surprise.

***Leung v Hanna* (1999) BCSC — 7-1(7) — listing privileged documents**

F: Privileged doc list included 8 of 10 docs described as having been initialled by the handling solicitor (i.e., listed as "privileged document 1, 2, 3"); **Issue:** P applied for more information; **Holding:** P's application dismissed;
Analysis: descriptions in the list do not assist P, but overriding requirement is not to reveal privileged information.

- Each privileged doc must be listed separately.
- **R 7-1(7)** limits the **description** required to **that information which would not reveal privileged info** (e.g., providing the dates documents were made may disclose privileged information).
- If party thinks privilege has been improperly claimed, can apply under **7-1 (20)** for court to review the doc
  - **Court MUST err on side of maintaining privilege (rather than aid P)**

***Hunt v T&N* (1995) BCCA — implied undertaking of confidentiality over litigation docs (reverses *Kyuquot*)**

F: asbestos litigation. P wanted to provide D's documents to parties in the US for use in a parallel litigation. D would not provide docs w/out condition that they would not be shared for litigation outside BC

- TJ held for P, bound by the majority decision in ***Kyuquot* (1986) BCCA**, where the Court held that a party seeking the production of docs could use the docs for purposes other than the originating proceedings.

Analysis: the majority relied on the dissenting decision in ***Kyuquot***, which held that if a party wishes to use litigation docs in other proceedings, the party MUST first obtain (a) owner's permission OR (b) leave of court

  - ('use in the proceedings' includes showing doc to witnesses, experts)

Holding: there's an implied undertaking of confidentiality re: docs disclosed in course of litigation; **Why?—**a blanket confidentiality rule encourages broader disclosure by lessening risk of misuse or collateral use of documents.

6. October 23, 2017 – Lecture 6 - Discovery Procedures #2 (Other procedures for ascertaining facts)

Beyond document discovery (**R. 7-1**), the rules provide for a variety of procedures for ascertaining facts:

- XFD (**R. 7-2**); Interrogatories (**R. 7-3**); Pre-trial examinations of W (**R. 7-5**); Physical Examinations (**R. 7-6**); Admissions (**R. 7-7**); Depositions (**R. 7-8**)

In each case, you should ask which discovery mode will ensure the most "just, speedy and inexpensive determination of the case on its merits", having regard to considerations of proportionality —> ***Roitman***

Examination for Discovery (R. 7-2) —>Form 20

- **What?** Oral examination **under oath** of a party by **another party adverse in interest [R. 7-2(1) & 7-2(4)]**
- **How is XFD conducted?** By cross-examination **[R. 7-2(17)]**

    - Adversity of interest may arise at any point in the proceedings & is not only defined by the pleadings (includes an adverse pecuniary interest or other substantial legal interest even if the parties are on the same side of the record)
- **When?** Anytime after the pleadings close, usually after docs are exchanged; usually P examines D 1st
    - need to certify that discovery is complete to file a trial certificate
- **Scope of XFD?** Unless the court orders otherwise, a person being examined for discovery must answer any question within his or her knowledge/means of knowledge regarding any nonprivileged matter relating to a matter in question in the action (**R. 7-2(18)**)
    - The examinee is compellable to give names & addresses of persons who reasonably might be expected to also have knowledge relating to any matter in question [**R. 7-2(18)(b)**]
- **What if witness is unable to answer certain questions?**
    - examinee has a duty to inform oneself & provide answers, usually in writing by letter: **R. 7-2(22)-(24)**
    - answers provided after XFD are deemed to be answers provided under oath in the XFD [**R. 7-2(23)**]

<u>The role of XFD in the context of the litigation:</u>

- To **understand** the other side's case, in order to know the case to meet (**discover** facts, strengths & weaknesses) —>Leave requests for further documents
- To **tie down or commit** the other side & thereby avoid surprises at trial; result = eliminate or narrow issues
- To assess the effectiveness & believability of your own client & the other side – are they good witnesses?
- To obtain **admissions** of fact which can be used as evidence at trial
- To facilitate settlement

<u>Applying for more time</u> (*Kendall*)

On an application for additional time for XFD, the court must consider the considerations in **R. 7-2(3):**

- Conduct of the party being examined (i.e., evasive, uncooperative, unduly lengthy responses)
- Refusal to admit matters that should have been admitted
- Conduct of examining party (i.e., wasting time)
- Whether it was practical to complete the discovery in the time
- The number of parties and examinations and the various interests of those parties

***Kendall v Sun Life…* (2010) BCSC — R. 7-2(3) — application for additional time for XFD/ scope of XFD**

Facts: D's lawyer objected to so many questions at XFD that P's lawyer walked out. P applied for more time for XFD.

Analysis: Scope of XFD is very <u>broad</u>; it's defined by the pleadings which may be amended. It's a cross-examination so Counsel must not <u>unduly interfere or interrupt examination</u>

- only in rare circumstances would the court allow continuation of XFD when a party discontinues XFD unilaterally; HOWEVER, the court was sympathetic to P, since D's lawyer had been so obstructive & disruptive at initial discovery, & implied that client didn't have to answer q's.

Holding: Counsel shouldn't object unless Q is clearly not relevant, necessary to resolve ambiguity in Q or prevent injustice; D counsel's conduct defeated the purpose of the XFD & ordered a fresh start for P (7hrs)

***First Majestic Silver Corp v Davila* (2011) BCSC — R. 7-2 — sharing XFD time re: multiple litigants**

Facts: P, who was added to proceedings after pleadings, was denied XFD of D. All Ps had same lawyer

Court: Multiple Ps or Ds do NOT have multiple rights of discovery where they share a common interest. Such parties should be able to cooperate & share XFD time.

<u>Examining a party that is not an individual (corporation, partnership, society etc)</u>

- Party being examined nominates its <u>most knowledgeable</u> representative (R. **7-2(5)(b))**

- Entitled to examine **one** representative as of right (R. **7-2(5)(a)); BUT** subject to ***Westcoast*—>**can apply to examine a subsequent representative.
- Party being examined nominates its most knowledgeable representative **[R. 7-2(5)(b)]**
- Examining party has the final choice among current & former directors, officers, EEs, agents or external auditors (**R. 7-2(5)(c)); BUT** subject to ***Rainbow***—> D can ask for an order (exceptional) to substitute representative.

***Westcoast* (1984) BCSC —R. 7-2(5)(a) — XFD against a corporation; criteria to examine subsequent representative**

Facts: after two discoveries, P still didn't have enough info. P wanted to examine another rep of the company.

- **P's position:** D's 1st rep was not sufficiently knowledgeable; no opportunity for "real cross-examination"; answers based on hearsay where P should be entitled to admissions; generally the XFD was unsatisfactory
- **D's position:** P had already examined two of D's officers and **(i)** no questions were left unanswered; **(ii)** hearsay may constitute admissions

Analysis: disallowed further XFD because P knew all the players & should've known the examinee nominated by D was not the most knowledgeable.

Ratio: The relevant question is whether adequate or satisfactory discovery has been or can be obtained from the representative put forward. The test is **objective**, not subjective; whether there has been a full inquiry of the issues either upon witness's testimony or witness informing himself/herself

- To show XFD is unsatisfactory must demonstrate questions have not been answered or answers given are incomplete, unresponsive or ambiguous
- Cross-examination is not mandatory on XFD – it is a means but not an end. The witness can inform his or herself and that can result in a satisfactory XFD
- Answers based on hearsay may become admissions if W accepts the truth of the information provided

***Rainbow… v CNR* (BCSC) 1986 — R. 7-2(5)(c) — XFD against a corporation; substitution of representative**

Facts: P wanted to XFD jnr EE in organization; D applied to substitute P's choice with a senior EE (to avoid prejudice).

Holding: D's application allowed; while P has the right of choice in the first instance to select the representative of a corporation, a substitution may be required where necessary to achieve justice & fairness.

- an order allowing a substitution is **exceptional**; the serious allegations of fraud against D tipped the scales.

***Fraser River Pile v Can-Dive Ltd* (1992) BCSC — interactions between solicitor & client examinee during XFD**

- if the XFD is to last one day or less, counsel should not have any discussions with the witness, including over lunch or at the recess during the XFD (the same rule as for cross-examination during a trial)
- if XFD is longer than one day, counsel may discuss all issues relating to the case, including evidence, at the conclusion of the day provided counsel has advised the other side of his or her intention to do so in advance
- counsel should not seek an adjournment during the XFD to discuss evidence that was given by the witness. Such discussions should wait until the end of day adjournment or until just before re-examination at the conclusion of the cross-examination
    - above three criteria are now part of Code of Professional Conduct (**5.4-2**)

Interrogatories — Rule 7-3

- **What?** form of written discovery; answers provided by affidavit within 21 days—>7-3(4)
    - ***Roitman:*** court can allow a party to defer its response until other discovery processes have been completed, including XFD
- **Purpose?** to obtain admissions in the form of sworn evidence
- **Use at trial?** to impeach; could seek to rely on the affidavit
- **Scope?** questions must be relevant to a matter in issue in the action, but the scope is narrower than XFD

- **When available?** unlike XFD, interrogatories are NOT available as of right; requires consent or leave of the court, usually they are obtained at the onset of a matter —>7-3(1)
    - typically used to request technical information, especially if the information is in records scattered around a company. Examples include: number of sales in Western Canada for given years; preparation of a chronology as in ***Roitman***; preparation of an exhaustive list
    - On the contrary, questions requiring a narrative answer are more appropriate for XFD
- **7-3(6)** - OBJECTION TO ANSWERING re: privilege or relevance // may state objection within answer
- **7-3(7)**: a person may be required to make further answer by affidavit or oral examination
- **7-3(11)**: CONTINUING OBLIGATION — if person who gave answer later learns that it was inaccurate OR incomplete, the person must promptly provide an affidavit with an accurate/complete answer.

***Roitman v Chan* (1994) BCSC — Rule 7-3 — purpose/principles of interrogatories**
Facts: the information sought was who had provided medical care to Mr. Roitman and what they did
Analysis: the **purpose** of interrogatories is to enable a party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon which XFDs are held.
Principles of interrogatories

- **governing principle** for interrogatories should be practicality. Court should encourage selection of the tool which would achieve the best result for the least effort & cost (proportionality)
- **interrogatories must** be relevant to a matter in issue
- **interrogatories should NOT**: be in the nature of cross-examination; include a demand for discovery of documents; duplicate particulars; be used to obtain names of witnesses
- **interrogatories** are narrower in scope than XFD; their **purpose** is to enable a party delivering them to **obtain admissions of fact** in order to establish case and provide foundation for XFD

Pre-Trial Examination of Witness — Rule 7-5

- **What?** oral examination, under oath, of non-party witness
- **When available? 7-5(1):** needs leave of the court
    - Takes the form of a cross-examination **7-5(8)**
- **PURPOSE?** purely informational; to permit examination of uncooperative witness, not to record evidence or provide admissions; **AT TRIAL** — solely to impeach, **can't be used for read-ins**
- **When available?** by order, where a person has material evidence but has refused or neglected to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question or, has given conflicting evidence
- **LOGISTICS/TIMING**- can ask witness to produce documents, as per **7-5(10)** or subpoena docs **7-5(5)(a)**
    - time for examination must not exceed 3 hours, as per **7-5(9)**
- **Scope** is potentially broader than XFD and may extend to matters of opinion in cases such as ***Sinclair***
- **How?** Application needs to be accompanied by an affidavit setting out **why** you need pre-trial examination.
- **What** you need, as per **7-5(3)** includes ALL of:
    - the evidence of the proposed witness may be material
    - if the witness is an expert, why the applicant is unable to obtain facts and opinions by other means
    - that witness has refused requests to give responsive statements or has given conflicting statements

***Delgamuukw (Muldoe) v BC* (1988) BCSC — Rule 7-5 — pre-trial examination; unresponsive witness**
Facts: D wanted P's expert to be examined under oath—>to obtain facts as prior attempts were unsuccessful
Analysis: P's expert had only answered 29 of the 110 questions, thus an unresponsive witness
Holding: application allowed since D was unable to obtain facts and opinions on the subject matter by other means

***Sinclair v March* (2001) BCSC — Rule 7-5 — pre-trial examination; unresponsive witness (W)**

F: Medical negligence case involving a doctor who didn't want to be an expert witness; P applied to examine doctor
Analysis: In considering request for pretrial examination of W, court acknowledged that W could provide material evidence, but questioned whether W had already provided/neglected to provide a responsive statement
Ratio: Test for pre-trial examination — Rule **7-5** applies where a witness with material evidence refuses or neglects to give a responsive statement or otherwise gives conflicting evidence —>basically same as in **7-3(3)**

- Clear refusal to provide responsive opinionated information is sufficient to open the door to the exercise of discretion under the Rules and to consider whether opinions may be elicited upon pre-trial examination
- Opinions relating to first hand experience of facts would be subject to the rule.

Holding: application allowed; P entitled to know the facts & opinions formed by doctor during his treatment of her

- Condition was doctor would only answer questions that he had answers to (i.e., more research not needed)

Depositions — Rule 7-8

- **What?** oral examinations under oath (direct, cross & reexamination) – usually video recorded;
- **When?** before or during trial
- **Purpose:** to take sworn evidence so that the deposition is available and tendered as evidence at trial
    - use when W may be unable to testify in person at trial; HOWEVER, real time evidence is preferred as it allows court to assess credibility, rule on objections, & assess evidence before examining witness
- **Where available?** by order or by consent, usually with respect to the evidence that is directly material from a material witness **7-8(1)**
- ***Factors for consideration/Grounds for Order* [Rule 7-8(3)]:**
    - convenience of the person sought to be examined
    - possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence
    - possibility that the person will be beyond the jurisdiction of the court at the time of the trial
    - expense of bringing the person to the trial
    - possibility and desirability of having the person testify at trial by video conferencing or other electronic means instead of a deposition —> court usually prefers this option if available (***Campbell***)

***Campbell v McDougall* (2011) BCSC — Rule 7-8(3)— factors to consider re: depositions**
Facts: application by D to have their expert testify by deposition before going to Africa for 6 month sabbatical
Court: application dismissed; interests of justice required attendance by video conferencing instead of deposition

- **Factors considered:** importance of witness, likely scope of cross examination, possibility for objections & prejudice to P in having to conduct deposition before trial, & the witness' knowledge of his potential absence at the time he was retained.

Admissions — Rule 7-7

- **Scope?** sets out procedures for Notices to Admit (NTA), including consequences of failure to respond; also governs withdrawal of certain forms of admissions
    - **R. 7-7(1*):*** a party to an action may, by service of an NTA, request any party to an action the truth of a fact or the authenticity of a document
    - The NTA is NOT strictly a discovery device, but provides a procedure for requesting admissions of fact
- **What PURPOSE?** narrows & defines issues to be decided at trial //removes need to prove admitted facts //can serve as basis for an order dismissing claim OR granting judgment
    - **Unreasonable refusal to admit** - (1) don't refuse to admit facts you should admit - this can result in you having to pay the cost of proving the fact, as per **7-7(4)**; and (2) be careful what facts you admit to since it's difficult to withdraw admission and requires leave of court
- **Effect:** binds parties for the purposes of the action
- **WHEN AVAILABLE?** ONLY in an action; ONLY once pleadings have been exchanged

- **How admissions are made?** in response to an NTA or failure to respond to a NTA (a deemed admission); in pleadings or on discovery; by way of affidavit

To avoid a deemed admission R 7-7(2)

- must respond NTA within 14 days by delivery of a written statement, else it becomes a deemed admission
    - (a) Must specifically deny
    - (b) Must provide explanation of why the admission cannot be made
    - (c) Identify where refusal to admit is made on the grounds of privilege/irrelevancy/improper request

Unreasonable refusal to admit —>an unreasonable refusal to admit may have costs consequences: R. **7-7(4)**

Withdrawal of an admission —>certain admissions can only be withdrawn by consent or with leave: R. **7-7(5)**

- response to an NTA// a deemed admission// an admission made in a pleading, petition or R to petition

***Hurn v McLellan* (2011) BCSC — 7-7(5) — test for withdrawing admissions**

Facts: application by D to amend pleadings to withdraw admission of liability in an MVA case

Ratio: test for withdrawing admission—>whether there is a triable issue which, in the interests of justice, should be determined on the merits & not disposed of by an admission of fact

Holding: application denied — withdrawal would result in prejudice to P, not only in a delay to the trial but because the litigation had been conducted on the basis of an admission for more than a year.

- P's ability to conduct any investigation of liability was hampered by the passage of time. Also, the admission was made after a thorough investigation & there had been delay in bringing the application

***Piso v Thompson* (2010) BCSC — 7-7(5) — test for withdrawing deemed admissions**

Facts: application by P to withdraw deemed admissions resulting from his counsel's failure to respond to NTA, scope of notice was extensive

Analysis/Holding: application granted — it was essentially conceded that admissions resulted from inadvertence, application to withdraw brought in a timely fashion & there were significant issues to be tried

- The argument that P could have his relief via a negligence claim against his former counsel failed to recognize the further delay & expense of such a claim; also, in the context of proportionality, such an option did not seem appropriate from a financial or court resource perspective.

Ratio: if refusal of leave to withdraw will deny a party the opportunity to have their claim heard on the merits, withdrawal will be allowed so long as it is brought in a timely fashion.

Physical Examinations & Inspections — Rule 7-6

- **What?** Physical examination of a person by way of medical examination OR inspection of property
- **PURPOSE?** ensure litigants obtain access to all relevant evidence & information, & are on equal footing with other parties
- **When available?** By order– **7-6(1)**
    - **Independent Medical Exam (IME) —>** will ONLY be ordered when a party's mental or physical condition is an issue in the action (***Jones***)
    - Not available as a *right*; court's discretion to be exercised judicially having regard to the respective interests of the parties & circumstances of the case

***Jones v Donaghey* (2011) BCCA — 7-6 – availability of IMEs**

- medical exams are ONLY available where the physical/mental condition of a person is at issue

***Jackson v Yushiden* (2013) BCSC — 7-6(1) – evidentiary burden of party seeking IME order**

Facts: D sought P's IME after expiry of 84 day deadline for submission of expert reports

Analysis: an **R. 7-6(1)** order is discretionary; primary purpose is to put parties on equal footing. Factors considered**:**

- Evidence of necessity
- Whether examination will advance the litigation by potentially yielding relevant evidence on a material issue
- Higher threshold if the deadline for submitting expert reports has already passed —>**current issue**
- Whether a similar examination has already been conducted

Ratio: key question is whether an examination should be ordered to enable applicant to file responsive evidence.

- The applicant MUST establish that the examination is necessary to properly respond to the expert witness whose report has been served by the other party. It is not simply a matter of demonstrating a need to respond to the subject matter of P's case.
- meeting that evidentiary threshold where the object of the IME is the eventual production of a fresh or new expert report will not usually be difficult; however, where the time limited for serving fresh or new expert reports has passed, and thus the only purpose of an IME is in furtherance of the production of a responsive expert report, the evidentiary burden will generally be more difficult to meet

Holding: application dismissed for lack of evidence of necessity. No evidence from the functional capacity expert had been tendered in support. P had already attended an examination with an occupational medicine expert.

8. October 30, 2017 – Lecture 7 - Chambers Practice

Purpose of chambers applications/proceedings — Chambers [Rule 22-1] & Applications [Rule 8-1]:

- provide a means of determining interlocutory matters (those that do not result in final disposition)
- In appropriate cases, disposing of all or part of the claims or defences in the action by way of a final order

Chambers — Rule 22-1

22-1(1): Types of Proceedings: Chambers proceedings include:

- (a) petition proceedings (**R. 16-1**) or requisition proceedings [**R. 17-1(5)(b)**]
- (b) all applications, including applications for:
  - SJ **(9-6);** ST **(9-7);** DJ **(3-8)**; judgment on admissions **[7-7(6)]**; point of law **(9-4)**; special case **(9-3)**, etc.
- (c) appeal/confirm/vary order of master or other officer of court
- (d) action ordered to proceed by way of affidavit (includes special cases and hearings on point of law)

22-1(2): **If party fails to attend**: court may proceed if, considering the nature of the application, it would further the objective of the Rules (just, speedy, inexpensive determination on merits + proportionality)

22-1(3): if court then makes an order as per **22-1(2)**:, it should **not be reconsidered** unless court is satisfied person who failed to attend was not guilty of willful delay or default

22-1(4): Evidence: is by way of affidavit but the court can order:

a) Cross examination on affidavits:

- the court may order that a deponent of an affidavit attend for cross-examination
- done either before the court or, as is more usual, before some other person, such as a court reporter
- on an application to cross-examine on an affidavit, the Court will consider whether:
  - there are material facts in issue
  - the cross-ex. is relevant to an issue that may affect the outcome of the substantive application, or
  - the cross-ex. will serve a useful purpose re: eliciting evidence that would assist determine the issue

b) Examination of party or witness

c) Give directions for the discovery/inspection/production of doc

d) Order an inquiry under **R 18-1**

e) Receive other forms of evidence (eg. Court can appoint own experts)

***MTU v Kuehne & Nagel (*2007) BCCA — 22-1(4) — other forms of evidence; unsworn statements**

Facts: Appeal from the decision of a judge in chambers relying on unsworn statements by counsel as to where P carried on business to determine the issue of jurisdiction; D objected
Analysis: discretion in the rules to allow court to accept other evidence (i.e., unsworn statements by counsel);

- HOWEVER, **this evidence should not be relied on to establish new facts not within the personal knowledge of counsel, or facts which are of singular importance to the outcome of the application.**
- Unsworn statements could be used to explain/amplify affidavit materials, but has to be w/in personal knowledge of person

Holding: the Statement of Claim & affidavit did not contain the necessary facts to support the application.

Powers of the Court — 22-1(7)
On a hearing of a chambers proceeding or application are set out in **R. 22-1(7)**; The court may:

A. grant or refuse relief or dispose of any question arising (but notice is required — ***Bache Halsey***)
B. adjourn the application
C. obtain the assistance of one or more experts
D. order a trial, generally or on an issue (see: ***Southpaw***)

Bache Halsey v Charles **(1982) BCSC —R 22-1(7)(a)— powers of court; if P does NOT give D notice of relief sought**
Facts: on chambers application, P obtained order to strike out the defence & P recover judgement against D; D appealed arguing court had no jurisdiction as judgement was not sought in the form of the motion
Holding: set aside judgment since no notice was given (**P's NOA must set out relief sought; D shouldn't guess**)

Southpaw Credit **(2012) BCSC — 22-1(7)(d) — powers of court; converting chambers proceeding into a trial**
Facts: application by petitioners to convert oppression claim (must be started as a petition) into an action
Analysis/Ratio: to convert a petition to an action, ask if there are bona fide triable issues b/w the parties that cannot be resolved on the documentary evidence (i.e., where serious & disputed questions of fact & law are raised)
Factors to consider include:

- (a) undesirability of multiple proceedings,
- (b) desirability of avoiding unnecessary costs & delay,
- (c) whether credibility is an issue,
- (d) need to have full grasp of evidence,
- (e) whether it's in the interests of justice that there be pleadings & discovery to resolve dispute
- (f) timelines of the application

Application of above factors to case at hand:

- there was a realistic possibility the oppression and tort claims would not be joined
- there would be additional cost and delay from conversion
- it was not yet possible to say that:
  - credibility could not be dealt with by cross-ex. on affidavits as these had not yet been conducted
  - the court could not obtain a sufficient grasp of the evidence in a summary proceeding

Holding: application to convert to trial dismissed; court held two actions could be heard separately (tort and oppression); no significant advantage if thru a different form of pleading (XFD) instead of cross-ex. on affidavits

Powers of a Master — Rule 23-6 — a master hearing an application has the powers of the court set out in:

- **8-5(6) - (8)**: urgent applications: power to issue, vary or set aside an order made without notice
- **22-1(2) - (8):** chambers proceedings
- **23-6(6)** – a **master can refer a matter to a judge** if it appears matter should be decided by a judge
  - judge can then hear the matter OR send the matter back to the master with directions
  - NOTE - restrictions in the PD 50 (Practice Direction) override this.

- make certain FINAL orders such as — orders by consent; orders related to non-compliance of Rules; orders granting default judgment; granting summary judgment where there is no triable issue, or striking out pleadings provided there is no determination of a question of law; orders for foreclosures, etc.

***Pye v Pye* (2006) BCCA — jurisdiction of masters to make final order**
Facts: Appeal from an order considering whether a master has the jurisdiction to make a final order; order at issue was a consent order made at a judicial case conference regarding the status of certain property as a family asset.
Holding: The order was within the jurisdiction of the master.

1. **Masters have the jurisdiction to grant final orders**, subject to constitutional limitations & restrictions imposed by practice directive (where no contested issue of fact or law needs to be determined)
2. **Caveat:** masters may not determine contested disputes or decide appeals by weighing evidence.

Affidavits — Rule 22-2— An affidavit is a written statement of evidence, sworn by the person giving the evidence (i.e., deponent) before a person authorized to take affidavits (lawyer, notary, commissioner)

- A court relies on affidavit evidence in the same way as it relies on oral testimony

22-2(1): Affidavits must be filed — Form 109

- (a) must be in first person + show name, address, and occupation of deponent
- (b) if deponent is a party or their lawyer/agent/D/O/employee, the affidavit must state this fact
- (c) paragraphs must be numbered sequentially

22-2(12-13) Content: Key Rule: An affidavit may state only what a deponent is permitted to state in evidence at trial

- EXCEPTION — affidavit may contain statements about the deponent's information & belief (hearsay) provided the source of information is given and the affidavit is made:
  - **(i)** in support of an application that does not seek final relief; or **(ii)** with leave of court
- The deponent cannot know what is in someone else's mind
- Informant must be identified (not simply "my son" or "the engineer", state name & employment etc:
  - ***Albert Politano:*** not stating the source of the information renders it worthless
  - ***Jiwa:*** the court has the power to strike inadmissible evidence from affidavits
    - affidavits must not contain personal opinion, editorial comment or argument

***Albert v Politano* (2013) BCCA — affidavits; unidentified sources**

- Not stating the source of information (i.e., an identified person) in an affidavit renders the "offending paragraphs" worthless as the reliability of the information is beyond the respondent's reach.

***Haughian v Jiwa* (2011) BCSC — affidavits; striking out inadmissible portions**
Facts: D applied to strike certain portions of the affidavits filed by P in the summary trial application, including:

- excerpts of P's XFD transcript; portions of a witness' affidavit containing hearsay, personal opinion, editorial commentary or argument

Holding: Affidavit evidence in summary trial is subject to the Rules & evidentiary requirements applicable at trial.

- Affidavits should be confined to facts & should not include personal opinion, editorial comment or argument
  - limited hearsay allowed BUT source must be identified
- **Court has power to strike inadmissible evidence from affidavits**

Notice of Applications (NOA) — Rules 8-1 to 8-5

- They're dealt with in Chambers, EXCEPT:
  - Consent applications (**R. 8-3**)
  - Applications of which notice is not required (**R. 8-4**)

- Applications by written submissions **8-6** (these are rare).
- All other applications are brought in chambers.
  - General procedure **R. 8-1**
  - Urgent applications [**R. 8-5 (R. 22-1(9)]**— if the other side were given notice, it would defeat the purpose (e.g., Anton pillar orders/freezing assets).
- Contents of a NOA:
  - must be in Form 32, and must not exceed 10 pages in length
  - The NOA sets the **date and time** of the hearing and sets out the following:
    - Part 1–Order sought; Part 2–Factual Basis; Part 3–Legal Basis; Part 4–Material to be relied on
  - The evidence required to prove the facts necessary for the court's decision will generally be by way of affidavits: **R. 22-1(4)**
  - You must serve the NOA & supporting affidavits on each party of record and any other person who may be affected by the order sought: **R. 8-1(7)**

NOA: basic procedure

1. **File and serve NOA –** 8 days before regular application or 12 days before a summary trial [**8-1(7-8)**]
2. **File and serve application response –** 5 days after service or 8 days for summary trials [**8-1(9)**]
3. **Applicant may file a responding affidavit –** must be done before 4pm one business day before hearing
4. **Must file application record if opposed –** with the Registry before 4pm one business day before hearing

***Bache Halsey v Charles* (1982) BCSC — 8-1 — powers of court; NOA must include relief sought**
Facts: on chambers application, P obtained order to strike out defence & recover judgement against D; D appealed arguing court had no jurisdiction to grant judgement as judgement was not sought in the form of the motion
Holding: set aside judgment since no notice was given; **P must set out relief sought in NOA; D shouldn't guess**

***Zecher v Josh* (2011) BCSC — 8-1 — NOA requires full & meaningful disclosure**
Facts: D made Application for documents including P's calculation of wage loss; application merely listed the rule & was missing the order sought & the legal/factual basis
Analysis/Ratio: NOA is intended to provide court & opposing party with full disclosure of the argument to be made in chambers; NOA must set out detailed request for what is sought; legal basis should include rules & C/Law analysis

- IOW, NOA should give court & other parties full & meaningful disclosure – misstating the authority for the relief sought can mislead the other party, therefore grounds for refusal.

Holding: dismissed since application docs were deficient (**lacking the order sought & factual/legal basis**)

Orders — Rule 13-1

- Orders are the result of the court process, if taken to its conclusion.

13-1(1-2) —DRAWING & APPROVING:

- **(1)(a)** any party can draw up an order unless court directs Registrar to do it
- **(1)(b)** order must be approved in writing by all parties that consented to order, unless **(2)** order is signed/initialed by presiding judge or master
- **(9)** any judge can approve an order
- **(1)(c)** parties that didn't consent or appear don't have to approve
- **(1)(d)** after approval, order must be left with Registrar to have court seal affixed

13-1(3) - **FORM OF ORDER—**

- (a) without hearing and by consent - Form 34
- (b) order made after trial - Form 48

- (c) any other order - Form 35

13-1(11-14)—SETTLEMENT OF ORDERS: purpose is to not reargue the same thing; rather agree on the terms.
- **(11)** REGISTRAR can settle if needed & may then refer draft back to judge/master who made order
- **(12)** A PARTY may file appointment to settle order - will then have to serve draft order on all parties whose approval is required under (1) at least one day before time fixed by the appointment
- **(13)** if party fails to attend at time appointed for settlement, registrar can settle order in party's absence
- **(14)** COURT may review and vary the order as settled

13-1(17) - CORRECTING ORDERS — at any time court can correct clerical mistake or error arising from accidental slip or omission OR amend order to provide for any matter that should've been adjudicated but was not
- **NOTE** — court has an inherent jurisdiction to correct its own orders

***Halvorsen v BC* (2010) BCCA — R. 13-1 — draft court orders must be clear, complete, & intelligible**
Facts: form of order was vague and uncertain.
Holding: (1) responsibility of the parties, with assistance of registrar, to prepare orders that give definitive expression to the decisions of the courts
- (2) Court orders MUST be:
  - clear, complete and intelligible on their face so that those who are affected by them or must act on them will readily see what rights have been declared and what directions given
  - susceptible of performance.
- Should not require resort to extrinsic sources, such as to the pleadings, evidence, or reasons for decisions
  - IOW, orders should stand on their own — must be understandable by simply reading them.

Appeals in the Supreme Court — R. 18-3(1)

- if an appeal from a decision,direction or order from any person or body is authorized by an enactment to be made to the court or to a judge, the appeal is governed by this Rule to the extent that this Rule is not inconsistent with any procedure provided for in the enactment. Examples include:
  - ***Small Claims Act*, s. 5(1)** – appeal of the decision of a Provincial Court judge
  - ***Supreme Court Civil Rules*, R. 23-6(8)** – appeal of a decision from a master, registrar or special referee

Interlocutory Appeals — Rule 23-6
- **23-6** governs the procedure for **appeals from a decision or order of a master**. Appeals are heard by a judge of the Supreme Court.
- **23-6(8) masters' decisions can be appealed**:
  - anyone affected by the order can appeal —>**R. 23-6(9)**
  - The appeal must be made within 14 days of the order or decision complained of —>**R. 23-6(9)**
  - An appeal is not a stay of proceeding unless so ordered by the court or the master —> **R. 23-6(11)**

Standard of review: *Abermin* —>two standards of review:
- (a) An appeal from a master's order in a purely **interlocutory matter** should not be entertained unless the order was CLEARLY WRONG (correctness standard)
- (b) **But**, rulings by a master which are **final orders** or which raise questions **vital to the final issues**, require a REHEARING ON APPEAL—>judge not bound by prior decision/no need to show deference.
  - ***Ralph:*** questioned ***Abermin*** – decision based on *stare decisis*; THEREFORE, ***Abermin*** stands.

***Abermin Corp v Granges Exploration Ltd* (1990) BCSC — R. 23-6(8) — SOR re: appeal from a masters' order**

Facts: underlying action for fraud, misrep, professional negligence. P made assignment into bankruptcy, D applied for security for costs. P sought adjournment D's application on an undertaking from the bankruptcy trustee to be responsible for costs after the date of the assignment. D argued that this was insufficient – the undertaking was too narrow & there might be more costs (since trustee only agreed to pay the costs from a certain date forward).

- Master adjourned D's application on the condition that XFDs not proceed until the disposition of D's application. P appealed the order staying the XFDs on the basis that it was not within the jurisdiction of a master because it granted injunctive relief

Analysis: the context was clearly interlocutory, thus within the jurisdiction of a master; also, the characterization of the adjournment of the XFDs as a stay of proceedings is incorrect, but rather as condition for granting the adjournment of D's application for security for costs.

Ratio/Holding: confirmed Master's order, dismissed P's appeal**:**

1. An appeal from a master's order in a purely <u>interlocutory</u> matter can only be entertained if the order was CLEARLY WRONG **(correctness standard)**
2. **<u>But,</u>** rulings by a master which are <u>final orders</u> or which <u>raise questions vital to the final issues</u> require a **rehearing on appeal****
    - On a rehearing, a judge may substitute his discretion for the discretion exercised by the master, & is unfettered by any deference to the order under appeal.
    - Appeal proceeds on the record that was before the master (i.e., NOT ***de novo***) unless there is an order permitting new evidence

Ralph's Auto Supply (BC) Ltd. v. Ken Ransford Holding Ltd.* (2011) BCSC — R. 23-6(8) — reviews *Abermin

- questions whether ***Abermin*** should be reversed as was done in Ontario (i.e., same SOR b2in judges/masters)
    - Ont. CA held there shouldn't be a different SOR between masters & judges as that difference was based on an outmoded sense of hierarchy, & also b/c the role of masters in Ont had expanded.
- **Holding:** although there are sound reasons for narrowing the SOR to show more deferrence, court is bound by ***Abermin*** (*stare decisis*); THEREFORE, it is up to the court of appeal to change the SOR.
- Difficulty in ***Abermin*** approach — determining whether a matter is interlocutory or final.

Appealing orders from a judge

***Court of Appeal Act*, s. 6: jurisdiction —>*Rahmatian*:**

- an appeal lies to the Court of Appeal from an <u>order</u> of the Supreme Court, except where an appeal is excluded by legislation (e.g., the *Small Claims Act* allows an appeal to BCSC, not to the BCCA).
- An appeal is from the <u>order</u> of the TJ, though the CA considers the judge's reasons in its review of the order:
    - "A reviewing court may refer to the reasons for judgment in order to ascertain whether the decision from which the appeal is brought has been arrived at by a reviewable error but the appellate review process relates to <u>attacks on the order that has been made, not the reasons for judgment</u>. If an appeal is successful, it is the order that is set aside, not the reason(s) that is/are 'overturned'".

***Rahmatian v HFH Video Biz Inc* (1991) BCCA — unsuccessful non-suit motions are NOT appealable**

Facts: At the conclusion of Ps' case, the defence made an <u>unsuccessful</u> motion for non-suit. Before proceeding to call the defence, D filed a notice of appeal. P argued that there was no order to appeal against.

- non-suit = terminating a legal action without an actual determination of the issue on its merits (e.g., a judgment of nonsuit may be granted against a P who either fails to pursue, or abandons, the action).

HELD: A TJ's ruling on a no evidence motion is NOT an order or judgment of the court (it is more properly described as a ruling or a ruling on evidence which is part of the trial process), thus cannot be appealed until trial completion. Of course, a <u>successful</u> motion for non-suit results in a dismissal of the action from which P can appeal as of right.

Court of Appeal Act*, s. 7: Leave to appeal —>*Power Consolidated.

- required in some cases: gateway process to appear before the court —> decisions requiring leave to appeal are laid out in **R.2.1 of the Court of Appeal Rules**. Examples include:
    - Orders made under: Part 5 (case planning); Part 7 (procedures for ascertaining facts); orders granting or refusing adjournments/extension/shortening of time, orders granting or refusing costs, etc.
- Factors bearing on the granting of leave to appeal include: *Power Consolidated:*
    - *OVERALL TEST: is it in the interests of justice?*
- Non-suit motions and other decisions that ARE NOT JUDGMENTS OR ORDERS: *Rahmatian*

***Power Consolidated Pulp Inc v BC Resources Inv Corp* (1988) BCCA — criteria for granting leave to appeal.**

Facts: Application for leave to appeal from a decision holding that disclosure of part of a letter did not waive privilege as to the remainder of the letter.

Ratio: key QUESTION: is it in the interests of justice that leave be granted? **Factors to be considered include**:

- (1) whether the point on appeal is of significance to the practice
- (2) whether the point raised is of significance to the action itself
- (3) whether the appeal is *prima facie* meritorious or, is alternatively, frivolous
    - question is not whether the appeal will succeed but whether the points raised are arguable
- (4) whether the appeal will unduly hinder the progress of the action

Analysis: The point was of significance to the practice, raising questions of law as to the waiver of privilege may be significant to the action, appeared to have some merit & it was agreed that an appeal would not unduly hinder the progress of the action; THEREFORE, **Holding = leave to appeal granted**.

9. November 6, 2017 – Lecture 8 - Summary Proceedings

Part 9 of the Rules – provide a means of disposing of the merits of a case (either in whole or in part) by way of an application in chambers *without a full trial*

Purpose: quickly/inexpensively dispose of uncontested actions, quickly/inexpensively reject claims & defences that are bound to fail, and provide a mechanism to determine disputed issues of law

Important: pay attention to the SUBTLE differences between **R. 9-5(1)(a)** & **R. 9-6(5)(a)**

Key concept: is it a question of law or fact?

- ***Canada v Southam*** —>distinguished between questions of law, fact, & mixed law and fact:
    - questions of law are questions about what the correct legal test is;
    - questions of fact are questions about what actually took place between the parties;
    - questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

Summary Proceedings — Proceedings other than a trial:

- Special case: **R. 9-3**
- Proceedings on a point of law: **R. 9-4**
- Applications to strike pleadings: **R. 9-5 —>also page 3.**
    - Ask court to strike a NOCC, a Response to NOCC, etc —>argue there's no genuine issue for trial.
- Application for summary judgment: **R. 9-6**
    - applies if there are no facts sufficient to prove one's case; however, a "glimmer of hope" is sufficient for court to decline application for summary judgment.
- Application for summary trial: **R. 9-7**

Special Case — Rule 9-3

What: An alternative summary procedure by which a question of law or fact, or partly of law and partly of fact is stated for the court in the form of a special case for the opinion of the court

When available:

- Any time, by agreement of the parties OR
- In the absence of agreement, by order of the court (the court will consider whether there will be a saving of expense to the parties, and a saving of time to the court itself, in separating out the question instead of determining it in the main proceedings)

Process: A signed statement of facts is necessary to enable the court to decide the question

- The court may draw inferences from the statement of facts

Result: A decision of the court is in the form of an opinion, which may serve as the basis for an order for judgment or for special relief, but only if the parties consent [see **R. 9-3(5)**]

***William et al v BC et al* (2004) BCSC — R. 9-3**
Facts: court directed parties to state a case but parties were not able to agree on facts to be stated
Held: case was not appropriate for determination under Rule 9-3 because:

- no question of law that could dispose the central issue in the case
- claim was dependent on complex issues of fact, on which parties could not agree
- case was important and should not proceed on assumed facts

Note: generally, a court is required to act judicially, so will not ordinarily consider hypothetical questions based on assumed facts (but could exceptionally where determination of hypothetical question will have a conclusive effect)

Proceedings on Point of Law — Rule 9-4

What: A mechanism by which the court can consider a question of law on the basis of the facts alleged in a pleading

Features: No evidence. The facts in the pleadings are assumed to be true (but it is not an admission of these facts)

Limitations:

- The point of law MUST arise from the pleadings
- It must be a **pure point of law** (e.g., not causation which is always a mixed question of fact and law)
- Not available where there are contested facts or the need to weigh evidence – no resort to evidence
- If the action involves investigation of serious questions of law or questions of general importance – general preference that those matters be determined by reference to a full factual context

When available: At any time before the trial by consent OR by order:

- Whether a point of law should be decided before the trial is **discretionary** – a determination of the question MUST be decisive of the litigation/substantial issue raised in it (i.e., question goes to the root of the action)
- KEY QUESTION TO ASK: will a determination shorten the trial or result in a substantial saving of costs?

Result: If the decision on the point of law substantially disposes of the whole action or of a particular claim, the court **may** dismiss the action or make any order it considers will further the object of the rules [**R. 9-4(2)**]

***Harfield v Dominion of Canada* (1993) BCSC — Rule 9-4**
Facts: P wanted court to determine whether insurance policy excluded coverage for loss caused by insane person
Holding: application allowed; **Analysis:**

- the point of law arose from the pleadings & there was no requirement to determine facts (i.e., there was no dispute regarding the terms of the exclusion clause)
- the determination would decide a substantial issue in the action & potentially save time, expense & energy (i.e., if decided against P, issue of insanity would be moot)

Summary: STRIKING PLEADINGS vs SUMMARY JUDGMENT

- ISSUES -
  - pleadings are struck when claim/defence, as pleaded, can't succeed as matter of law
  - SJ's decide whether claim/defence is factually without merit, though may also deal with mixed question, or questions of law only under 9-6(5)(c)
- EFFECT -
  - after being struck, party can plead again (limited by time limits & LP)
  - SJs provide final order which conclusively determines the issues

Striking Pleadings — Rule 9-5

What: A rule by which the parties can enforce the rules of pleadings to stop cases that ought not to have been commenced from proceeding (i.e., gatekeeping function)
How: On a 9-5 application, the court is empowered to:
1. strike out or amend the whole or any part of a pleading;
2. pronounce judgment, stay or dismiss a proceeding; AND
3. order that costs of the application be paid as special costs

When: Available at any stage of a proceeding

Evidence: is admissible for **9-5(1)(b) to (d)**;
- **9-5(2)** provides that **evidence is NOT admissible** for **9-5(1)(a)**

Grounds as per 9-5(1): the court may order the striking out or amending a pleading, petition or other document if:
- **9-5(1)(a)** the pleading discloses no reasonable claim or defence
  - Test: assuming the facts as stated in the NOCC can be proved, is it "plain & obvious" that P's claim discloses no reasonable cause of action? ***Hunt v. Carey***
  - The application assumes facts pleaded are true ***Rose***
  - Court offers a large scope and flexibility – will likely allow you to amend your pleadings if there is a "glimmer" of a claim/defence ***National Leasing***
  - Needs to actually link the claim to D (i.e., D needs to know what claim they need to meet)—>***Rose***
- **9-5(1)(b)** it is unnecessary, scandalous, frivolous or vexatious; Test = ***Willow:***
- **9-5(1)(c)** it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- **9-5(1)(d)** it is otherwise an abuse of the process of the court —> flexible doctrine as per ***Willow***

***Hunt v Carey Canada Inc* (1990) SCC — 9-5(1)(a) — plain & obvious test**
Facts: P commenced an action in conspiracy for personal injuries suffered by reason of exposure to asbestos; D sought to strike out the claim pursuant to R. 19(24)(a) [now **R. 9-5(1)(a)**]
Analysis*:* the purpose is not to ask whether P will succeed, but whether pleadings disclose a radical defect making it plain and obvious P will not succeed;
- Ps claims came within recognized categories of conspiracy tort & raised a triable issue, thus passed the test

Ratio: pleadings will be struck where it is plain and obvious that the claim discloses no reasonable cause of action
- e.g., claim not known to law, material facts required to establish claim not in pleadings & not amendable

***Willow v Chong* (2013) BCSC — combined test re: 9-5(1)(a) & (b)& (d)**
Facts: Ps filed claims against Ds re: closure of P's college; Some Ds filed applications to strike portions of NOCC
Held: Applications granted.
- Under **9-5(1)(a)**, improper pleadings disclosed no reasonable claim (incomplete causes of action)

    - The claims against gov't agencies could not found a proper action outside of the administrative law context and were an impermissible collateral attack.
- Under **R 9-5(1)(b)**, a pleading is unnecessary, frivolous or vexatious:
    - if it does not go to establishing P's cause of action;
    - if it does not advance any claim known in law;
    - where it is obvious that an action cannot succeed; or
    - where it would serve no useful purpose & would be a waste of the court's time & public resources.
    - also if a pleading is so confusing that it is difficult to understand what is pleaded
- Also an abuse of process (there was a collateral action) under **9-5(1)(d)**.
    - Flexible doctrine —>To avoid the violation of principles of judicial economy, consistency, finality, and to preserve integrity of the administration of justice
    - Ps were not granted leave to amend pleadings due to the nature of the proceedings and the extent of the omissions in material facts.
    - **Examples**: an application to strike on the basis of:
        - *res judicata* (already decided) or issue estoppel (could have been decided)
        - collateral attack — the existence of another action that deals with the same issue, or the pursuit of a civil claim where there is a statutory remedy

Summary Judgment — Rule 9-6
- examines whether there is a genuine issue for trial and if so, whether the issue can be resolved summarily
- evidence need not be equivalent to that at trial, but must be enough for a judge to fairly resolve the dispute.
- ***Hryniak***—>criteria for allowing summary judgment (**refer to page 2**)
- **Availability — ALL CRITERIA must be satisfied**
    - Available to both P [**9-6(2)**] & D or third party [**9-6(4)**]
    - available after the exchange of pleadings
    - subject to conditions under **9-6(5)** being satisfied

9-6(2): **APPLICATION BY P** — can apply for SJ on all or part of claim once responding pleading has been served
- does not require evidence; however, **some evidence should be presented from the applicant** (e.g., ***Taoist Church*** —>to show why the defence is bound to fail)

9-6(3) – **RESPONSE TO APPLICATION** - answering party can claim originating pleading does not raise cause of action OR must show, using affidavit or other evidence that there is a genuine issue requiring trial (***Taoist Church***).
- **9-6(3)(b)** expressly requires evidence from the respondent to an application for SJ, which must set out specific facts to show that there is a genuine issue for trial (***Taoist Church***)

9-6(4) — **APPLICATION BY answering party**—can apply to dismiss all or part of claim after filing/serving a response

9-6(5) — POWERS OF COURT
(a) if **no genuine issue for trial**, court must pronounce judgment OR dismiss claim
- TO DISMISS **9-6(5)(a)**, it **must be** manifestly clear/plain & obvious/beyond doubt that action won't succeed
- If there's any doubt as to whether there is a triable issue = dismiss SJ application
- NOT court's function under **R. 9-6(5)(a)** to try disputed questions of fact
    - IOW, only question is whether the facts raise a bona fide triable issue

(b) if **no genuine issue other than damages**, court may order trial to determine damages OR give judgment with reference/accounting to determine amount
(c) if the **only genuine issue is question of law**, court may determine question & give judgment;

- however, if the matter raised is <u>novel</u> <u>&</u> <u>not</u> <u>settled</u> <u>by</u> <u>authoritative</u> <u>jurisprudence</u> (***Haghdust***), then judgment under **9-6(5)(c)** is not appropriate

(d) make any other order that will further the object of the Rules

***Haghdust v BCLC* (2011) BCSC — Rule 9-6— summary judgment NOT appropriate**

Facts: Ps claimed for jackpot winnings that had been denied b/c of enrolment in a voluntary self-exclusion program;

- Ds applied for SJ under **R. 9-6** saying P's claim was precluded by program, or 2) illegality.
- Ps argued their responses raised genuine issues for trial (either as questions of law or mixed fact/law)

Holding: D's application dismissed as Ps claim <u>not</u> <u>bound</u> <u>to</u> <u>fail</u> **(R. 9-6(a)**; also, as per **R. 9-6(c),** while issues raised were largely legal, they were novel, not settled by authoritative jurisprudence & raised factual components.

***International Taoist Church* (2011) BCCA — Rule 9-6(3)— SJ appropriate if sworn evidence is available**

Analysis: it is inconceivable that P could overcome a filed defence & obtain SJ w/o sworn evidence that proves the claim; it is also inconceivable that D could obtain SJ w/o sworn evidence establishing the claim is w/o merit.

Ratio: SJ appl. MUST be dismissed if there's NO sworn evidence **(i)** proving claim or **(ii)** proving claim is w/o merit

- IOW, NO express evidence requirement, but desirable whether P is seeking SJ/D is seeking a dismissal of SJ

Summary Trial — Rule 9-7

History (as set out in ***Inspiration Management***):

- aims to expedite early resolution of cases/address the two classic litigation complaints (i.e., costs & time)
- Problem with **R. 9-6** is that "artful pleaders are usually able to set up an arguable claim/defence & any affidavit that raises any contested question of fact or law is enough to defeat a motion for judgment."

<u>Purpose</u> <u>&</u> <u>key</u> <u>features</u>: means of obtaining judgment involving a weighing of evidence & application of the law without a conventional trial

- a party can apply for judgement on an <u>issue</u> OR <u>generally</u>
- a trial based on <u>affidavits</u> which reduces wait times trial time & cost —> satisfies objective of the rules

<u>How is it different from Summary Judgment (9-6)?</u>

- no question whether there is a genuine issue for trial, rather the court actually tries the issue(s) on affidavits
- the court can weigh evidence, assess credibility or draw inferences – mini trial based on affidavits

<u>Availability</u>

- available with respect to (i) an action, (ii) a petition converted into an action, & (iii) a third party proceeding or counterclaim, as long as a <u>responding pleading</u> has been filed [**R 9-7(2)**]
- **TIMING**: a summary trial application must be heard at least **42 days before a scheduled trial date** (**R 9-7(3))**
  - HOWEVER; not every case is suitable for summary trial

<u>Evidence:</u>

- Primarily affidavits; NOT on information & belief – **hearsay is not admissible**)
- Witness may NOT provide an affidavit – barrier to having a summary trial
- Affidavits — as per, **9-7(5)**, can rely on the following:
  - XFD transcript extracts (possible to obtain cross-examination order) [**9-7(12)(b)**]; interrogatories; admissions; expert opinion; deposition evidence
  - BUT CANNOT rely on pre-trial examination of a witness —> because these are purely informational

The Process:

1. **Bring and respond to application**
   - ST application as per **R. 8-1** —> notice/evidence/filing within 12 business days [**9-7(4),(8)-(10)**]
2. **May bring an application for preliminary directions at hearing or before the summary trial**
   - to challenge suitability [**9-7(11)**]
   - to obtain directions as to evidence and the conduct of the application [**9-7(12)**]
   - preliminary applications are before a judge or master [**9-7(13)**]
3. **Hearing in chambers**
   - before a judge (**not within the jurisdiction of a master**)
   - **9-7(11)(b):** challenge to suitability (also possible at the hearing, not just before); court can dismiss ST application (before/same time as ST hearing) if:
     i. issues raised are NOT suitable for summary disposition (lack of necessary facts?)
     ii. the 9-7 application will NOT assist the efficient resolution of the proceeding
4. **Judgment (discretionary)**
   - [**9-7(15)(a)(i) and (ii)**— grant judgment on an issue or generally; or decline to grant judgment if:
     i. the court is unable to find the facts necessary to decide the issues of fact or law OR
     ii. it would be unjust to do so

ST preferred if it can achieve justice & save the parties either/both time & money. **KEY QUESTIONS TO ASK**:

- are the issues raised by the summary trial application suitable for disposition on a summary basis?
- Will the summary trial application assist the efficient resolution of the proceeding?
- Does the court have the necessary facts to decide the issues?
- Would it be just to render judgment in the case where trial is by way of a summary process?

Inspiration Management **(1989) BCCA — 9-7(11) — factors to determine ST suitability**

Facts: dispute over terms of a loan agreement (i.e., what was the agreement, what collateral had been agreed to?)

- Given the conflicting evidence, TJ dismissed P's ST application on the basis that "it was not clear that a trial in the usual way could not possibly make a difference in the outcome"; P appealed

Holding: overturned TJ's decision;

- case was suitable for resolution by ST, but further process was required (cross-examination on affidavit)
  - "unresolved issues of fact are within a sufficiently narrow compass to make management of the case by ST a preferred alternative to trial ".
- Object of rules is just, speedy, inexpensive resolution – not every case should proceed to a full trial

Ratio: Factors relevant to determine suitability:

- general considerations: amount involved, complexity, urgency, any prejudice arising from delay, costs of taking case to trial in relation to amt involved, course of the proceedings, any other relevant matter
- sufficiency of the evidence — also an express factor at **9-7(15)(a)(i)**
- conflicts in evidence—a judge shouldn't decide an issue on the basis of conflicting affidavits (even if he/she prefers one version); however, other admissible evidence may allow judge to resolve the conflict
- caution against litigating in slices, unless resolution of critical issue may lead to settlement
  - IOW, ST application may not be appropriate where other matters MUST proceed to trial.
- other potential factors

Question of suitability may arise at various stages:

- On application of one of the parties under **R. 9-7(11)**
  - on a preliminary application before the ST application (see ***Western Delta Lands***); or
  - at the same time as the summary trial application (***Charest v. Poch***)

- In either case: **suitability** and **efficiency** are the focus
- At any other time – the judge retains a discretion to refuse to grant judgment if **unable to do so on the evidence** or, if of the opinion that to do so would be **unjust**: R. 9-7(15)

***Western Delta Lands* (2000) BCSC — 9-7(11) — preliminary application BEFORE the ST application**

Facts: $19.5 Mil. claim for damages for alleged breach of a partnership agreement in addition to general damages;

- D applied, before the ST, for an order dismissing P's ST application on suitability grounds.

Holding: application dismissed; while suitability can be determined on a preliminary basis, such motions are unlikely to succeed unless the ST is anticipated to take considerable time/effort/cost or where suitability is relatively obvious.

Analysis: D failed to establish lack of suitability notwithstanding some complexity & significant amounts claimed; matter was fairly urgent as it involved an ongoing partnership.

Takeaway: on a **9-7(11)** preliminary application there is a **heavy onus** on the applicant to demonstrate the existence of the following, in addition to the factors in ***Inspiration Management***, which if present, may tip the scale **against** having the matter heard summarily:

1. the litigation is extensive & the ST hearing itself will take considerable time;
2. the unsuitability of the ST is relatively obvious (e.g., where credibility is a crucial issue)
3. it is clear the ST involves a substantial risk of wasting time & effort and of producing unnecessary complexity
4. the issues are not determinative of the litigation & are inextricably interwoven with issues that must be determined at trial.

***Charest v Poch* (2011) BCSC — 9-7(11) — preliminary application DURING the ST application**

Facts: Application for ST & question of suitability heard concurrently; Ds initiated an **9-7** application; P argued **R. 9-7** was NOT suitable because credibility was at issue + complex issues and sought to amend their pleadings.

Holding: ST application allowed in part; the fact that P would amend pleadings is irrelevant—can't allow one party's delay (unpreparedness) to frustrate ST procedure.

- The fact that application raises issues of credibility on essential issues will not be a bar where those issues can be resolved by reference to other materials.

11. November 20, 2017 – Lecture 9 - Interim Relief & Expert Reports

Interim Relief

- Pre-trial Injunctions – **R. 10-4**
- Undertakings as to Damages – **R. 10-4(5)**
- Special Types of Injunctions: Mareva Injunction & Anton Piller Orders
- Pre-judgment Garnishing Orders – *Court Order Enforcement Act*, **ss. 1- 27**

Pre-trial Injunctions — R. 10-4

Injunctions are a form of relief (future looking) according to which the court orders a person to:

- **refrain** from doing something in order to enforce or preserve a legal right – **prohibitory injunction** (common)
- do something (a positive action), rather than refraining from doing something — **mandatory injunction**

Source: BC courts empowered to issue injunctions under **s. 39** of the ***Law & Equity Act*** (inherent jurisdiction)

Types of pre-trial injunctions:

- **Interim injunctions:** orders that stay in place for a specific time period
- **Interlocutory injunctions:** orders that stay in force until trial, or until revised by further order
- **Special injunctions: *Mareva:*** to preserve property or assets**; *Anton Piller:*** to preserve evidence

10-4(1) availability: a party can apply for an injunction whether or not it was sought in the relief claimed
10-4(2) urgent situations: allows a party to seek an injunction **before a proceeding has even commenced**
10-4(3) allows an injunction application to be brought without notice (***ex parte***).

- **Why**? Urgency & to avoid defeating the purpose of the injunction (e.g.,. Anton Piller orders)
- Counsel have added professional obligations [**CPC 5.1-1-[6]—>ex parte applctns require full & frank disclosure)**: an order granted without notice to the other side is at greater risk of being set aside
- Increasingly, the court grants injunctions sought without notice only on an interim basis to allow the matter to be addressed by both sides with full submissions.

10-4(5) undertaking as to damages: Unless court otherwise orders, an order for an interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages. **Why?**

- to provide the enjoined party some security
- to provide some comfort to the court that in "pre-judging" the rights of the parties there will be a remedy at the end of the action if the injunction was not appropriate
- ***Vieweger****:* undertakings as to damages are generally payable if injunction is overturned; **if case FAILS: presumption that the undertaking is triggered absent special circumstances**

***AG (BC) v Wale* (1986) BCCA — 10-4 — generally accepted test re: injunctions in BC**

Facts: underlying ARs issue — First Nations passed bylaw allowing commercial fishing in certain rivers by the Bands; Province filed injunction to prevent commercial fishing (preserve status quo) EXCEPT as per the *Fisheries Act*.
Issue: did the TJ apply the appropriate test for granting an injunction?
Holding: injunction should have been granted; **Ratio:** The test is framed in two parts:

1. Is there a fair (arguable) question to be tried; AND
2. Does the balance of convenience favour granting or refusing the injunction? IOW, the injunction was to preserve public interest in fishery, thus treated as a matter of irreparable harm
    - **Balancing of convenience** – where BOTH parties may suffer irreparable harm — if the injunction is granted & the other party if it is not — the court will generally default to "preserving the *status quo*"
    - **Irreparable harm** – is essentially equated with the adequacy of damages. It does not require "clear proof", but rather, mere doubt as to the adequacy of damages is sufficient
    - **the overall test** is whether it is just & equitable in all of the circumstances to grant an injunction

Analysis: application to the facts

- There was a fair/arguable question to be tried — (i) Delegation of fed. legislative powers to bands & (ii) the span of First Nations lands to midpoint of the rivers bounding the reserves
- Balance of convenience showed evidence of irreparable harm to BOTH sides, thus preserving status quo:
    - Interference (the injunction) depriving the Band from fishing revenue **VERSUS** commercial fishing affecting salmon stocks/regulations being flouted/substandard sales possibly damaging market

RJR MacDonald v Canada (1994) SCC — 10-4 — generally accepted test outside BC re: injunctions

The test has three parts:

1. Is there a serious question to be tried?
2. Will the applicant suffer irreparable harm if the injunction is refused?
3. Who will suffer the greater inconvenience from the granting or refusal of the remedy?

IMPORTANT

- ***Wale*** was affirmed by the SCC, and not expressly overturned in ***RJR-MacDonald***
- Both the two-step test in ***Wale*** & the three-step test in ***RJR-MacDonald*** are relied upon/applied in BC
- Courts have sought to minimize the discrepancy by describing it as a "distinction without a difference"
    - Will the applicant suffer **irreparable harm** (harm that cannot be compensated by damages – mere doubt that they won't be enough is sufficient) if the injunction is refused? (this can be evaluated under **2** in balancing the convenience – "distinction without a difference between Wale and RJR.

***CBC v CKPG TV Ltd* (1992) BCCA — 10-4 — factors to assess the 2nd prong**

Facts: CBC sought an injunction to prevent its local affiliates from substituting local ads for regional ads.

- TJ —>DESPITE holding there was a fair issue to be tried re: whether the affiliates were in BOC, TJ held CBC had not made out a "prima facie case" (higher threshold than whether there was a fair issue to be tried)

Issue: did the TJ err in applying the injunction test? **YES to #1 & NO to #2; Analysis/Ratio:**

1. Proper test re: prong 1 = "a fair question to be tried" rather than a "prima facie case"
   - The difference between the two is essentially an evidentiary burden — the strength of the case is not considered under the 1st prong (but can be a factor under the 2nd prong)
2. The TJ's finding that the balance of convenience favoured refusing an injunction was NOT varied; Factors to assess the balance of convenience (to be weighted overally) include:
   - Adequacy of damages as a remedy (for the applicant if injunction is NOT granted & for the respondent if injunction is granted)
   - The likelihood that if damages are finally awarded they will be paid
   - The preservation of contested property
   - Other factors affecting whether harm from the granting or refusal of the injunction would be irreparable
   - Which of the parties has acted to alter the balance of their relationship & affect the *status quo*
     - *i. which party took a step that first altered the status quo*
     - *ii. which party did the thing which is said to be actionable,* AND
     - *iii. nature of the impugned conduct & which is continuing when the injunction applctn is made*
   - The strength of the applicant's case
   - Any factors affecting the public interest
   - Any other factors affecting the balance of justice and convenience (the list is open)

Summary re: test for granting an injunction – overall IS IT EQUITABLE? *Wale/RJR*

1. ***PRONG 1:*** serious question to be tried? But do not assess merits of the case at this stage as per ***CBC***
2. ***PRONG 2:*** **Balancing convenience:** Who will suffer the greater inconvenience from the granting or refusal of the remedy? **Factors to assess: *CBC***

***Vieweger v Rush* (1964) SCC — 10-4(5) — Undertakings as to damages**

Facts: P claimed a supplier was contract-bound to leave equipment at construction site; when D threatened to remove equipment due to non-payment, P obtained prohibitory injunction; court held that D was not bound by contract, thus P was liable for damages as per undertaking (i.e., P's injunction was unwarranted).

- P argued damages were only payable if P had acted improperly in obtaining the injunction + damages should not be payable b/c of 'special circumstances' (i.e., P had not obtained injunction through misrepresentation)

Issue: was the undertaking as to damages engage? **YES.**

- **Why?** P had obtained use of the equipment, which made it unavailable to the supplier to use in its business.

Holding: Rejected P's arguments & ordered damages; when undertaking is given & case fails, there is a presumed inquiry into damages UNLESS there are special circumstances (need more than 'order was obtained in good faith')

- Examples of **truly special circumstances**: where public body acts in public interest to preserve status quo or where D has succeeded on merits but has engaged in misconduct disqualifying seeking damages.

Mareva Injunctions—an order intended to prevent the **removal of assets** from the jurisdiction or reach of the court

- Can be a very draconian order in effect – freezes assets
- Common considerations include — the impact of the order on the subject party's/ another party's ability to conduct business OR on the subject party's ability to defend itself in the litigation.

***Aetna Financial v. Feigelman* (1985) SCC — 10-4 — test for mareva injunction**

Facts: P obtained injunction prohibiting D from removing assets from Manitoba, including funds recovered in P's receivership. D was about to transfer the funds to its HQ in another province in ordinary course of business.

Analysis: general principle is that a litigant should not be permitted to seize assets of D before judgment; also, while a Mareva Injunction is available in Canada, a higher threshold than an ordinary injunction must be required.

Holding: original injunction was ordered set aside**;** removal of assets from one province to another is not as concerning as removing them from the country given creditors' rights within the Canadian federal system

- funds were also to be transferred in the ordinary course of business, not to avoid judgement

Ratio: Test for *Mareva* injunction

1. Strong prima facie case, NOT just a 'good arguable case'
2. Persuasive evidence that the respondent is:
   - actually removing or there is real risk of removing assets from the jurisdiction to avoid the possibility of a judgement OR
   - dissipating assets in a manner outside of the usual or ordinary course of business

***Reynolds v Harmanis* (1995) BCSC — 10-4 — respondent or assets MUST be in BC re: prima facie case**

Facts: D had moved to Australia (only wife/son in BC); P, a BC resident, claimed BOC but had no evidence re: contract

Holding: P failed to establish a strong *prima facie* case; also, there was NO evidence of imminent asset dissipation.

Ratio: Mareva injunction can't be granted where the order will be entirely extraterritorial in effect

- IOW, either D or assets sought have to be in the BC jurisdiction;

NOTE: must not allow 'litigious blackmail' through *Mareva* injunction —>***Aetna***

***Silver Standard Resources* (1998) BCCA — 10-4 — strong prima facie case is in itself insufficient to order MI**

Facts: P loaned $$ to D including advancing $$ to C on D's behalf; P obtained MI barring C from paying D;

- TJ granted D order setting aside the injunction on the basis of **(i)** order's effect on an 'innocent third party' AND **(ii)** payments were being made in ordinary course of business, not to avoid paying a judgment

Issue: did the TJ err in granting the order? **NO**

Holding: appeal dismissed DESPITE P having a very strong case + could NOT execute judgement without MI, on account of all the circumstances, it was NOT appropriate to order a Mareva injunction.

Ratio: ultimate test is whether it was fair and just in the circumstances to interfere with D's assets (***AG Wale***)

Anton Pillar Orders

- The purpose is to **preserve evidence** pending trial
- These orders can "effectively" (but not technically) authorize a party to enter the premises of another party & seize property in advance of trial without prior notice
- Obtaining such an order requires a high threshold to be satisfied and safeguards to be implemented
- These types of orders are often sought in cases dealing with intellectual property rights

***Anton Piller KG v Manufacturing Processes* (1975) ERCA — 10-4 —**

Facts: P discovered D was offering P's confidential information to competitors. P worried D would destroy evidence.

- TJ: order to seize documents was not permitted as it might become an instrument of oppression and abuse

Holding: AP Order requires D to give P access to premises. If party doesn't comply, found in contempt unless order is set aside; **Test for *Anton Piller:***

- extremely strong *prima facie* case
- very serious potential damage to P
- clear evidence that Ds:

    - have incriminating documents/other evidence AND
    - real possibility that documents/evidence it will be destroyed if they have notice of application
- additional safeguards:
    - party which has obtained the order expected to act with circumspection
    - subject of order should be given opportunity to consult counsel prior to providing access
    - service and execution should be supervised by independent solicitor

Canadian courts have emphasized:

1. importance of a limited order which identifies material to be preserved in detail
2. role of independent supervising solicitor in ensuring that privileged material is preserved but not disclosed

Pre-judgment Garnishing Orders — *Court Order Enforcement Act*, ss. 1- 27

purpose — allows attachment of debts prior to judgment - extraordinary order // P typically has no recourse until judgment issued // ex parte application (i.e., no notice given to other party)

COEA 3(2) — judge may order debts owing from the garnishee (a 3rd party usually a bank) to D be attached up to amount of debt or claim // claim must be for LIQUIDATED AMOUNT

AFFIDAVIT must be COMPLETE & ACCURATE —> filed in support of application & set out information in **COEA 3(2)(d)-(f)**: action commenced + when commenced // nature of cause of action // amount of debt, claim, or demand // that amount is justly due and owing, after discounts // garnishee indebted to D // place of residence of garnishee

Pre-judgment garnishing orders: PROCESS MUST BE STRICTLY ADHERED TO

- Garnishing order operative once it is served on garnishee **- COEA 9(1)**
- Employer cannot garnish employee's wages prejudgment - **COEA** 3(4)
- Garnishee can either (1) dispute the debt allegedly owing to D; or (2) pay garnished amount into court; if garnishee does neither, court may order amount paid into court & pay costs of process - **COEA 11(a)**
- D must be served with garnishing order - **COEA** 9(2)
- any technical defects will result in garnishing order being set aside

***Knowles v Peter* (1954) BCSC — garnishing orders (GO) are strictly interpreted**

Facts: P obtained GO based on affidavit which described nature of the cause as 'debt on a chattel mortgage'

Holding: The garnishing order was struck; attachment of debts before judgment is an extraordinary process; meticulous observance of the requirements the statute is required.

Ratio: the statute required a description of the nature of the cause of action which the court held to mean a "succinct and informative statement". The affidavit did not describe a cause of action, but rather a form of security.

Expert Reports – Rules 11-1 to 11-7

Rule 11 concern **procedural matters** as opposed to matters of **substance**;

Substance:

- Generally, evidence is only admissible at trial to establish facts - **expert evidence is an exception** to this rule
- Properly qualified experts are entitled to give evidence of their **opinions** where such opinions are **admissible**
- The substantive admissibility of an expert opinion is governed by the common law
    - ***R. v. Mohan*** provides that admissibility depends on —>Relevance; Necessity in assisting the trier of fact; A properly qualified expert; & The absence of any exclusionary rule

Procedure— If you intend to adduce expert evidence, follow these rules:

- Application of the rule: **R. 11-1**

- R. 11 does NOT apply to summary trials under **9-7** OR where the expert is the one whose conduct is the subject of the action (except Rule 11-6)
- Duty of the expert: **R. 11-2(1) & (2)**
  - (1) experts have a duty to assist the court & NOT advocate for a party—>***Yewdale; Turpin; Wilson***
  - (2) Experts must expressly certify awareness of their duty & their report conforms to the duty (***VCC***)
- Appointment of the Expert: Rules 11-3, 11-4 and 11-5
- Content and service of reports: R. 11-6
- Use of expert evidence at trial: R. 11-7

***VCC v Phillips Barratt* (1988) BCSC — 11-2(2) — independence & objectivity of reports**

Facts: P's claim was based on an expert's report which was revised on 10 occasions with "considerable advice" from counsel; **Issue:** was the report independent & objective? **NO; Holding;** report rejected & P's case dismissed

Analysis: report was "substantially rewritten by counsel"; the expert and report were partisan, one-sided & of no value; the evidence would have been rejected even if not contradicted by other evidence

Ratio: Experts may revise reports on advice from counsel but expert must remain independent and objective; NOT appropriate for counsel to make suggestions vis-à-vis substance of expert's opinion

***Yewdale v ICBC* (1995) BCSC — 11-6 — admissibility of expert reports/duty to assist court**

Facts: Application for a ruling on the admissibility of all or part of 5 experts' reports produced by P.

Holding: The reports were mostly rejected because they made conclusions that are for the court, or are "self-evident" and of no assistance

Ratio: Key principles applicable to expert reports:

- Opinion evidence is only admissible if helpful in matters outside of the ordinary experience of the trier of fact
- Expert opinion must be limited to the stated area of expertise.
- The expert must NOT make conclusions of fact on issues in dispute.
- Experts must be independent not advocates
- Experts must not express opinions on the law.

Analysis: ONLY The 5th report was admissible, subject to its relevance being subsequently challenged at trial.

- The 1st, 2nd & 3rd reports were inadmissible in their entirety in that the authors made **findings of fact on disputed issues** & attempted to perform the function of the court/counsel by articulating what were essentially **legal conclusions** and opinions based on **their** understanding of the facts
- The 4th was inadmissible because it was of **no assistance** to the court in that it only contained **self-evident statements** on the issues requiring resolution at the trial

Appointment of Experts

11-3(1) - **JOINT EXPERT** - 2 or more parties can appoint a joint expert if they agree on the following:

- (a) identity of expert; (b) issue in action needing opinion; (c) facts or assumptions for report to be based on; (e) questions to be considered by expert; (f) when report is to be prepared; (g) who will pay fees & expenses

11-3(3)-(5): **COURT MAY APPOINT JOINT EXPERT** either at CPC/application by one of party subject to settlement of 11-3(1) issues—>if parties cannot reach agreement, court may settle terms of appointment & name the expert

11-3(6): an agreement must be entered into and disclosed to all parties

- joint experts are **RISKY** since you can't ditch them UNLIKE OWN expert's report

R 11-3(7) and (9): **If a joint expert is appointed, the joint expert** is the only expert who may give an opinion on the issue, except where leave is granted to file additional expert evidence

- the joint expert is subject to cross by all parties: **R 11-3(10)**

11-3(11) – parties with shared interests can appoint a **common expert** — expert appointed by parties who are not adverse in interest

Own Expert — R 11-4 — **PARTY CAN APPOINT OWN EXPERT** subject to a case plan

Court Appointed Expert — R 11-5 - court may appoint expert on its own initiative at any stage of proceedings

- **(2)(a)** can request parties to suggest names // **(6)** each party can cross-examine court-appointed experts // **(7)** court, in consultation with parties, settles questions to be submitted to expert // **(9)** court can order one or both party to pay expert fees // **(12)** any report produced is tendered into evidence

Content of reports — R. 11-6 — Requirements of Expert Reports
11-6(1): reports must be signed, certified and contain:
- (a) expert's name, address, & area of expertise,
- (b) expert's QUALIFICATION & employment & educational experience in area of expertise;
    - ***Turpin:*** **qualifications MUST be related specifically to the opinion to be given**
- (c) INSTRUCTIONS provided to expert in relation to the proceeding
- (d) NATURE OF OPINION BEING SOUGHT & issues in proceedings to which they relate
- (e) EXPERT'S OPINION - expert's opinion respecting those issues
- (f) REASONS FOR OPINION - including (i) factual assumptions; (ii) research conducted by expert that led to opinion; (iii) list of every document relied on —> ***Turpin:*** don't just say "literature review" – actually list docs

11-6(2) — assertion of qualifications of expert is evidence of those qualifications

***Turpin v ML Insurance Company* (2011) BCSC — 11-6(1) & 11-2— requirements of expert reports**
Facts: P objected to D's expert report on basis that **(i)** qualification were not set out, **(ii)** opinion sought to answer the ultimate issue for the court; & **(iii)** documents relied upon by expert were not listed;
Holding: expert's opinion was not directly related to expertise/qualification.
- (i) the expert's report did NOT sufficiently set out qualifications to give opinion evidence (i.e., practicing "internal medicine NOT enough") —> qualifications must be related specifically to the opinion to be given.
- (ii) Opinion can't decide the ultimate issue – that's for the trier of fact
- (iii) Expert can't refer to "literature"; have to actually list particular documents reviewed
- not appropriate to use bold and italicized fonts to emphasize portions of the report which benefit the party which retained the expert –> akin to advocacy which violates duty in **11-2**

Service of Expert Reports:
- A report must be served at least **84 days** before trial: **R. 11-6(3)**
- Responsive reports must be served **42 days** before trial: **R. 11-6(4)**
- **Material changes** to the opinion of the expert, AFTER SERVICE, must be made by **Supplementary Report** served on the other parties and must set out the changed opinion and reason for it: **R. 11-6(5)-(7)**
- Objections to admissibility must be made on the earlier of the trial management conference (TMC) or **21 days** before trial: **R. 11-6(10)-(11)**

Production of Expert Reports — R. 11-6(8)
Production of the material relied on by the expert (expert's file) is governed by **R. 11-6(8)**:
- (a) The expert must disclose **upon request** of any party of record:
    - •Written statement of facts; •Independent observations; •Data; •Results of tests
- (b) The expert must disclose upon request of any party of record, the contents of the expert's file relating to the preparation of the opinion:
    - Promptly after receiving request if made less than 14 days before trial, or **at least 14 days before trial**

Delgamuukw v BC **(1988) BCSC — 11-6(8) — disclosure of expert reports; solicitor's brief privilege**
Facts: expert reports were disclosed with substantial portions blacked out for privilege. D sought unredacted copies
Holding: Clear copies were ordered to be produced

- cited ***VCC*** re: **an expert called to testify must produce all documents** which are/have been in the expert's possession, including draft reports & other communications—>relevant to matters of substance or credibility
- Solicitor's brief privilege should be preserved to the greatest extent possible, but not at the expense of the integrity of the trial process; waived vis-à-vis matters of substance once the expert is called to give evidence.
  - Docs/comm (incl. oral) that relate to the substance of the evidence or credibility must be disclosed.
  - Counsel's comments not related to the substance/credibility of the evidence may remain privileged.
- Materials that must be disclosed include: letters of instruction; fee agreements; written communications from party or its agents or lawyers relating to the assignment; memoranda & drafts; suggestions from others; any other written material which has or might have been considered in preparing the report
  - A claim for privilege must be made by providing a reasonable description of the document.

Expert opinion evidence at trial — 11-7

- Expert opinion is limited to evidence contained in an expert report —>**11-7(1)**
- Report becomes evidence if expert is NOT requested for cross examination—>**11-7(2)**
  - request, if made, MUST be within **21 days** of service
- Other side will give you notice that they seek to cross-examine expert—>**11-7(3)**
- **EXCEPTION—**Court has discretion to dispense with any requirements under **R 11** if there are new facts that could NOT have been learned through due diligence, there is no prejudice, & if interests of justice demand it.

Surrey Credit Union v Wilson et al**, (1990) BCSC — 11-2(1) & 11-6 & 11-7 —admissibility of expert report/opinion**
Facts: Application for ruling on admissibility of expert report. D objected to report b/c it contained opinion evidence outside the expertise/qualifications of the expert; argument rather than opinion; and large irrelevant passages.
Holding: The report was not satisfactory in its present form (too long & contained too many objectionable opinions); however, it could be rewritten to adhere to the principles enunciated by the court.

- Evidence of an accepted standard w/in a profession is technical info that would be of assistance to the court.
- expert can give evidence whether a standard was followed/breached based on hypothetical/assumed facts
- **expert may NOT give an opinion on the legal duty, make conclusions or arguments of fact or law**

12. November 27, 2017 – Lecture 10 - Trial Procedures, Costs & Review

Trial Procedures — R. 12
Rules leading up to trial (12-1 to 12-4)
12-1(2): to set a trial: a party must file a notice of trial form (Form 40)—as a matter of practice and courtesy you consult with the other side before reserving trial dates

- Then one of the parties must file and promptly serve a Notice of Trial —>**R. 12-1(2) & (6)**

12-2(2) - TRIAL MANAGEMENT CONFERENCE - mandatory and must be held at least 28 days prior to trial date

- each party must file/serve W list listing full name/address of each W the party may call at trial: **R 7-4(1)&(2)**

12-2(2) -**WHO PRESIDES**: TMC is conducted by a judge or master, & if practicable, the judge that will preside the trial
12-2(3) - **TRIAL BRIEF REQUIRED** - each party of record MUST file trial brief in advance of TMC & serve - FORM 41

- **Plaintiff: min 28 days** before; **All other parties** no later than **21 days** before
- **Outline of a trial brief:** Summary of the issues in dispute and position // Witnesses to be called: name, address, issue, time // Expert reports/witnesses, area of expertise, date of report // Witnesses to be cross examined and time required // Objections to admissibility // Documents and exhibits // Admissions // List of

authorities // Time required for submissions // Orders that may affect trial // Orders sought at TMC // Settlement (whether any discussions have taken place/mediation) // Trial with or without jury

- ○ if no one files a trial brief, costs can be ordered against this party—>**R. 12-2(3.2)**, then the trial is struck from the trial list **R 12-2(3.3)**

12-2(4)&(5) - **PARTIES MUST ATTEND TMC** – you and your client "must" attend - if only counsel is attending – the party must be ready for consultation during the TMC// **Pro Tip -** under **(6)** you can file application by requisition - FORM 17 - to not have your client attend - because the actual practice is that no one brings the client anyway

12-2(3.4) - The parties can apply for a consent order to **dispense with the TMC by efiling** an application containing**:**

- copies of all filed trial briefs AND a prescribed checklist duly completed

12-2(9) - **TMC ORDERS -** long list of things presiding judge/master can set - TMC's are very intensive, so the time for them has now been limited // real use is to confirm that all parties are ready to proceed with trial. Orders include:

- How the trial should be conducted
- Amendments of pleadings
- Admissions of fact and documents at trial
- Imposing time limits for witness examinations and opening statements/final submissions
- Providing will say statements in advance or evidence at trial by way of affidavit
- Respecting experts
- opening statements and final submissions in writing;
- adjournment of the trial or changing the number of days;
- directing the parties to attend a settlement conference;
- orders that can assist resolve the proceeding/make the trial more efficient/further the object of the rules
- the judge or master **cannot hear applications requiring affidavits or make final orders at a TMC R 12-2(11)**

Procedure at Trial — 12-5

- Much of the actual conduct of trial is governed by the rules of evidence and advocacy, but there are procedural rules specifically addressing these matters —>**R 12-5**

12-5(21) - ADVERSE WITNESSES must be served (FORM 45) + witness fees at least 7 days before attendance date

12-5(31)-(34) - SUBPOENAS - party can prepare and serve on any person // FORM 25 // must be served

12-5(40) - transcript of video of deposition may be given in evidence & witness may still be called to testify

12-5(52) - USE OF XFD - can tender in whole or part XFD's under **7-5** to contradict or impeach as necessary in interests of justice if person is dead/unable to attend/out of jurisdiction or attendance can't be secured by subpoena

12-5(58) - USE OF INTERROGATORIES - can use whole/part of answer to interrogatory at trial - though court may order that other, connected parts be entered

12-5(59) - AFFIDAVITS - court may order evidence in chief of witness be given via affidavit

Rule **12-6** deals with jury trials

Expedited Trials (Fast Track) — Rule 15-1

15-1(1): Applies where:

- The claims are only for money (pecuniary and non-pecuniary damages) or property (real or personal) and the value of the claim is **less than $100,000**
- The trial can be completed within **3 days**
- The parties consent OR the court orders that the Fast Track process applies

R 15-1(3): Damages are not capped at $100,000

R 15-1(13): A trial date is meant to be provided **within 4 months** upon request by a party; if the trial date will take more than 3 days **R 15-1** may cease to apply **R 15-1(14) – may become a regular trial**

Limitations:

- no contested hearings can be held without a CPC or TMC having been held **R 15-1(7) and (8)**
- Discoveries are limited to 2 hours total by all adverse parties, unless the parties agree, or the court orders otherwise **R 15-1(11)**
- No jury **R 15-1(10)**

R 15-1(15): **Costs** of the action are fixed based on the number of trial days:

- (a) one day or less, $8 000;
- (b) 2 days or less but more than one day, $9 500;
- (c) more than 2 days, $11 000.
- **R 9-1 — OFFERS TO SETTLE —** considerations may apply

Costs — Rule 14

When/what? — arising after an application or after trial, costs provide for one party to pay another party (or non-party respondent) based on success in the application or action and other factors

Purpose? —> *Giles;* also referred to on page 12 (3rd parties) & page 14 (negligence & apportionment).

- indemnify successful litigants in whole or in part for the costs incurred in establishing their legal rights
- Deter frivolous proceedings
- Deter unnecessary steps in litigation
- Encourage meaningful settlement offers and negotiation between the parties

How Payable? under "Appendix B" -- the default for a successful party unless the court orders otherwise

- A party is entitled to prepare a Bill of Costs/identify the steps taken in litigation/claim "units" for those steps
- Each unit has a value set by a scale (A, B or C), based on the "difficulty of the matter"
- Reasonable and necessary disbursements are also claimable.

Types of costs

- **Costs in the cause**: whoever wins the ultimate issue is awarded costs of the application or step at issue
- **Costs in any event of the cause**: the party is awarded costs of this application or step irrespective of who wins the ultimate issue
- **Costs payable on a lump sum basis**: The court orders a specific sum to be paid to the successful party (as opposed to based on a bill of costs)
- **Costs payable forthwith**: Generally, costs are paid at the end of the action, unless an order is made that the costs be payable forthwith. Generally, a deadline by which costs are to be paid is included in such an order
- **Special costs:** A form of increased costs, which unlike "party and party" costs are based on the legal fees actually incurred by a party, rather than on costs allowed under Appendix B
    - whether ordered in respect of a particular application or in an action generally are meant to protect the integrity of the process & deter "reprehensible" conduct —> ***Rana***
    - **R. 14-1(33)** permits the court to disallow a lawyer from collecting fees or make the lawyer personally liable for costs if the lawyer has unreasonably caused costs through delay, neglect or other fault

***Giles v Westminster Savings*... (2010) BCCA — 14-1 — purpose of cost order; apportionment of costs**

Facts: TJ ordered Ps to pay 80 - 90% of Ds' costs after Ps' claims were dismissed;

- Ps appealed the cost order on the basis that issue was a test case, inability to bear the financial burden of costs, & issues regarding to access to justice.
- Ds sought to vary the cost order to be on a "joint & several" liability basis instead of several basis, include full costs instead of the apportionment of costs, & include double costs (for a rejected settlement offer).
    - Joint liability —>each party liable for full amount; full payment by one party absolves other parties.
    - Several liability —>each party only liable for own obligation; payment by one does not absolve others
    - Joint & several —>claimant can pursue obligation against any one party;
        - if D pays the claimant—>D can pursue payment from other Ds

Ratio: reviewing costs orders is <u>discretionary</u>, thus appellate review is limited; the **purposes of cost orders** include:

- deterring frivolous actions or defences
- encouraging a reduction of duration and expense of litigation
- encouraging settlement where possible
- discouraging doubtful cases or defences

Analysis/holding: a party that wishes to displace the usual rules (i.e., costs follow the event) has the <u>burden</u>.

- Ps' did not overcome onus to show that costs were not appropriate, thus cost order was upheld; however
    - Ps' refusal of double costs was appropriate since Ds' offer was nominal (not reasonably acceptable)
    - cost order was varied to joint & several liability since Ps had jointly claimed against Ds.

***Rana v. Nagra*, 2013 BCSC 184 — 14-1 —special costs; types of reprehensible conduct**

Facts: dispute between 2 families involving unsuccessful (i) claims of debt by Ps & (ii) counterclaim for debt by Ds

- Ds sought special costs on the basis of allegations of misconduct by Ps

Holding: Ps' conduct was <u>reprehensible</u> & deserving of rebuke. Conduct included:

- pursuing doubtful & unmeritorious claims (e.g., getting a Certificate of Pending Litigation [CPL] filed against property not at issue for an improper purpose — to put pressure on Ds)
- providing false, exaggerated or misleading sworn evidence
- making serious allegations of fraud & forgery without an evidentiary basis to support claims
- failing to properly disclose relevant documents, thus prejudicing Ds' ability to meet the case against them.

Analysis: court started with <u>principle</u> that a party that has "<u>substantially succeeded</u>" is entitled to costs; determination is made by considering the matters in dispute & their importance to the parties.

- Ds were found to have been substantially successful, the court noting that very little time was spent on their counterclaim advanced as part of the overall accounting between the parties.

***Lee v Jarvie* (2013) BCCA — 14-1 —test for apportionment for costs; what happens where success is divided?**

Facts: P brought a claim in an MV accident & was only awarded around $50,000 of the approx. $1 million claimed

- **Why?** TJ had doubted P's credibility & found some of P's experts to have been advocates rather than independent experts; THEREFORE, TJ ordered **(i)** each party to receive 50% of its costs, with the awards set-off against each other & **(ii)** fees paid to some of P's expert witnesses could not be claimed as disbursements & others were limited in what could be claimed;
- P argument/basis for appeal—> the language of the Rules relating to costs had changed, & now required a consideration of success in respect of a "matter" rather than in respect of an "issue".

Holding/analysis: P's appeal dismissed; court rejected P's argument, finding that "matter" ordinarily has a broad meaning, & therefore can encompass "issues"; also, a consideration of success based on specific issues would serve <u>proportionality and the underlying objects of the Rules</u>.

- court concluded that costs remain a highly discretionary decision; the <u>prior test for apportionment of costs</u> under the former Rules continues to apply & TJ properly applied it. Previous test asked:
    - Are there separate & discrete issues that the party seeking apportionment succeeded on at trial?
    - Can the trial judge attribute time to those specific issues? AND
    - Would apportionment effect a just result in the circumstances.

Offers to settle [OTS] — Rule 9-1

- **Old Rules** contained what was seen as a complete code for awarding costs, including what costs would be awarded in cases where there was a formal offer to settle & whether it was accepted or rejected **[9-1(a)(b)]**.
- **New Rules** give the court many layers of discretion re: costs & OTS are now only factor:
  - **Minimum requirements**: a party must: make a **written** OTS to a party in the proceeding + **serve** the offer on all parties of record + **state** "the [party] reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding" —>[**R 9-1(c)]**

9-1(2): the offer is "without prejudice" & is **not to be disclosed** to the court until costs are in issue

9-1(3): the offer is not an admission

9-1(4): the court <u>may consider an offer in relation to costs</u>, <u>but is not obliged</u> to do so

9-1(5): The court may

- a) Deprive a party of costs from the date of the offer
- b) Award double costs from the date of the offer
- c) Award costs in respect of all or certain steps undertaken after the date of the offer
- d) Award D costs re: all or certain steps made by D & P recovers an amount that does not beat the offer

9-1(6): In <u>considering</u> the offer the court may consider:

- a) Whether the offer <u>should reasonably have been accepted</u> on the date made or later;
- b) The <u>relationship (i.e., difference) between the terms of the offer and the final judgment;</u>
- c) The relative <u>financial circumstances of</u> the parties; and
- d) Anything else appropriate

9-1(8): an offer to settle does not expire by reason that a **counter offer** is made

***Ward v Klaus* (2012) BCSC — evaluation of 9-1(6) factors; whether or not to accept OTS**

Facts: P awarded damages at trial (**$433k**) sig. less than D's OTS (**$493k & $595k**). D sought order (i) P be deprived of costs & (ii) D entitled to costs as of date of 1 of 2 OTSs. P had assessed damages at a much higher amount (**$975k**).

Holding: P awarded costs to the date of 1st OTS (**$493k**) & each party to bear its own costs after

- **Why?** <u>there must be some impact for the substantial offers made</u>, which P did not beat at trial; BUT forcing P to pay costs was too great a penalty given that it was not unreasonable for her to have rejected the OTSs.

Analysis: evaluation of each 9-1(6) factors:

- review of **9-1(6)(a)** is undertaken without regard to final outcome — P NOT obligated to accept sig. less offer
  - IOW, the final outcome is relevant vis-à-vis reasonableness of the offers
- review of **9-1(6)(b)** is MANDATORY, but NOT determinative in the current case — OTSs were more than final award, so P would have been better off accepting either offer
- **9-1(6)(c)** NOT a material factor (since there was no financial info about D, but he would likely be indemnified by insurance) + P wouldn't be completely impoverished if required to pay costs despite getting less $$

Security for costs (SFC)

- In some circumstances, the court will order a party bringing a claim, particularly a corporate party, to post security into court to ensure any future costs order is paid
  - **Why?** to prevent litigants from arranging their affairs to bring claims without the risk of an effective costs order —>Mostly in relation to Ps – so that courts aren't a vehicle for nuisance
- Parties are permitted to defend a claim without posting security
  - However, D may have to if you filing <u>counterclaim</u> that is significantly separate from original claim
- Statutory provisions regarding <u>corporations</u> based on **s. 236** of BC's **BCA** — ***Integrated Contractors***
  - NOTE: no SCC Rules for costs orders against <u>individual litigants</u>, so inherent jurisdiction applies (***Han***)

***Integrated Contractors Ltd.* (2009) BCSC — corporations test for security for costs**

Facts: P claimed not being paid by D after contract completion. D filed counterclaim + added eng. firm as D re: failure to perform contract & delaying project. P & eng firm sought SFCs re: D's counterclaim.

Holding: both P's & eng. firm's applications for security dismissed; **Ratio: test for Security for Costs**

1. applicant must make out a *prima facie* case that respondent would not be able to pay costs if claim fails
2. respondent may defeat #1 by showing:
    - it has exigible assets (easily disposable) that would satisfy an award of costs OR
    - there is no arguable defence to the claim
3. respondent may also resist SFC order on basis that:
    - an order for security will deprive respondent of ability to pursue a valid claim,
    - D's counterclaim is 'sufficiently intertwined' with D's defence of main claim, OR
    - financial hardship is due to actions of applicant — fairness

Analysis: Basis for ordering SFC against a BC company is in **s. 236** of BC's ***BCA*** & inherent jurisdiction of court; also, where security for costs is ordered, the quantum of the order is a matter of the court's discretion

1. *prima facie* test satisfied b/c D's only asset was property in foreclosure, thus no exigible assets;
2. Complicated case thus assessment of case merits (i.e., arguable defence) NOT appropriate re: P's application
    - D NOT required to post SFC re: counterclaim against eng firm (firm had no arguable defence as their pleadings provided denials without any material facts)
3. Court accepted that D did not have the resources to post SFC + might be prevented from proceeding with its counterclaim if security were required
    - also, counterclaim inherently intertwined with D's defence of original claim + most of the costs would be incurred regardless of the counterclaim
    - also, unfair to deprive counterclaimant (D) of its ability to fully respond to P's claim P (esp since P had already obtained security for its claim & some costs thru' a garnishing order)

***Han v Cho* (2008) BCSC — individuals' test for security for costs**

Facts: Ds applied for security for costs against personal Ps in fraud claim. Ps resided outside BC jurisdiction (Korea)

Analysis: BC is unique among the Canadian common law jurisdictions in having no Supreme Court Rules with respect to security for costs orders against individual litigants; THEREFORE, reliance on court's inherent jurisdiction

- After a historical review of the law re: SFCs where P was a natural person, a distinction should be made b2in individual litigants & corporation re: SFC applications, which implies a high threshold to obtain such an order.
    - **Why?** partly to ensure individual access to courts despite impecuniosity (little $$)
    - IOW, orders for SFC against an individual will be made ONLY under very special circumstances
- Judicial discretion requires a balancing of the relative injustice to each party. Some considerations include:
    - Merits of the claim or defence;
    - The ability to order a lesser amount of security;
    - Delay in bringing an application for security; AND
    - Ability to recover costs — onus on applicant to show inability to recover costs
- The fact that P resides outside the jurisdiction, has no assets in BC, or is impecunious is not sufficient in itself.
- SFC may be awarded against an individual where there's a weak claim, a previous failure to pay costs or refusal to obey a court order

Application to case at bar:

- Ps resided outside of the jurisdiction in a non-reciprocating state
- NO evidence of impecuniosity, nor that Ps would be unlikely to pay costs if judgment were sought in Korea
- Ps had a strong case in fraud against Cho
- There were no special circumstances to require an order for SFC against the individual Ps