LAW 469 - CIVIL PROCEDURE - GREENBERG & MICHAUD - FALL 2014 - A. FRASER

INTRODUCTION

- **SPEECH - CJBC McEACHERN - PROPORTIONALITY VS PERFECT JUSTICE** - called for proportionality in court rules versus "perfect justice" - which was really just another name for exhaustive procedural compliance // BG says speech was about balancing search for truth against practical realities of cost & timeliness

"If it takes too long, and becomes too expensive to obtain perfect justice, then some will be deterred from the atstice." - CJ Alan McEachern

Hyrniak v Mauldin 2014, SCC	• **summary judgement allowable method to determine case** // case on summary judgement in Ontario (where final order available w/ out trial) // COURT - 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) is proportionate, more expeditious and less expensive means to achieve a just result VS going to trial

SCHEME & OBJECT OF THE RULES

OBJECT OF RULES

1-3(1) - UNDERLYING PRINCIPLES - secure just, speedy, and inexpensive determination on merits

1-3(2) - **PROPORTIONALITY** - achieving (1) includes conducting proceeding proportionate to **(a)** amount involved; **(b)** importance of issues in dispute; **(c)** complexity of proceedings // added to the new Rules

NON-COMPLIANCE WITH RULES

22-7(1) - **FAILURE TO COMPLY IS IRREGULARITY NOT NULLITY** - unless court orders otherwise, failure to comply is irregularity - does not nullify proceeding, steps taken in proceedings, or any document or order // **WHY?** --> goal is to get determination on the merits - although Rules can read as draconian, the courts will generally allow a second chance - or more!

22-7(2) - **POWERS OF COURT** - upon failure to comply with Rules, court may **(a)** set aside proceeding in whole or part; **(b)** set aside any steps in proceeding, document, or order made; **(c)** allow amendment of pleadings under **6-1; (d)** dismiss proceedings OR strike our response and pronounce judgement; **(e)** make any other order that will further the Rules

ETHICS

BARRISTER & SOLICITOR'S OATH

(1) don't promote suits on frivolous pretences; **(2)** don't pervert law to favour or prejudice anyone; **(3)** act in all things truly and with integrity

CODE OF PROFESSIONAL CONDUCT

CHAPTER 2 - STANDARDS OF THE LEGAL PROFESSION - general duties to act with integrity & uphold standards of legal profession

2.1-1 TO THE STATE	**(a)** maintain integrity & law // don't help people to break law
2.1-2 TO COURTS & TRIBUNALS	**(a)** conduct characterized by candour & fairness // **(c)** don't attempt to deceive court or **(d)** try to improperly influence
2.1-3 TO THE CLIENT	**(a)** obtain sufficient knowledge of facts & beware of bold assurances; **(c) FAIR SETTLEMENT** - where fair settlement possible, client should be advised to end litigation
2.1-4 TO OTHER LAWYERS	**(a)** conduct characterized by courtesy & good-faith; **(b)** fulfill undertakings; **(c) avoid all sharp practice** & paltry advantage
2.1-5 TO ONESELF	**(a)** assist in maintaining honour & integrity of profession; **(c)** make legal services available in efficient & convenient manner
2.2 INTEGRITY	lawyer has duty to carry on practice of law & discharge responsibilities honourably and with integrity

CHAPTER 5 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

5.1-1 LAWYER AS ADVOCATE	When acting as an advocate, a lawyer must represent the client resolutely and honorably within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect **[6] - EX PARTE** applications carry heightened duty to be accurate, candid, and comprehensive in presenting case to tribunal
5.1-2 LAWYERS MUST NOT	**(a) abuse process** by starting actions that are legal, but clearly motivated by malice & brought solely to injure other party **(b)** knowingly assist/permit client to do anything dishonest or dishonourable **(e)** offer false evidence, misstate facts of law, present or rely on **FALSE/DECEPTIVE AFFIDAVIT** **(f)** knowingly misstate contents of a document, testimony, substance of argument, or statutory provision **(g)** knowingly assert as fact that which can't reasonably be supported by evidence **(i)** deliberately refrain from informing tribunal/other lawyer of case law on point **(j) IMPROPERLY DISSUADE WITNESS** from giving E or advise a witness to be absent **(l)** knowingly misrepresent client's position in litigation OR issues to be determined in litigation
5.1-4 DISCLOSURE OF ERROR OR OMISSION	Lawyers who have unknowingly done OR failed to do something that would be in breach of this rule AND discovers the error or omission must disclose error or omission & do what's reasonable to rectify - subject to confidentiality
5.1-5 COURTESY	Lawyers must be courteous, civil, act in good faith - to tribunal & all persons with who lawyer has dealings

5.1-6 UNDERTAKINGS	must strictly and scrupulously **fulfill any undertakings** given & honour any trust conditions accepted in course of litigation
5.2-1 LAWYER AS WITNESS	Lawyers must not testify or submit **own affidavit evidence** unless **(a)** permitted by law, the tribunal, or rules of court; **(b)** matter is purely formal or uncontroversial; **(c)** necessary in the interests of justice
5.3 INTERVIEWING WITNESS	Lawyers must disclose their interest as lawyer AND take care not to subvert/suppress E or procure W to stay out of the way
5.4-1 DON'T OBSTRUCT W's	When involved with a proceeding, **don't obstruct examination or cross-examination** in any way
5.4-2 COMMUNICATION WITH YOUR WITNESS DURING TRIAL & DISCOVERY	**(a)** - you can discuss anything while examining your own W **(b)** - during cross, you can't discuss with your own W --> the evidence in chief, or any related matter **(c)** - after cross, and during re-examination, you can discuss any matter with leave of the court **(d)** - in discovery is one day --> must refrain from discussing evidence // if discovery is more than one day - can discuss any matter at the end of the day if you tell the other side first

CHAPTER 7 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

7.2-1 COURTESY & GOOD FAITH	Lawyers must be courteous, civil, and act in good faith with all person whom they deal with in course of practice **[5]** - **DEFAULT PROCEEDING** - if you know another lawyer has been consulted on a matter, you must not proceed in default without first making inquiries and giving reasonable notice
7.2-2 AVOID SHARP PRACTICE	**Avoid sharp practice & don't take paltry advantage** without fair warning on matters not going to the merits (ie/ technical mistakes by other lawyers) or involving the sacrifice of client's rights
7.2-3 DON'T RECORD	Can't record conversations with client or another lawyer without first telling them you'll be recording
7.2-5 REASONABLY PROMPT	Answer all professional letters & communication in reasonably prompt manner. Punctually fulfill your commitments.
7.2-6 PERSON REPRESENTED BY ANOTHER LAWYER	Where a person is represented, must not (a) approach, communicate, or deal with the person; or (b) attempt to negotiate or compromise --> except through or with consent of their lawyer
7.2-6 CORP REPRESENTED BY ANOTHER LAWYER	Lawyer can't contact officers or employees without the consent of the corporation's lawyers if --> (a) person has power to bind corp; (b) person directs or regularly consults with corp's lawyers; or (c) is directly interested in the representation
7.2-9 LAY LITIGANTS	lawyer must --> (a) urge them to get representation; (b) make it clear you don't represent their interests; (c) make clear that you act exclusively in the interests of your client
7.2-11 UNDERTAKINGS	don't give undertakings that cannot be fulfilled + fulfill every undertaking + honour every trust condition accepted **[1]** CLARITY - undertakings should be absolutely unambiguous & in writing, or confirmed in writing

TIME

TIME

22-4(1) - HOLIDAYS & COMPUTATION OF TIME FOR LESS THAN 7 DAYS --> does not include holidays - unless contrary intention appears

22-4(2) - EXTENDING/SHORTENING TIME - court may extend/shorten any time provided for in Rules or in order - even if application made after period of time expired // avoids overly technical application of the Rules & helps satisfy underlying principle in **1-3** that case be determined on its merits

22-4(3) - PLEADINGS - time to serve/file/amend pleadings can be extended by consent

22-4(4) - AFTER A DELAY OF ONE YEAR WITH NO JUDGMENT OR STEP TAKEN --> must not proceed until you file and serve notice of intention to proceed on all parties of record and then wait 28 days - use **Form 44** // BUT - see next rule!

22-4(5) - WANT OF PROSECUTION - defendant or respondent can apply to have proceeding dismissed without having to serve notice of intention to proceed

8-1(1) - BUSINESS DAY - day when court registries are open for business

DEEMED COMPLETION OF ORDINARY SERVICE

4-2(3) - SERVICE BY DELIVERY -

(a) if left at address before 4:00pm on day that's not a Saturday or a holiday, service is deemed to be on that day

(b) if left at address after 4:00pm, on Saturday, or on a holiday, service is deemed to be on the next day that's not a Saturday or holiday

4-2(4) - SERVICE BY MAIL - deemed served one week later, or on the next day that's not a Saturday or holiday

4-2(5-6) - SERVICE BY FAX - faxes less than 30 pages can be served at any time // faxes more than 30 pages may be served b/w 5:00pm and 8:00am next day or another time if agreed to by person receiving

(a) if transmitted before 4:00pm on day that's not a Saturday or a holiday, service is deemed to be on that day

(b) if transmitted after 4:00pm, on Saturday, or on a holiday, service is deemed to be on the next day that's not a Saturday or holiday

INTERPRETATION ACT

25 - CALCULATION OF TIME - **(2)** acts that fall on or expire on holiday are extended to next day not a holiday **(4)** time expressed as clear days, "at least" or "not less than" must include the first and last days - ie/ don't count the day of the "event" or the first day of computation **(5)** otherwise, the first day is excluded and the last day included

29 - HOLIDAY - includes Sunday + Christmas + Boxing Day + Good Friday + Easter Monday + a bunch of other stat holidays

COMMENCING PROCEEDINGS

PRELIMINARY CONSIDERATIONS

FORM OF PROCEEDINGS

2 WAYS TO START PROCEEDINGS IN BC AS PER RULE 2-1 --> (1) NOTICE OF CIVIL CLAIM - THIS IS THE DEFAULT - SEE SECTION BELOW; **(2) PETITION**

PETITIONS

16-1(2) - **FILING REQUIREMENTS** - to bring a petition under **2-1(2)** must file ---> **Form 66** + **supporting affidavits**
16-1(3) - **SERVICE** - petition & affidavits in support must be personally served on all persons who may be affected by order
2-1(2) - WHEN USED --> (a) person starting proceeding is only person interested in relief claimed OR no person against whom relief sought; **(b)** where statute mandates that matters will be heard by petition - ex/ oppression actions under BCBCA or foreclosure petitions; **(c)** sole issue is construction of document - question of LAW - ex/ will, contract, statutory interpretation

- **PETITIONS DO NOT LEAD TO ACTIONS, AS PER RULE 1-1** - therefore, many pre-trial processes are unavailable
- **CONVERSION - 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** - see case summary in CHAMBERS section for factors to consider)
- **RESPONSE TO PETITION - 16-1(4)** - 21 days if person served resides in Canada // 35 days if person served resides in US // 49 days if resides elsewhere

LIMITATION PERIODS

- **LIMITATION ACT** - in absence of LP in a specific statute, this legislation applies // KEY FOCUS ---> DISCOVERABILITY (pro - responsive to particulars of each case // con - makes LP less certain & more subject to dispute)
- **PRO TIP** - even if client is only potential client, figure out LP for an prospective claim & notify potential plaintiff // failure to do so can result in liability in neg.

LA 3 - **EXEMPTIONS** - doesn't apply to --> sexual assault // assault or battery of a minor // claim for child support or spousal payment under judgement
LA 6 - **BASIC LIMITATION PERIOD** - 2 years from date the claim is discovered
LA 8 - **DISCOVERABILITY** - date on which person knew or reasonably ought to have known that **(a)** injury/loss/damage occurred **(b)** caused or contributed to by act or omission; **(c)** act or omission by person against whom claim made; **(d)** wrt all the circumstances, court action most appropriate means to seek remedy
LA 21 - **ULTIMATE LIMITATION PERIOD** - 15 years from date of act / omission, regardless of when damage suffered or discoverability
LA 22 - **COUNTERCLAIMS & 3rd PARTY CLAIMS** - another exception - allowed, even if they'd otherwise be out of time if main action delayed b/c discoverability
LA 24 - **EXTENSION IF LIABILITY ACKNOWLEDGED** - LP can be delayed by conduct (ex/ payment) or acknowledgment of liability in writing - LP starts from then

DEFINING THE ACTION

NOTICE OF CIVIL CLAIM

The NOCC has a threefold purpose. First, to define the issue of fact and law to be determined by the court. Second, to identify material facts for each cause of action. And third, to set out the plaintiff's right or title, the defendant's wrongful act violating that right or title, and the relief sought. The principles that underly rules on NOCC are efficiency and fairness, which align with the object of the rules in **1-3**.

- **2-1** - **NOCC IS DEFAULT** - unless provided otherwise by enactment or SCCR, every proceeding must be started by filing NOCC (not petitions)
- **3-1(1) - FORM 1** - must be used to file NOCC
- **3-1(2) - NOCC MUST DO FOLLOWING** --> **(a)** set out concise statement of material facts giving rise to claim; **(b)** set out relief sought against each defendant; **(c)** set out concise summary of legal basis; **(d)** proposed place of trial; **(g)** otherwise comply with **Rule 3-7** (**see Pleadings below**)

Sahyoun v Ho 2013 BCSC	• **basic elements of NOCC** // P's ordered to amend NOCC - original was "extremely prolix", failed to identify causes of actions against which D's and listed variety of statutes not connected to cause of action • CLEAR & CONCISE - clearly identify issues of facts & law - "both brevity and lucidity are important" // relief sought must be clear - set out P's right or title, D's wrongful conduct, and resulting damage • MATERIAL FACTS - identify material facts for each cause of action, though not particulars // **material fact** = "one that is essential in order to formulate a complete cause of action." // **particulars** = intended to provide D with sufficient detail about case to meet • LEGAL BASIS - **legal basis must include named cause of action or statute relied upon**
National Leasing 2011 BCSC	• **striking pleadings per 9-5 - no cause of action disclosed - glimmer of defence** // counterclaim written in "idiosyncratic" language // MASTER - struck b/c it didn't disclose a cause of action // DEFICIENCIES = failure to set out nature of alleged tx; failure to set out the parties; failure to indicate date of alleged tx // "Our scribble/scribble-procedures are not inflexible, but they do require that counterclaims disclose a comprehensible, arguable cause of action, and I am afraid this one does not." // but NOTE - where there's some semblance of a defence, court will be hesitant to strike pleading, especially where lay litigant is involved
Jerry Rose Jr v UBC 2008 BCSC	• **striking pleadings per 9-5 - accusations in NOCC too broad** // wild range of accusation in NOCC // defendants applied to strike pleadings for no reasonable cause of action // **COURT** - TEST - assuming all facts pleaded are true, is it "plain and obvious" that pleadings disclose no reasonable cause of action // although unlikely, reasonable claim exists if facts taken to be true - BUT - plaintiff failed to say which defendants did what and when // resulted in "wild speculation" against all D's // claim struck on that basis

RENEWAL OF NOCC

3-2(1) - RENEWAL OF ORIGINAL NOCC - NOCC in force for 12 months // before OR after expiration, court can order renewed for additional 12 months

3-2(2) - FURTHER RENEWAL - if a renewed NOCC has not been served during currency of renewal, court may order renewal for additional period no longer than 12 months (in other words, don't let your renewed NOCC lapse)

3-2(4) - AFTER RENEWAL - renewed NOCC must be served // **EFFECT ON LIMITATION PERIOD** - renewal prevents operation of any statutory limitation period

- **TEST FOR RENEWAL** (**Swetlishnoff**)
  1. was application to renew brought promptly?
  2. did D have notice of claim despite not being served?
  3. has D suffered prejudice from delay in service? must be more than mere delay.
  4. was failure to serve attributable to actions of D, or to someone else, such as D's counsel?
  5. merits - only to be considered where claim is bound to fail (**Weldon**)
- **OVERARCHING GOAL OF 3-2** - seeing that justice is done - test will be applied with this goal in mind

Swetlishnoff 2011 BCSC	• **prejudice must be more than mere delay** // action for interest in property commenced, but never served - D's eventually find out about it & apply to have action dismissed // **COURT** - treats application as an application for renewal // here, significant delay resulted to real prejudice to D's - decline in health and memory // **interfered with D's ability to mount defence**
Weldon v Agrium 2012 BCCA	• **consideration of merits on renewal** // D's claimed that merits of action should also be factor on decision to renew // here - limitation defence // **COURT** - only consider merits in exceptional cases - where claim bound to fail // renewal not generally appropriate stage

PLEADINGS

- **4 MAIN FUNCTIONS** --> (a) define issues / questions in dispute; (b) avoid surprises; (c) inform the court; (d) provide a permanent record of the previous
- **1-1** - **PLEADINGS INCLUDE** -->
  - NOTICE OF CIVIL CLAIM (**3-1**) and RESPONSE TO CIVIL CLAIM (**3-3**)
  - REPLY
  - COUNTERCLAIM (**3-4**) and RESPONSE TO COUNTERCLAIM (**3-4**)
  - THIRD PARTY NOTICE (**3-5**) and RESPONSE TO THIRD PARTY NOTICE (**3-5**)

PLEADINGS GENERALLY - RULE 3-7

3-7(1) - **NO EVIDENCE ALLOWED** - only include facts (who, what, when, where) but not how you'll prove those items

3-7(2) - **STATE EFFECT OF DOCUMENTS** - but do so briefly - do NOT plead precise words in the document unless they're material

3-7(6)&(7) - **NO INCONSISTENT PLEADINGS** - BUT - can plead **in alternative**

3-7(8)&(9) - **CAN RAISE OBJECTION OF LAW** - ex/ limitation period argument - BUT - can only plead result of law if supporting material facts also pled

3-7(11) - counterclaims & setoffs - SEE BELOW

3-7(12) - for pleadings other than NOCC --> must plead fact/law that party alleges **(a)** makes claim/defence not maintainable; **(b)** if not pled would take other party by surprise; **(c)** raises issues of facts not arising out of preceding pleading

3-7(15) - **DENIAL OF FACT MUST BE CLEAR** - not evasive

3-7(16) - **DENIAL OF CONTRACT** - taken only as denial of express contract - not its legality, terms, or sufficiency

STRIKING PLEADINGS - RULE 9-5

9-5(1) - **WHOLE/PART OF PLEADINGS CAN BE ORDERED STRUCK/AMENDED AT ANY STAGE OF PROCEEDINGS ON GROUDS THAT....**

(a) pleadings disclose no reasonable claim or defence --> most commonly used // high threshold (**National** & **Hunt**)
- **TEST** - must be plain and obvious that pleadings do not disclose reasonable claim or defence
- **9-5(2)** - no EVIDENCE admissible on 9-5(1)(a) --> facts as pleaded presumed to be true
- BUT - court may look behind allegations of fact to determine if they're based on speculation OR incapable of proof - can the refuse to assume such allegations are true - ex/ generalized accusations, failure to state adequate particulars about when, where, how allegations occurred (**Jerry Rose Jr**)
- court will attempt to save even the worst pleadings by allowing party to amend (**National**)

(b) unnecessary, scandalous, frivolous, or vexatious // can admit E when attempting to establish
- pleadings are "without substance, groundless, fanciful, and will waste the time of the court" (**Jerry Rose Jr**)

(c) pleadings may prejudice, embarrass or delay fair trial or hearing of proceeding // can admit E when attempting to establish

(d) pleadings are an abuse of process // can admit E when attempting to establish

9-5(1) - **COSTS** - court may order costs of the application to be paid as special costs

THINGS TO REMEMBER ABOUT STRIKING PLEADINGS

- **SOLE ISSUE IS SUFFICIENCY OF PLEADINGS -** only issue on application to strike is sufficiency of the pleadings as a matter of law // successful application is NOT a determination on the merits & the losing party will be given chance to try again (subject to time limits & LP's) // court will also likely look to whether amendment can solve issue
- **GLIMMER OF DEFENCE** - where there's some semblance of defence, court will be hesitant to strike, especially where lay litigant is involved (**National Leasing**)

Hunt v Carey 1990 SCC	• **test to strike on 9-5(1)(a) = plain and obvious to fail, not whether P will succeed** // P claimed conspiracy for personal injury claim // D applied to strike claim - on basis that tort of conspiracy not yet extended to personal injury // **COURT** - refused to strike // purpose of test is not to ask if P will succeed, but whether pleadings disclose "radical defect" making it plain and obvious to fail
Willow v Chong 2013 BCSC	• **factors to strike on (b) unnecessary, frivolous, or vexatious pleadings OR (d) abuse of process --> bound to fail** // students of Chinese medicine school that was shuttered brought suit against variety of D's, including Crown & Ministers // C&M sought application to strike portions of NOCC // **COURT** - allowed // claims against government agencies can't found proper action outside of admin law context & were impermissible collateral attacks (pursuing civil claim where there's statutory remedy) // claims against Ministers were abuse of process (decision should be dealt with in admin tribunal) // FACTORS --->1. pleading does not go to establishing cause of action 2. pleading does not advance any claim known in law 3. would serve no purpose and be a waste of court time & public resources to proceed 4. pleading is so confusing that it cannot be understood

AMENDING PLEADINGS & PARTIES

- **OVERRIDING PRINCIPLE** ---> courts are VERY liberal in their approach - the key question is whether amendment is in the interests of justice // can amend even during the course of trial, as per **6-1(8)**, or after expiration of LP
- **AMENDMENTS AFTER EXPIRATION OF LP** (**Bedoret v Badham**) - **FACTORS** --> **(1)** extent of delay; **(2)** reason & explanation for delay; **(3)** degree of prejudice, and must be actual prejudice; **(4)** connection b/w existing claim & proposed new cause of action and/or party

AMENDING PLEADINGS - RULE 6-1

6-1(1) - **AMENDMENT OF PLEADINGS** - party can amend pleadings in whole or part

(a) once without leave of the court at any time before the earlier of **(i)** date of service of notice of trial; **(ii)** date of CPC; ("FREE AMENDMENT")

(b) any other time only with **(i)** leave of court; or **(2)** consent of parties of record (**TJA v RKM**)

6-1(2-3) - **TECHNICAL PROCESS** - amended pleading must --> indicate date original pleading filed + show deleted words as struck out + underline new words

6-1(4) - **SERVICE OF AMENDED PLEADINGS** - 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 (not yet parties of record)

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 (ie/ can't use this as an opportunity to amend whatever you like in your response) - serve within 14 days // **(6)** no amended response? original response deemed to be the amended response & any new facts deemed to be outside knowledge // **(7)** served on new party??? the new party has the same time to respond as they would to an original pleading

- **NOTE - TIME FOR SERVICE CAN BE EXTENDED BY CONSENT - 22-4(3)**

AMENDING PARTIES - RULE 6-2

- **KEY DIFFERENCE** - one free amendment (by certain time) allowed under **6-1** // BUT - amending parties under **6-2** requires leave of the court // though note certain safeguards do exist where leave is not required (ex/ requirement to serve amended pleading & ability to apply to strike pleadings)

6-2(1)-(5) - **CHANGE OF PARTIES IN VARIOUS CIRCUMSTANCES** - party ceases to exist (dies, becomes bankrupt) // interest is assigned or conveyed // change or transmission of interest or liability OR new interested person comes into existence

6-2(7) - **PARTY ADDED / REMOVED / SUBSTITUTED** - very common order - if just and convenient, parties can be

(a) cease to be a party if --> person is not, or has ceased to be proper/necessary party

(b) added or substituted if --> person ought to have been joined as party OR participation necessary to ensure effective adjudication

(c) added if --> question or issue related/connected to relief or subject matter

6-2(8) - **TECHNICAL PROCESS**

(a-b) - AMEND & SERVE - originating pleading must be amended and served --> 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 (not yet parties of record) // no further steps can be taken against added party until service

(c) - **APPLY TO DISCHARGE** - added parties can apply to discharge order within 21 days after service

6-2(10) - **ADDING PARTY AS PLAINTIFF REQUIRES THAT PERSON'S CONSENT**

TJA v RKM 2011 BCSC	• **test for allowing amendment - useless amendment** // D's sought to strike claim in defamation on unpleaded claim of privilege // P's then seek to amend pleadings to add defences of qualified & absolute privilege // **COURT** - amendments will only be disallowed if they are useless or cause prejudice to other side - amendments are useless if they are plain and obvious to fail // POLICY - ensure real issues are determined in the litigation // here - privilege claim not bound to fail - amendment allowed
Bedoret v Badham 2012 BCSC	• **amending OR adding party after expiration of LP** // MVA claim brought just prior to expiration of LP // ICBC told P's counsel that they could name the suspected other driver, vs ICBC - later claimed other driver was not involved! // P applied to amend & ICBC refused // **COURT** - general rule = amendments after LP usually prejudicial - BUT - **LA 22** - court has discretion to allow amendment of pleadings after LP expired so long as there's an existing action // FACTORS --> see above // ICBC added as party
Broom v Royal Centre 2005 BCSC	• **substitution of party OR amendment for misnomer?** // slip & fall case - P couldn't figure out identity of maintenance company prior to LP - filed against "John Doe" // used "free" amendment to change name of party once discovered // D said this required application to court // **COURT** - draws distinction b/w deliberate misnomer (as here) and sub of party (which would require leave) // **TEST** --> if party is sufficiently described in initial pleadings such that a reasonable person would know pleadings applied to them, can consider change to be amendment for misnomer -then do NOT have to apply for leave to substitute

PARTICULARS

3-7(18) - WHEN PARTICULARS NECESSARY - claims in MR, fraud, breach of trust, willful default, or undue influence // OR - "if particulars may be necessary"

3-7(20) - FURTHER PARTICULARS - authorizes demand for further particulars - must be served within 10 days // if more particulars become known after date of pleading, these must also be served

3-7(22-23) - COURT ORDERS FOR PARTICULARS - court may order party produce "better and further" particulars // BUT - before applying for order, party must first demand them in writing

3-7(24) - DEMAND FOR PARTICULARS DOES NOT STOP CLOCK - where party has demanded particulars, this does not act as stay or time extension // ex/ stop clock running on your time to respond // BUT - party can apply for extension of time

- **PURPOSE OF PARTICULARS** (**Camp Development**)
  - INFORM - inform other side of case to be met + what evidence will be required + prevent them from being taken by surprise
  - CLARIFY & LIMIT - limit generality of pleadings + limit and clarify issues to be tried + tie hands of party - prevent new issues from being raised

Camp Development **2011 BCSC**	• **test for granting order for particulars** // claim for multiple categories of damages as result of expropriation - D sought numerous particulars // **COURT** - orders for particulars will be granted if necessary to delineate the issues b/w the parties

PARTIES

MULTIPLE CLAIMS AND PARTIES - RULE 22-5

22-5(1) - MULTIPLE CLAIMS - P may join several claims in the same proceeding

22-5(2) - MULTIPLE PARTIES - P may name 2 or more D's in a single proceeding if --> (a) matter involves common question of law; (b) common relief is sought; or (c) court grants leave

22-5(6) - CAN APPLY TO SEPARATE - if joinder of claims/parties may unduly complicate or delay proceedings, or is otherwise inconvenient, court can separate or make any other order that furthers the objectives of the rules

22-5(7) - SEPARATING COUNTERCLAIMS OR THIRD PARTY CLAIM - court may order if they "ought to be disposed of by separate proceedings" - kind of vague

22-5(8) - CONSOLIDATION - court can order separate actions be combined into one proceeding at any time - OR - can order they be tried at same time

SPECIAL RULES FOR CERTAIN PARTIES

20-1 - PARTNERSHIPS - **(1)** P's can sue or be sued in firm name // **(2)** service - effected on firm by leaving docs with partner OR at Px office with someone who appears to be in charge // **(3)** response - must be filed on behalf of Px - but individual partners an also file their own response & defend action in own name // **(4)** - can require affidavit listing names & addresses of all partners at relevant time

- **EXECUTION OF ORDER AGAINST FIRM** - **(6-7)** - can be executed against firm property AND anyone who ---> appeared individually on action, as per (3) + was served as a P but did not appear + has admitted to being a P or has been found to be a P by the court

20-2 - PERSONS UNDER LEGAL DISABILITY - **(3)** must commence or defend proceedings via Litigation Guardian // **(4)** LG must act through lawyer - exception is PG&T // **(10)** if party becomes incompetent during proceedings, LG must be appointed; **(11)** court can remove, appoint, or substitute LG; **(12)** infants can take over litigation once they are of age

- **TWO SAFEGUARDS** - **(14)** - no default judgement without court approval // **(17)** - no settlement without court approval

20-3 - REPRESENTATIVE PROCEEDINGS - if multiple parties have same interest in proceeding, one party can be the representative to start and continue the proceeding - on application or by court order

COUNTERCLAIMS & SET-OFFS

3-7(11) - **SET-OFF OR COUNTERCLAIM** - defendant may set-off or set up, by way of counterclaim // SET-OFF - defence in which a claim back is made against plaintiff that's intrinsically tied to original claim // COUNTERCLAIM - stand alone claim that could be brought by D as separate action

- **PRACTICAL DIFFERENCE** - if P's claim is dismissed or discontinued, the set-off falls away but counterclaim remains
- **IDENTIFICATION OF PARTIES - 3-4(3)** - parties typically retain one identity through action // P against whom counterclaim is brought continues to be P + D against whom counterclaim is brought continues to be D + any other person is "defendant by way of counterclaim"

COUNTERCLAIMS - RULE 3-4

3-4(1) - **COUNTERCLAIM AGAINST PLAINTIFF** - D in action may file counterclaim - **Form 3**

3-4(2) - **ADD ANOTHER PARTY** - if counterclaim raises questions involving another party, that party may be joined as party against whom CC is brought

3-4(4) - **SERVICE OF COUNTERCLAIM** - PARTIES OF RECORD - 21 days if person was served in Canada // 35 days if person was served in US // 49 days if person served anywhere else // NEW PARTY - personal service within 60 days after CC filed

- **NOTE - 22-4(3)** - time for serving/filing/amending may be extended by consent

COUNTERCLAIMS & LP's

LA 22 - **COUNTERCLAIMS & 3rd PARTY CLAIMS** - allowed, even if they'd otherwise be out of time if main action was delayed b/c discoverability

RESPONSES

RESPONSE TO NOTICE OF CIVIL CLAIM

3-3(1) – **FILING RESPONSE TO CC** – to contest action (and avoid default judgment) defendant must file response to civil claim – **Form 2** – and serve copy on P

3-3(3) – **TIME TO FILE** – 21 days if person was served in Canada // 35 days if person was served in US // 49 days if person served anywhere else

- **NOTE – 22-4(3)** – time for serving/filing/amending may be extended by consent

3-3(2) – **CONTENTS OF RESPONSE** – analogous to contents of NOCC & **3-1(2)**

(a)(i) – each fact must be admitted, denied, or outside knowledge
(a)(ii) – no blanket denials – D must set out own version of any denied facts
(a)(iii) – concisely set out additional material facts
(b) – indicate position on relief sought (consents, opposes, no position)
(c) – state reason for opposition to relief, if any
(d) – otherwise comply with **3-7** (pleadings rule)

3-3(8) – any allegations of fact NOT responded to are deemed to be outside knowledge of D

RESPONSE TO COUNTERCLAIM

3-4(5) – **TO DISPUTE COUNTERCLAIM** – must file response to counterclaim – **Form 4** – and serve copy on all parties of record

3-4(6) – **RULES FOR RESPONSE TO NOCC APPLY TO COUNTERCLAIMS** – includes **Rules 3-1**, **3-3**, and **3-8**

- **TIME TO SERVE** – as per **3-3(3)** – 21 days if person was served in Canada // 35 days if person was served in US // 49 days if person served anywhere else
- **NOTE – 22-4(3)** – time for serving/filing/amending may be extended by consent

3-4(7) – **COUNTERCLAIM CONTINUES** – even if P's claim is stayed, discontinued, or dismissed

DEFAULT JUDGMENTS

- **NOTE** – **MASTER** has jurisdiction to make final orders granting judgment in default, as per **PD-42**

DEFAULT JUDGMENTS

3-8(1) – PREREQUISITE ---> P may proceed under this Rule if **(a)** D has not filed & served RCC; and **(b)** period for filing & serving has expired

3-8(2) – FILING REQUIREMENTS – proof of service of NOCC + proof D failed to serve RCC + endorsed requisition from Registrar that no response to civil claim has been filed + draft default judgment order in **Form 8**

3-8(3) – CLAIM FOR ASCERTAINABLE AMOUNT – if damages are specified/ascertainable, a default judgment gets you that amount

3-8(12)&(13) – DAMAGES TO BE ASSESSED – P may take judgment and have damages assessed by trial OR summary application (on affidavit or other evidence)

3-8(11) – COURT MAY SET ASIDE OR VARY DJ – see CASES below

OTHER CONSIDERATIONS

7-7(6)(b) – DEEMED ADMISSIONS – can bring application for DJ for all or part of claim on basis of deemed admissions – this is w/out prejudice to other D's

20-2(14) – PERSONS UNDER LEGAL DISABILITY – cannot take DJ without leave of the court against person under legal disability

14-1(26) – COSTS ON DEFAULT JUDGMENT – registrar can fix costs and set out amount in the judgment OR in separate certificate // costs awarded based on **Appendix B, Schedule 1**

ETHICAL CONSIDERATIONS

- The Rules address procedural matters respecting default judgments, but a number of professional and ethical obligation are also engaged.
- **CPC 7.2-2** – general requirement to avoid sharp practice
- **CPC 7.2-1-[5]** – if you know another lawyer has been consulted on the matter – must not proceed without **reasonable inquiry and notice** // check to see if lawyer is still involved & give reasonable notice of your intent to take default judgment

Miracle Feeds	**TESTS to set aside default judgment – 4 FACTORS** (referred to in both of the John Doe cases) 1. show failure to file RCC was NOT DELIBERATE 2. either (a) show application to set aside DJ made AS SOON AS REASONABLY POSSIBLE; or (b) EXPLAIN DELAY in application 3. demonstrate a DEFENCE WORTHY OF INVESTIGATION – D must show that at trial, P may not be successful – must be a positive defence (**John Doe 2**) 4. do all of the foregoing on ADMISSIBLE AFFIDAVIT EVIDENCE
Director of Civil Forfeiture v John Doe 1 2010 BCSC	• **failure to meet one of the MF factors is not fatal to application to set aside DJ** // P brought claim for funds in court // DJ issued with term that D's could apply to set aside within 42 days // COURT – extends the 42 day period to set aside DJ // this case is in tension with #2
Director of Civil Forfeiture v John Doe 2 2010 BCSC	• **must adduce E that failure to file RCC was not deliberate (+) positive defence** // same action – Court hears actual application to set aside DJ // no evidence as to why RCC was not filed – in absence of such E, Court assumes claim was deliberately disregarded – this alone was fatal // regardless, D's failed to demonstrate E of worthy defence – did not even meet low threshold that there be some evidence of a meritorious defence to show that at trial, a P may not be successful

SERVICE & DELIVERY OF DOCUMENTS

SERVICE

4-1 – **ADDRESSES FOR SERVICE & CHANGE OF ADDRESS** – **(1)** each party of record must have address for service & keep it up to date // address can be --> lawyer's office address // accessible address within 30km of registry // accessible address + postal address in BC, fax, or email // **(2)** additional address of postal address, email address, or fax number // **(3)** change of address by filing and serving **Form 9**

4-2 – **ORDINARY SERVICE** – subject to **4-3(1)** below, documents can be served by ordinary service, unless court orders otherwise // **(2)** ordinary service = leaving document at address, mailing by ordinary mail, fax – if number provided, email – if email address provided // ***WHEN?*** *--> use after formal, initial personal service already established*

4-3(1) – **PERSONAL SERVICE** – unless court orders otherwise, notice of civil claim + petition are to be personally served // counterclaim + third party notice too, if not served on parties of record // ***WHY?*** *--> ensure that parties to litigation get proper notice of proceedings – this is often first they hear of the action*

4-3(2) – **HOW TO EFFECT PERSONAL SERVICE** – NOTE – see book for service on unincorporated association, trade unions, infants, or mentally incompetent
(a) individual = leave copy of document with them
(b) corporation = **(i)** leave copy with president, chair, mayor, or other chief officer; **(iii)** leave copy with manager, cashier, clerk, etc of the corp at any BC branch; **(iv)** serve in manner consistent with BCBCA (as per **BCBCA 9(1)(a)** deliver documents to delivery address OR mail to registered mailing address)

4-6 – **PROVING SERVICE** – ORIGINATING PLEADING – prove service of originating pleading (NOCC) by filing affidavit of personal service – **Form 15**; or by other party filing response // OTHER DOC BY PERSONAL SERVICE – by filing affidavit of personal service – **Form 15** // OTHER DOC BY ORDINARY SERVICE – by filing affidavit of ordinary service – **Form 16**

Orazio v Ciulla 1966 BCSC	• **test for valid personal service – mere delivery vs notice** // D's usual lawyer ended up on other side of matter – when D came to see him on unrelated matter, lawyer gave D the NOCC & explained what it was // D handed it back and left // valid? // **COURT** – delivery must be under circ's that enable court to conclude that D knew, or reasonably ought to have known, that he was being served with legal documents // mere delivery of document is NOT notice // goal of notice is awareness // here --> valid service
Wang v Wang 2012 BCSC	• **invalid service** // default judgement on basis that D's were served with no response // challenged // service via (1) NOCC being shoved under windshield of car stopped at red light AND (2) handed to drunk person at restaurant // **COURT** – first invalid --> no reasonable person would think they were being served in those circ's – BUT second valid --> being drunk isn't excuse to say you weren't served

SUBSTITUTIONAL SERVICE

4-4(1) – **ALTERNATIVE SERVICE** – if impracticable OR person can't be found after diligent search OR person is evading search – on ex parte application, court may make order for substituted service

4-4(2) – **MUST INCLUDE ORDER** – unless court orders otherwise, or when substitutional service is by advertisement --> when serving documents under **4-4(1)**, must include copy of alternate service order

- **FORM** --> within discretion of court // can be be advertisement in newspaper (**Form 10**); tacked on door; via service of third party in contact with person; notice at the courthouse // court will often order combination of methods // KEY ISSUE – how likely is it that alt service will come to the person's attention?

Luu v Wang 2013 BCSC	• **test for substitutional service – meaning of impracticable** // (1) impracticable or (2) person can't be found or is evading service // D wanted order for substitutional service set aside // **COURT** – "impracticable" means onerous or expensive so as to be more trouble than reasonably justified in circumstances // here – claim was for substantial amount; P tried to effect service on wrong person AND didn't attempt to serve real P in China // "a modest degree of inconvenience and expense does not…justify a departure from the ordinary rule of personal service" // order for substitutional service set aside
Burke v John Doe 2011 BCSC	• **impracticable – service via alternative means** // defamation suit against message board users – no known names, only screen names, board allowed for PM's // **COURT** – personal service impracticable given that real names not known; no other cost-effective way to determine true identities // service via PM and publication in national Canadian newspaper

SERVICE EX JURIS

4-5 – **SERVICE OUTSIDE OF BC** – can be done one of two ways
(1) – Without Leave – must fit within circumstances of **s.10** ***Court Jurisdiction & Proceedings Transfer Act (CJPTA)*** // **(2)** must have an endorsement – **Form 11** – state ground(s) on which service ex juris is based // KEY – must have justification – real and substantial connection // s.10 examples = proprietary interest in BC property; K to be performed in BC or subject to BC law; injunction against doing something in BC; tort committed in BC
(3) – With Leave – can't find a justification in CJPA? --> can apply to court to allow ex juris service // **(4)** application may be made without notice // **(5)** must include copies of --> notice of application for leave to serve + all filed affidavits + order granting leave to serve

4-5(10) – **HOW TO SERVICE EX JURIS** – docs can be served outside BC in ---> (a) manner provided for in Rules; (b) in accordance with law of place service is made; or (c) pursuant to Hague Convention, if jurisdiction is a signatory (this is a weird & expensive process – rarely used)

CHALLENGING JURISDICTION

21-8(1) – **TO DISPUTE JURISDICTION** – served party can dispute jurisdiction by filing Jurisdictional Response Form – **Form 108** // after filing, can (a) apply to strike out NOCC, counterclaim, third party notice, or petition; (b) apply to dismiss or stay proceedings; or (c) allege court lacks jurisdiction // **NOTE** – it's vital to use the form – otherwise, if you respond in BC court you're deemed to have accepted jurisdiction

21-8(2) – **APPLY FOR STAY OF PROCEEDINGS** – once Form filed, on basis that court ought to decline to exercise jurisdiction

21-8(3) – **CHALLENGE SERVICE** – once Form filed – party can challenge purported service as invalid – seek order to set aside NOCC, etc

21-8(5) – **DEFEND ON MERITS** – once From filed – party can defend on merits without accepting jurisdiction

CLASS ACTIONS + 3RD PARTY PROCEEDINGS + CASE PLANNING

CLASS ACTIONS

- **CPA 2** – any member of class can commence proceeding on behalf of members // but must apply to have matter certified & approved by court
- **CPA 4** – **TEST FOR CERTIFICATION**
  - **(a)** pleadings disclose cause of action
  - **(b)** identifiable class of 2+ persons
  - **(c)** common issues among class members (NOTE – all issues need not be common, but the CA will only resolve the common issues)
  - **(d)** CA would be best for fair & efficient resolution
  - **(e)** representative plaintiff who –-> can fairly & adequately represent interests of class // has workable plan for proceedings // no conflict of interest

Tiemstra v ICBC 1997 BCCA	• **efficiency criteria for certification** // ICBC policy of "no crash, no cash" // P brought CA alleging that policy led to major savings for ICBC at policy holder's expense // **COURT** – common issue was whether ICBC could arbitrarily reject claims that lacked objective E – BUT – even if true, at best all that could happen was each P would get to go to trial // therefore, CA no more efficient – certification denied
Rumley v BC 1999 BCCA	• **general criteria for certification – narrow certification of common issue** // students of Jericho School claimed for physical & sexual abuse + secondary victims claimed as well // **COURT** – certification wrt narrow issue of sexual abuse – for which there was no LP to take into account // BUT – other claims denied certification b/c individual issues were more predominant than common issues

CASE PLANNING & MANAGEMENT

- **INTENDED TO BE SIGNIFICANT ASPECT OF LITIGATION UNDER NEW RULES –** presumably because it was intended to be speedy and inexpensive – **1-3(1)**
- IN REALITY, HASN'T BEEN USED THAT MUCH, THOUGH EASILY AVAILABLE – WHY? **–** costly, time consuming process in and of itself

REQUESTING A CASE PLANNING CONFERENCE

5-1(1) – ANY PARTY OF RECORD CAN REQUEST CPC – once pleading period has expired // obtain date & time from Registry and file **Form 19**

5-1(2) – COURT CAN ORDER CPC – at any stage of action, after pleading period has expired

5-1(3) – SERVICE OF NOTICE – 35 days before initial CPC // 7 days for subsequent CPC'S // NOTE – court can order shorter period for either

5-1(5)&(6) – CASE PLAN PROPOSAL – once CPC requested/ordered, each party prepares proposal // P must provide within 14 days // other parties 14 days later // **Form 20** – summarize the following –-> document discovery, XFD, dispute resolution, experts, witnesses, trial type & estimated length

CONDUCT OF CPC

5-2(2)&(3) – ATTENDANCE – for first CPC – counsel OR parties, if unrepresented, must attend in person // subsequent CPC's can attend via phone or video

5-2(6) – FAILURE TO ATTEND – judge or master may proceed with CPC or adjourn // failure to attend may have cost consequences!

5-2(7) – RECORDINGS – CPC proceedings must be recorded BUT only available by way of court order // NOTE – production of recordings will only be in exceptional cases and on compelling, reasonable grounds (**Parti v Pokorny**) – WHY? – CPC's meant to be candid & foster frank discussion

CASE PLANNING CONFERENCE ORDERS

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

5-3(3) – CASE PLAN ORDER – mandatory at end of CPC // NOTE – parties may file consent CPO w/out actually having a CPC – this accords with the objectives of the Rules (**Stockbrugger**)

5-3(6) – NON-COMPLIANCE – if party fails to comply with CPC order or this part of the Rules –-> court can make order under **22-7** (set aside proceedings, allow amendment, strike response, etc) or make order for COSTS

APPLICATION TO AMEND CASE PLAN ORDERS

5-4(1) – REQUESTING AMENDMENTS – case plan orders can be amended by consent or by application – use **Form 17** + draft of proposed order + supporting docs, other than affidavits // judge/master can still amend case plan orders at a CPC under **5-3(1)**

Parti v Pokorny 2011 BCSC	• **underlying purpose of CPC is to encourage frank & open discussion** // ICBC sought CPC transcripts for "training purposes" // **COURT** – NO – transcripts will only be given when there's compelling reason to do so – otherwise may impede frank & open discussion

THIRD PARTY PROCEEDINGS

- **WHAT IS A THIRD PARTY CLAIM?** – allows a party other than the P to assert a claim against someone else for the liability they're alleged to have to the plaintiff // claim can be independent or dependent upon the cause of action – but there must be some connection to underlying action
- **PURPOSE** – (1) facilitates efficiency and judicial economy by using single proceeding to resolve related issues, questions, or remedies in order to avoid multiple actions and inconsistent findings; (2) allows third party to participate in defence of underlying action; and (3) ensures third party claim decided before D must pay full amount of judgment
- **WHO CAN MAKE THIRD PARTY CLAIM?** – any party against whom relief is sought other than P // however P's can make third party claims in capacity as D to a counterclaim // **NOTE** – D shouldn't make third party claims against P – should bring counterclaim; claim set-off; or raise defence of contributory negligence

THIRD PARTY CLAIMS – RULE 3-5

3-5(1) – **MAKING THIRD PARTY CLAIM** – any party other than P can pursue third party claim where they allege that

(a) – they're entitled to contribution or indemnity from proposed third party

(b) – they're entitled to relief against proposed third party that's connected to subject matter of action

(c) – question/issue between person & third party is substantially same as question/issue related to relief claimed OR subject matter in action AND it should be properly decided by the action // **NOTE** --> **BG** says this option is rarely used – if you fall into this category, you already probably fit into (a) or (b)

3-5(3) – **CONTENTS OF NOTICE** – **Form 5** – and accords with **3-7**

3-5(4) – **TIMING** – can file at anytime with leave of court OR without leave, within 42 days after being served NOCC or counterclaim

3-5(7) – **SERVICE** – THIRD PARTIES – within 60 days you must provide parties that are not already parties of record with --> copy of filed notice + any pleadings already served on other parties // PARTIES OF RECORD – must receive notice promptly after filing

3-5(8) – **COURT MAY SET ASIDE NOTICE** – at any time, on application

3-5(9) – **RESPONSE TO NOTICE** – third party required to respond just as defendant would (Form 6 + in accordance with 3-7 + service) // unless **(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

3-5(11) – **RULES APPLY AS IF IT WERE A CLAIM & RESPONSE** – includes **3-1** and **3-3**

3-5(12) – **RESPONSE TO CIVIL CLAIM & AVAILABLE DEFENCES** – if third party files a response to civil claim (after filing response to third party notice) it can raise any defence open to a defendant

3-5(16-17) – **DEFAULT JUDGEMENT** – available if third party does not respond in time & court may grant any or all relief claimed in third party notice

THIRD PARTY CLAIMS & LP's

LA 22 – **COUNTERCLAIMS & 3rd PARTY CLAIMS** – another exception – allowed, even if they'd otherwise be out of time if main action delayed b/c discoverability

NEGLIGENCE ACT ISSUES

- **JOINT VS CONCURRENT TORTFEASORS** (**Tucker**)
  - JOINT – rare – people who act in concert, with a common purpose – duty imposed on them jointly – no apportionment of fault – release on one releases all
  - CONCURRENT – act separately, but torts combine to cause damage (ex/ MVA) – can release one without releasing all – **NA 4** applies
  - **NA 4** – where loss is caused by two or more persons the court can allocate fault between the parties // wrongdoers are jointly & severally liable but they can seek indemnification from others in accordance with apportioned liability
  - **PROBLEM OF SETTLING MULTI-PARTY LITIGATION** --> CT's who settled would still be jointly & severally liable and other CT's would seek contribution and indemnity from the party that settled // so there was no incentive to settle b/c you still may be stuck on hook for more money down the road
- **BC FERRIES SETTLEMENT** – solution to problem of settling multi-party litigation --> where P seeks only the portion of the loss attributable to one D, that D has no right of contribution // in such a settlement the P will waive its right to recover loss attributable to third party – allows parties to be released from multi-party litigation without risk of being third-partied in for contribution and indemnity
  - **RISK TO P** – P has to be sure it's getting a good deal – you don't want to settle for small amount & then find out that party was 90% responsible – as a result of the risk, these type of settlements are rare

NEGLIGENCE ACT CLAIMS

- **21-9(1)** – **CONTRIBUTION/INDEMNITY CLAIMED** – D's must make claim for contribution/indemnity under *Negligence Act* by third party notice– but against P by counterclaim
- **21-9(2)** – **CLAIM OF APPORTIONMENT OF LIABILITY** – D must include in RCC a defence based on claim of contributory negligence

Laider Holdings 2012 BCCA	• **criteria for allowing/striking third party claims** // P leased property to D – but D couldn't use property for intended use b/c of bylaw & zoning issues – D refused to close lease // P brought claim to demand payment // D third partied its leasing agents, who in turn tried to third party D's lawyers // ISSUE – could leasing agents third party the lawyers? // **COURT** – canvassed decision in two prior cases // here --> lawyers fell within both branches of **Adams** and further found that lawyers did not owe leasing agents independent duty of care – third party claim disallowed // NOTE – in doing so the BCCA departed from Ontario cases that suggested in some cases a P could escape liability for the actions of their agents • **Adams** – **not allowed** – third party claim is barred in two circumstances --> **(1) ACTING AS AGENT** – where claim against third party is legally attributable to P b/c of an agency relationship; **(2) FAILURE TO MITIGATE** – where claim against third party is for failing to assist the P in mitigating damages • **McNaughton** – **allowed** – third party claim will be allowed where third party owes a separate duty to the D
Steveston Seafood 2013 BCSC	• **independent duty must be owed** // P's defrauded – brought action against accountants for failing to discover fraud // accountants sought to third party bookkeeper who committed fraud – claimed bookkeeper owed them a separate duty // **COURT** – test is whether the third party notice is bound to fail // here --> possible that independent duty owed to accountants – third party allowed to proceed
Tucker v Aleson 1993 BCCA	• **multi-party litigation – joint tortfeasors VS concurrent tortfeasors** // infant P injured in MVA – liability apportioned 1/3 to mother (driver) and 2/3 to Crown // BUT – prior to trial, P settled with mother // Crown argued that **NA 4** no longer applied b/c of the settlement // **COURT** – Crown still liable for full amount of loss minus settlement – still entitled to seek contribution & indemnity from concurrent tortfeasor (mother) since fact of settlement does not release the concurrent tortfeasor from joint & several liability and other CT's retain right to seek contribution and indemnity
BC Ferries v T&N 1993 BCSC	• **BC Ferries Settlement** // Ferries found to have asbestos – P claimed against manufacturer who in turn third partied installers for contribution and indemnity – BUT – installers had already settled with BC Ferries // normally (under **Tucker**) installers would've been stuck in action // **COURT** – allowed P's to expressly waive any amount of loss from D attributable to third party

BUILDING THE CASE – DISCOVERY PROCEDURES

DOCUMENT DISCOVERY

- **DOCUMENTS – 1-1(1)** – has extended meaning and includes --> photographs; film; recording of sound; any information of permanent or semi-permanent character; and any information recorded or stored by means of any device
- **ETHICS OF DOCUMENT 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 self-policing
- **FOR LAWYERS** – lawyers have additional ethical considerations as officers of the court
  - THEY MUST --> disclose all documents regarding material facts (Stage 1) // provide additional disclosure (Stage 2) // review documents & make enquiries about suspicious disclosure (**Myers**) // look for gaps in the information // keep docs disclosed for litigation confidential (**Hunt**)
  - **CPC 5.1-2** – lawyers must not knowingly assist/permit client to do anything dishonest or dishonourable
- **POTENTIAL CONSEQUENCES FOR FAILURE TO DISCLOSE** – knowingly providing inaccurate discovery can result in court order under **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)** (no discovery? not able to use that 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 // modern era – vast expansion in documentation – result was that cost of document discovery became disproportionate to the litigation // **New Rules** – incorporates principle of proportionality – restricted documents to be discovered
  - **BG says** --> interesting effect – less documents disclosed, so more efficiency arises – BUT – the inefficiency has simply been shifted to document review!

DISCOVERY AND INSPECTION OF DOCUMENTS

PHASE 1 DISCLOSURE

7-1(1) – **LIST OF DOCUMENTS** – within 35 days after pleading period all parties must provide list of documents in **Form 22** of (i) all docs that are or have been in the party's control that could be used by any party to prove or disprove a material fact; and (ii) other docs you intend to use at trial // serve on all parties of record

7-1(2) – **LIST MUST INCLUDE BRIEF DESCRIPTION** – for each listed document

7-1(3-4) – **INSURANCE POLICIES** – must disclose policies that may be triggered by judgment // BUT – info in policy not to be disclosed unless relevant to matter

7-1(6-7) – **PRIVILEGE** – must still list privileged docs with brief description AND must include brief description of why privilege claimed, so that other side can assess validity of claim of privilege, without releasing privileged information // **7-1(20)** – **COURT MAY REVIEW** – assess objections to disclosure based on privilege

- SOLICITORS BRIEF – document or communication brought into existence through application of lawyer's professional skill and judgment (**Hodgkinson**)
- SOLICITOR-CLIENT PRIVILEGE – any communication between lawyer & client that (a) entails seeking/giving of legal advice, and (b) is intended to be confidential (**Keefer**)
- LITIGATION PRIVILEGE – documents created where predominant purpose is pending or anticipated litigation (**Shaughnessy**)

7-1(8) – **AFFIDAVIT VERIFYING LIST OF DOCUMENTS** (this usually only happens when there's some indication full D has not been made)

7-1(9) – **SUPPLEMENTARY LIST** – party must promptly amend list of docs if (a) come to their attention list is inaccurate or incomplete; or (b) party obtains possession or control of new document that satisfies **(1)**

PHASE 2 DISCLOSURE

- **NOTE --> EXAMINATIONS FOR DISCOVERY** – can be used to canvass matters of potential relevance & parties can then make applications for additional disclosure under **(11)** or **(18)**

7-1(10) – **DEMAND FOR DOCS THAT SHOULD'VE BEEN INCLUDED UNDER (1)** – made by party receiving list

7-1(11) – **DEMAND FOR ADDITIONAL DOCUMENTS** – 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 with reasonable specificity and give reason why they should be disclosed (NOTE – these are docs that would've been captured under the old rules for disclosure) // NOTE – "reasonable specificity" is flexible standard (**XY, LLC**)

7-1(12) – **RESPONDING TO DISCLOSURE DEMANDS** – party must respond within 35 days and either (a) comply; (b) comply in part; or (c) provide explanation why documents are not being disclosed

7-1(13-14) – **APPLICATION TO COURT** – parties may apply to court when they cannot agree on **(10)** or **(11)** // court may excuse compliance, or order list amended

7-1(15-16) – **INSPECTION AND COPIES** – parties must allow inspection and provide copies of listed documents

7-1(18) – **APPLICATION FOR DOCUMENTS FROM NON-PARTY** – court can order production of document OR certified copy (**Kaladjian**) – application under **8-1**

GWL Properties **1992 BCSC**	• **reasonable grouping of massive amounts of docs** // D's disclosed 621 documents itemized by date + 460 boxes, with only box numbers // later emerged that D's had an itemized list of 12 million docs – including those in the boxes – P sought to have D's defence struck on basis D had misled the court // **COURT** – document list must provide meaningful, reliable, and complete disclosure + must help other side to locate and understand the documents // may group documents, but must do so in intelligent manner
Kaladjian v Jose **2012 BCSC**	• **test for third/non-party disclosure is materiality – Phase 2 disclosure – medical records** // MVA claim – allegation of pre-existing injury – P refused to disclose MSP report // D's applied for non-party disclosure from province // **COURT** – standard to be used is that of materiality – not old relevancy standard // WHY? -- because, proportionality. // stage 1 – governed by pleadings -- stage 2 – broader discovery may be provided, but generally requires some evidence in support of application // medical records are generally private and should remain so unless disclosure necessary to litigation
XY, LLC **2013 BCSC**	• **"reasonable specificity" (11) – test for Phase 2 disclosure is materiality but in theory could be reasonableness** // D's in this action had been found to have destroyed or altered documents in another action // XY applied to get additional disclosure without having to describe documents with "reasonable specificity" – for fear of document destruction // **COURT** – "reasonable specificity" is flexible standard // in theory, relevancy *could* still be the test in some cases where proportionality may not be dominant concern – BUT – courts should be wary of fishing expeditions & some evidence will generally be required for Stage 2 disclosure // here – Anton Pillar order granted, so concern about document destruction lessened – XY had to comply with **(11)**

Dufault v Stevens 1978 BCCA	• **disclosure of docs in possession of third party - potentially embarrassing doc** // P sought disclosure of her medical records & D applied for same disclosure contemporaneously under **(18)** // **COURT** - disclosure may NOT be allowed if document is privileged OR interests of non-party may be embarrassed or adversely affected // must weigh value of document against prejudicial effect on non-party // here - production required
Hodgkinson v Sims 1988 BCCA	• **solicitor's brief privilege** // P claimed privilege - D wanted disclosure, on basis that documents in brief were not privileged, in and of themselves // **COURT** - where lawyer exercised knowledge, skill, judgment, and industry to assemble documents, legal privilege will attach // D could acquire the docs on their own - no risk of surprise - P's counsel should not be punished for doing preparation & investigation // court did require P to prepare new list with better description
Shaughnessy GCC 1986 BCCA	• **litigation privilege** // massive fire - insurers for the parties sent adjusters to make reports // P claimed litigation privilege over number of those reports // D argued reports prepared as a matter of course - therefore predominant purpose was business practice NOT litigation // **COURT** - test is whether predominant purpose was litigation - have to look at each doc individually // here - some reports ordered disclosed, other were not
Keefer Laundry 2006 BCSC	• **solicitor-client privilege VS litigation privilege** // solicitor client privilege attaches to any communication b/w lawyer and client that (a) entails the seeking or giving of legal advice, and (b) is intended to be confidential - litigation need NOT be contemplated
Leung v Hanna 1999 BCSC	• **describing privileged documents** // list of privileged docs provided with little description // **COURT** - will err towards maintaining privilege // if necessary, court can review the documents under **7-1(20)** to determine if documents are indeed privileged or should be disclosed
Hunt v T&N 1995 BCCA	• **implied undertaking of confidentiality for docs disclosed in litigation** // P's counsel wanted to provide D's disclosure to parties in another case of asbestos litigation // **COURT** - implied undertaking of confidentiality for docs received in course of litigation // prior to using disclosed docs other than in the proceedings at hand, receiving party must get 1. owner's permission; or 2. leave of the court

- **NOTE RE: DESTRUCTION OF EVIDENCE** - where a party intentionally destroys documents relevant to an issue in the action, and does so with the knowledge that litigation is pending or probable, then the court may be entitled to draw an adverse inference against that party in the litigation.

OTHER DISCOVERY PROCEDURES

EXAMINATION FOR DISCOVERY (XFD)

- **PURPOSE OF XFD** - together with document discovery it is one of the central means to gather evidence for trial --> (1) understand the other party's position; (2) obtain admissions to help your case; (3) pin down evidence before memories fade & avoid surprises; (4) facilitate settlement
- **WHEN DO XFD's HAPPEN?** --> anytime after pleadings closed // usually after documents exchanged // no rule, but P usually examines D first
- **XFD TRANSCRIPT** - can only be used by the party doing the examining for --> (1) impeaching W's at trial; or (2) reading in portions of transcript at trial, as per **12-5(46)** - court may order other parts of transcript also be entered if context required, as per **12-5(49)**

EXAMINATIONS FOR DISCOVERY

7-2(1) - **WHO CAN BE EXAMINED** - parties of record must make themselves available for XFD to parties adverse in interest (not only defined by pleadings) // **(4)** XFD is oral examination under oath // **NO ATTENDANCE?** can get order compelling attendance or make application to strike, pursuant to **22-7(5)**

7-2(2) - **TIME AVAILABLE** - unless court orders or by consent, XFD's must not, in total, exceed 7 hours // **15-1(11)** - **FAST TRACK** - XFD's must not exceed, in total, 2 hours - unless by consent // NOTE - time limited under new Rules in effort to keep litigation costs down

7-2(3) - **TIME EXTENSION?** - court must consider

(a) conduct of party who has been or is to be examined (unresponsive, failure to provide complete answers, evasiveness) // and maybe of counsel? (**Kendall**)

(b) denial or refusal to admit uncontroversial matters

(c) conduct of examining party

(d) whether it was reasonably practical to complete within time allotted

(e) number of parties and examinations, and the interests of those parties

- **NOTE -** extension of time will be exceptional & only awarded where warranted (**Campbell**)

7-2(5) - **EXAMINATION OF NON-INDIVIDUALS** - party to be examined must nominate representative who has knowledge of the matter at issue // examining party can then examine (i) the representative; OR (ii) another person they think appropriate who is/has been a D/O/employee/agent/external auditor of party // examining party has final choice - but see **Rainbow** // only entitled to examination of ONE representative as of right - but see **Westcoast**

7-2(18) - **SCOPE OF EXAMINATION** - must answer any question within knowledge regarding any non-privileged information relating to matter at issue AND must give names & addresses of all persons who might be expected to have such knowledge // **(16)** - **DOCUMENTS** - person must produce related docs on XFD

7-2(22) - **DUTY TO INFORM ONESELF** - to comply with **(18)** person may be required to inform themselves - XFD may be adjourned until that happens

- **7-2(22)** - **RESPONSE BY LETTER** - if person was required to inform themselves under **(22)** further response may be provided by letter to respond to one or more questions posed during the XFD // **(24)** if letter provided, question & answers deemed to have been given under oath

7-2(25) - **OBJECTIONS** - must be taken down by official reporter --> court may then decide (a) validity of objection; and (b) can order person to submit to further examination, subject to a time limit

Kendall v Sun Life 2010 BCSC	• **scope of XFD is very broad - objections should be limited** // SL's counsel kept interrupting with objections // **COURT** - XFD has character of cross-examination - counsel should not unduly interfere or interrupt the XFD - only to resolve ambiguity + prevent injustice + or if very clear answer not relevant - best practice is to allow the question // here - court allowed new 7 hour XFD
First Majestic 2011 BCSC	• **multiple P's or D's don't get multiple rights to discovery if they share common interest** // new P added to action after rep from the corporate D had been examined - new P sought to discover different rep from same D // **COURT** - NO - while **7-2(5)** gives each adverse party a right to chose corp rep, on its face, proportionality does not support that practice - must examine same rep
Rainbow Industrial 1986 BCSC	• **substitution of corporate representative** // P selected rep that was junior employee with little knowledge - D applied to substitute another rep // **COURT** - YES - corp rep's may be substituted where necessary, in the interests of justice
Westcoast Trans 1984 BCSC	• **test to examine a further representative** // P applied to examine another corporate representative // **COURT** - objective TEST = whether adequate and satisfactory discovery has been or can be obtained from the original representative // must show that answers given were incomplete, unresponsive, or ambiguous
Fraser River P&D 1992 BCSC	• **interactions with clients during XFD** // during XFD, D's corporate rep made unexpected admission - D's counsel requested immediate adjournment to discuss with the rep - P's counsel objected // **COURT** - if XFD is one day long, counsel should not discuss matter with W // more than one day - counsel can discuss any matter relating to case, provided they tell other side // adjournments should NOT be sought in order to discuss evidence

INTERROGATORIES

- **PURPOSE** - obtain admissions of facts in form of sworn evidence AND provide foundation for cross-examination during XFD's // **Form 24** - written questions - answers by way of affidavit // **USE AT TRIAL** - use affidavit to impeach; could seek to rely on affidavit itself as evidence
- **SCOPE?** - more narrow than XFD // not in nature of cross-ex // can't demand for documents // don't duplicate particulars // can't obtain W's names (**Roitman**)
- **BEST USE?** - for answers that require extensive research such as precise chronologies or exhaustive lists
- **WHO MAY BE SENT INTERROGATORIES?** - available on face of Rule to any party of record OR D/O/employee/agent/external auditor of party of record // whereas XFD's only available against adverse parties or their reps

DISCOVERY BY INTERROGATORIES

7-3(1) - **CONSENT OR LEAVE** - any party of record can send to any other party of record, or D/O/employee/agent/external auditor of that party if **(a)** party to be examined consents; or **(b)** with leave of court

7-3(3) - **POWERS OF COURT** - may set number or length + matters to be covered + timing of response + notification, if any, to other parties of record

7-3(4) - **TIMING OF ANSWERS** - must provide affidavit answer within 21 days unless otherwise ordered under (3)

7-3(6) - **OBJECTION TO ANSWERING** - can object on privilege or relevance // may state objection within answer

7-3(7) - **INSUFFICIENT ANSWER** - 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	• **use interrogatories only when practical - scope more narrow than XFD** // D applied to strike interrogatories in medical malpractice claim // **COURT** - struck narrative interrogatories but allowed those to do with chronology // purpose is to provide foundation for subsequent XFD // "*An important general principle governing the propriety of interrogatories should be the practicality of the procedure. The law should encourage the selection of the tool which is likely to achieve the best results for the least effort and cost*" // see **SCOPE** above

PRE-TRIAL EXAMINATION OF WITNESSES

- **PURPOSE** - purely informational // permits examination of uncooperative W // **AT TRIAL** - solely to impeach, can't be used for read-ins
- **EXAMINATION** - can ask W 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)**

PRE-TRIAL EXAMINATION OF WITNESSES

7-5(1) - **ORAL EXAMINATION OF NON-PARTY WITNESS WHO MAY HAVE MATERIAL EVIDENCE RELATING TO MATTER IN QUESTION** - requires leave of court

7-5(2) - **EXPERTS** - experts retained for in anticipation of litigation or preparation for trial cannot be examined under this rule unless party seeking examination is unable to obtain facts or opinions on same subject by other means (**Delgamuukw**)

7-5(3) - **ON APPLICATION** --> must show by affidavit // **7-5(4)** - must comply with **8-1** and must serve application on proposed W

(a) that the W has evidence that may be material to a question in the action;

(b) for experts - that applicant is unable to obtain facts or opinions on same subject by other means

(c) that proposed W has refused or neglected to give responsive statement relating to their knowledge of matter OR has given conflicting information

Delgamuukw 1988 BCSC	• **expert - unable to obtain facts by other means - (3)** // D (province) applied to have P's expert genealogist examined under oath // **COURT** - allowed - D's not able to obtains facts & opinions on same subject by other means
Sinclair v March 2001 BCSC	• **unique & irreplaceable knowledge** // P applied for pre-trial examination of doctor in medical negligence case - doctor not retained by either side, but was one who provided P's post-operative care // **COURT** - allowed to extent doctor could respond without requiring new research - P entitled to know doctor's facts & opinions about her - doctor had info other parties did not

DEPOSITIONS

- **PURPOSE** – pre-recorded sworn evidence that may be tendered as evidence at trial // use when W may be unable to testify in person at trial // BUT – real time evidence is preferred at trial ---> allows court opportunity to assess credibility + rule on objections + assess evidence before examining W
- **FORM** – usually video-recorded // direct examination, then cross-examination, opportunity to re-examine // available before or after trial

DEPOSITIONS

7-8(1) – **AVAILABLE BY CONSENT OR ORDER** – person may be examined on oath before or during trial & record of examination be entered as evidence

7-8(3) – **GROUND FOR ORDER** – court must take into account the following

(a) convenience of person to be examined

(b) possibility person may be unavailable at trial

(c) possibility person will be beyond court's jurisdiction as of trial

(d) possibility and desirability of having person testify at trial by videoconference (court will almost always prefer this option, if available, as per **Campbell**)

(e) expense of bringing person to trial

ADMISSIONS

- **PURPOSE** – narrows and defines the issues to be decided at trial // removes need to prove admitted facts // can serve as basis for an order either dismissing the claim OR granting judgment
- **CAUTIONS** – **(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

ADMISSIONS

7-7(1) – **NOTICE TO ADMIT** – **Form 26** – party of record may, by service of notice to admit, request any party of record admit to truth of fact or authenticity of document // **(3)** must attach any documents referred to in NTA

7-7(2) – **EFFECT OF NOTICE TO ADMIT --> BECOMES DEEMED ADMISSION** – unless within 14 days of service, served party serves a written statement that

(a) specifically denying content of NTA

(b) state why they can't make admission; or

(c) state that refusal to admit is based on privilege or relevancy – and set out reasons

7-7(5) – **WITHDRAWAL OF FOLLOWING ADMISSIONS REQUIRES LEAVE** – admission made in response to NTA; deemed admission under **(2)**; or admission made in pleading, petition, or response to a petition

7-7(6) – **APPLICATION FOR ORDERS** – the following admissions can be used on application for judgment OR other orders – court does not have to wait until the determination of any other matters between the parties

(a) admissions in --> **(i)** affidavit or pleading; **(ii)** XFD of party or person examined on behalf of a party; **(iii)** in response to notice to admit

(b) deemed admissions under **(2)**

Hurn v McLellan 2011 BCSC	• **test for withdrawal of admission under 7-7(5)** // D sought to amend pleadings in order to withdraw admission of liability in MVA case // **COURT** – in the interests of justice, is there a triable issue that should be decided on merits, vs admission of fact // here – D's application denied – to allow the withdrawal would result in prejudice to P and delay trial – parties had operated on basis on the admission for more than a year
Piso v Thomas 2010 BCSC	• **application to withdraw – brought in timely manner** // P applied to withdraw deemed admission that resulted from failure of P's counsel to reply to NTA // **COURT** – allowed – application brought in timely manner and deemed admission was result of counsel's action // to disallow would deny P opportunity to have claim heard on the merits

PHYSICAL EXAMINATIONS

- **PURPOSE** – ensure litigants obtain access to all relevant evidence and information, and are on equal footing with other parties // will only be ordered when a party's mental or physical condition is an issue in the action (**Jones**)

PHYSICAL EXAMINATION & INSPECTION (sounds ominous)

7-6(1) – **ORDER FOR MEDICAL EXAM** – where physical or mental condition at issue, court can order examination and may also **(a)** make order respecting expenses connected with the exam + **(b)** order results put in writing and copies be made available to interested parties of record

7-6(2) – **COURT MAY ORDER SUBSEQUENT EXAMS**

7-6(3) – **QUESTIONS** – examiner may ask any relevant questions

7-6(4) – **ORDER FOR PROPERTY** – if necessary or expedient court can order production, inspection, or preservation of any property & experiments on property

Jackson 2013 BCSC	• **multiple medical examinations – examination past deadline for service** // D wanted P to undergo second IME after expiration of 84 day deadline for service of expert reports // **COURT** – under **7-6(2)** court has discretion to order second IME – but this should only occur in exceptional cases where there's some question or matter that could not have been dealt with at earlier IME // past time to serve --> the report will be **responsive report** – must establish that examination necessary to properly respond // no evidence here of necessity – application denied

CHAMBERS PRACTICE

GENERAL

APPLICATIONS

1. **FILE AND SERVE NOA** – 8 days before regular application OR 12 days for summary trial
2. **FILE AND SERVE APPLICATION RESPONSE** – 5 days after service OR 8 days for summary trials
3. **APPLICANT MAY FILE RESPONDING AFFIDAVITS** – must be done no later than 4pm, one business day before hearing
4. **MUST FILE APPLICATION RECORD IF OPPOSED** – must be filed with Registry 4pm, one business day before hearing // in binder, with tabs

APPLICATIONS – RULES 8-1 TO 8-5

BRING & RESPOND TO APPLICATIONS

8-1(3) – NOTICE OF APPLICATION – party must file notice of application + originals of any affidavits or documents to be referred to, and not already filed

8-1(4) – CONTENT – use **Form 32** – must not exceed 10 pages – meant to give meaningful notice

- **NOA INCLUDES** –-> (1) draft order; (2) summary of facts; (3) legal basis – rule/enactment/authority; (4) material to be relied on; (5) estimated time

8-1(6) – APPLICATIONS LESS THAN 2 HOURS – not allowed to file or submit written arguments outside of those in Notice or Response

8-1(7-8) – SERVICE – must be filed and served on all parties of record AND every other person who may be affected,

- within 8 business days before date set for hearing
- within 12 business days before date set for hearing for summary trials under **9-7**

8-1(9-10) – APPLICATION RESPONSE – must respond within 5 days after service // 8 days for summary trials // **Form 33** – must not exceed 10 pages

- **RESPONSE INCLUDES** –-> (1) orders consented to; (2) orders opposed; (3) order on which no position taken; (4) factual basis; (5) legal basis; (6) material relied upon // meant to give meaningful notice

OTHER RULES

8-2 – PLACE APPLICATION IS HEARD – **(1)** by order of registrar, place agreed to by consent, or where proceeding is being conducted // **(4)** for urgent matters, registrar may allow application in place other than where proceeding is being conducted

8-3 – CONSENT APPLICATIONS – **Form 31** – INCLUDES –-> draft of order, evidence of consent, any consent from PG&T if required

8-4 – NO NOTICE REQUIRED – must submit requisition (**Form 31**) + draft order (**Form 35**) + documents in support of application

8-5 – URGENT APPLICATIONS – **(2)** "short notice application" – without notice and in a summary way using **Form 17** // **(6)** court may make order without notice in case of urgency // **(7)** order must be promptly served on each person affected by order // **(8)** affected persons can apply to have order set aside

Bache Halsey 1982 BCSC	• **relief sought should be specified – particularly if final order** // application brought without notice // P got defence struck & final order for judgment // order appealed – **JUDGE** – no jurisdiction to grant final relief since it was not set out in application + no notice
Zecher v Josh 2011 BCSC	• **application may be dismissed if application documents deficient** // application for further disclosure simply listed RULE without referencing other authorities // **COURT** – dismissed NOA // form of NOA intended to give court & other parties full and meaningful disclosure – includes clear expression of relief sought, legal authorities relied upon, and argument // misstating authority can mislead other party & result in relief being denied

CHAMBERS PROCEEDINGS

- **PURPOSE** – venue for hearing interlocutory matters (matters occurring at interim stage in proceedings) AND in some circumstance to grant final relief

CHAMBERS PROCEEDINGS

22-1(1) – CHAMBERS PROCEEDINGS INCLUDE

(a) petition proceeding
(c) all applications
(d) appeal/confirm/vary order of master or other officer of court
(e) action ordered to proceed by way of affidavit (includes special cases and hearings on point of law)
(f) summary judgment (**9-6**) or summary trial (**9-7**)

22-1(2-3) – FAILURE 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) // if court then makes an order, 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 BY WAY OF AFFIDAVIT – though court may order **(a)** W attend for cross-examination on affidavit (see section BELOW); **(b)** direct examination before court or other person as directed by court, **(c)** document discovery, **(e)** receive other forms of E

22-1(7) – POWER OF COURT ON CHAMBERS PROCEEDING

(a) grant or refuse relief in whole or part OR dispose of any question arising on chambers proceeding (**Bache Hasley**)
(b) adjourn application
(c) obtain assistance of one or more experts
(d) order trial – generally – or on one issue (**Southpaw**)

22-1(7) – POWERS OF COURT IF NOTICE NOT GIVEN – if it appears that notice ought to have been served but was not court may –-> **(a)** dismiss proceeding or dismiss against one person; **(b)** adjourn chambers & direct service; **(c)** make an order and direct service of order, with any documents directed

MTU Maintenance 2007 BCCA	• **unsworn statements by counsel generally not allowed as "other evidence"** // chambers judge issued decision based on unsworn statements by counsel – decision appealed // **COURT** – in some instances such statement may be used, but should not be relied on to establish new facts, not within personal knowledge of counsel OR facts important to outcome of application
Southpaw Credit 2012 BCSC	• **test to convert petition to action** // SH oppression action brought by petition under BCBCA – SH's applied to have converted to trial // **COURT** – test for conversion is whether there's a bona fide issue to be tried that cannot be resolved on summary basis // here, any issues about credibility could be resolved via cross-examination of the affidavit, per **22-1(4)** // FACTORS --> (a) undesirability of multiple proceedings; (b) desirability of avoiding unnecessary cost and delay; (c) need for full grasp of all E; (d) whether credibility is at issue; (e) interests of justice

MASTERS

- **MASTERS** – are judicial creatures of statute // jurisdiction set by **SCA 11(7)** – same powers as Chambers judge, unless restricted by the Chief Justice via PD
- **JUDGES** – have broad powers // can hear application and make final orders // most petitions will only be heard by judges, since they are usually seeking some kind of final order // also, injunctions are only available from a judge

MASTERS

23-6(1) – POWERS OF A MASTER – master hearing application has powers of court set out in --->

8-5(6-8) – urgent applications – power to issue, vary, or set aside an order made without notice (since these type of orders are never final relief)

22-1(2-8) – chambers proceedings – SEE RULES ABOVE – but includes

23-6(6) – REFERENCE BY MASTER TO JUDGE – a master can refer a matters to a judge if is 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 override this.

PRACTICE DIRECTIVE (PD-42)

- **MASTERS CANNOT** --> grant relief where expressly conferred on judge by statute + no appeal on merits + no injunctive relief + other stuff (SEE PD-42)
- **MASTERS CAN, WITH RESTRICTIONS** --> make interim orders under *Family Law Act* and *Divorce Act* – and vary those interim orders, whether made by judge or master + make certain final orders (SEE PD-42)

Pye v Pye 2006 BCCA	• **masters may not determine contested disputes or decide appeals on merits** // master made a final order by consent at Judicial Case Conference wrt certain property as family assets // **COURT** – YES – this was within master's jurisdiction, as it was by consent

AFFIDAVITS

- **AFFIDAVITS** – written first-person statement of E, sworn by the deponent before a person authorized to take affidavits // court relies on affidavit E in the same way it relies on oral testimony // subject to rules of E applicable at trial with a limited exception for hearsay, under certain conditions
- **Pro Tip** – carefully review content of affidavit with deponent // if you don't know the person, make sure you ID them

AFFIDAVITS

22-2(1) – AFFIDAVITS MUST BE FILED

22-2(2) – FORM – may be in **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! – affidavit may only state what the deponent would be able 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 (**Albert v Politano**)

22-1(4)(a) – CROSS EXAMINATION ON AFFIDAVIT – court can order cross-examination before court (where credibility is seriously at issue) or before other person as directed (usually a court reporter)

ETHICAL CONSIDERATIONS

- **CPC 5.2-2(1) – LAWYER APPEARING AS ADVOCATE SHOULD NOT SUBMIT OWN AFFIDAVIT E** – unless (a) permitted to do so by law, the tribunal, rules of court, or rules of procedure; (b) matter is purely formal or uncontroversial; (c) necessary in the interests of justice for lawyer to give E
- **CPC 5.2-2(2) – LAWYER AS W IN PROCEEDINGS CAN'T ACT AS ADVOCATE ON APPEAL** – if the lawyer was a W in a proceeding, they must not appear as advocate in any appeal from a decision in those proceedings – unless – matter on which they testified is purely formal or uncontroversial (only exception!)

Haughian v Jiwa 2011 BCSC	• **affidavits must not contain opinion or belief** // D applied to strike portions of P's affidavit in summary trial // **COURT** – affidavit E still subject to rules of evidence applicable at trial & court has power to strike inadmissible E from affidavits // limited use of hearsay, but should NOT include personal opinion, editorial comment, or argument // limited use of discovery E permissible

ORDERS

The result of a court process, if taken to its conclusion is an order from the court – that's what everyone is there for!!

ORDERS

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

(11) REGISTRAR can settle, where necessary & 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 may also correct order based on inherent jurisdiction

Halvorsen **2010 BCCA**	• **draft orders must be clear, complete, and intelligible** // form of order dismissing appeal was vague and uncertain in that it referred back to the court's reasons // **COURT** – it's the responsibility of the parties (with help from Registrar if required) to prepare orders that give definitive expression to the decisions of the court // orders should be complete on their face and NOT require resort to extrinsic documents

INTERLOCUTORY APPEALS

APPEALING ORDER OF MASTER

18-3(1) – APPEALS – appeal from decision, direction, or order of any person or body // **NOTE** – this rule is mainly used for statutory appeals, where statute or enactment provides rights of appeal (ex/ Small Claims Court Act) – but can also be used to appeal a decision of a master

(7) – DIRECTIONS – court may give directions for proper hearing and may make orders including ---> **(a)** production of docs, minutes, or transcripts; **(b)** that E be tendered by way of affidavit or otherwise; **(c)** appeal be determined on point of law

23-6(8-11) – APPEALS FROM A MASTER – **(8)** appeals of masters orders & decisions can be made to the court // **(9)** must be filed within 14 days using **Form 121** // notice of appeal must be served at least 3 days before hearing // **(11)** appeals do not act as a stay unless otherwise ordered

Abermin Corp **2009 BCSC**	• **standard of review for masters decisions = reasonableness OR correctness for final order** // P sought adjournment of application for security for costs – D thought this was insufficient // master granted adjournment – D appealed // **COURT** – appeals of purely interlocutory matters should not be granted unless order clearly wrong (ie/ not reasonable) – BUT – for final orders OR where order raises question vital to final issues, the SOR should be correctness // these appeals require a RE-HEARING and judge's discretion on appeal is unfettered // affirmed – **Ralph's Auto, 2011 BCSC** – despite fact that the decision **Abermin** was based on was subsequently overruled

APPEALING ORDER OF JUDGE

CAA 6 – APPELLATE COURT JURISDICTION – appeal from BCSC orders lies to the BCCA unless excluded by legislation (ex/ Small Claim is appealed to BCSC)

CAA 7 – LEAVE TO APPEAL – for limited appeal orders, leave to appeal is required // in granting leave, grounds of appeal may be restricted // see factors BELOW

- **LIMITED APPEAL ORDERS** – full list in **2.1 Court of Appeal Rules** (attached)
  - orders made under ---> Part 5 – Case Planning Conferences // Rule 7 – Procedures for Ascertaining Facts
  - orders granting or refusing adjournments // orders shortening or extending time // orders granting or refusing costs

Rahmatian **1991 BCCA**	• **appeal must be from an order or judgment** // at trial, on conclusion of P's case, D called for motion for non-suit (no evidence motion) // trial judge dismissed request // prior to proceeding with D case, D filed notice of appeal // on appeal, P objected on jurisdictional basis – no order to appeal! // **COURT** – motion for non-suit is not an order or judgement and therefore cannot be appealed – must wait until trial completed before appealing
Power Consolidated **1988 BCCA**	• **factors for decision whether to grant leave to appeal – overall test = interests of justice** // application for leave to appeal from decision that found disclosing part of a letter did not waive privilege over remainder of letter // **COURT** – expounded factors to be considered for decision to grant leave // KEY = whether granting the appeal is in the interests of justice 1. is point on appeal of significance to the practice 2. is point on appeal of significance to the action itself 3. is the appeal prima facie meritorious, or, is it frivolous 4. will the appeal unduly hinder the action's progress

SUMMARY PROCEEDINGS

SUMMARY JUDGEMENT

- **PURPOSES**
  - quickly and inexpensively dispose of uncontested actions
  - quickly and inexpensively reject claims and defences bound to fail at trial
  - provide mechanism to determine disputed issues of law
- **EVIDENCE** – affidavit or as permitted in chambers **22-1(4)** – court may order **(a)** W attend for cross-examination on affidavit; **(b)** direct examination before court or other person as directed by court, **(c)** document discovery, **(e)** receive other forms of E
  - **PLAINTIFF** – no express requirement to lead E for applications under (2), but it's recommended (**Taoist**)
  - **DEFENDANT** – must adduce E if responding to application under (3) by claiming that there IS a genuine issue requiring trial // E is also recommended for applications made under (4) (**Taoist**)

SUMMARY JUDGMENT

9-6(2) – **APPLICATION BY PLAINTIFF** – party who filed originating pleading can apply for SJ on all or part of claim, once responding pleading has been served

9-6(3) – **RESPONSE** – answering party can claim originating pleading does not raise cause of action OR must show, using affidavit or other E, that there is a genuine issue requiring trial

9-6(4) – **APPLICATION BY DEFENDANT** – party can apply for SJ dismissing all or part of claim, after they have filed & served a response

9-6(5) – **POWERS OF COURT**

(a) – satisfied no genuine issue for trial --> court must pronounce judgment OR dismiss claim
- **TEST TO DISMISS** = manifestly clear (plain and obvious, beyond doubt, etc) that action won't succeed (**Haghdust**)

(b) – no genuine issue, other than damages --> court may order trial to determine damages OR give judgment with reference/accounting to determine amount

(c) – only genuine issue is question of law --> court may determine question & give judgment

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

9-6(7-9) – **COSTS** – unsuccessful applicants may have costs fixed against them // BUT – court can decline to fix costs if the application was reasonable, though unsuccessful // BAD FAITH OR DELAY – can lead court to fix that party with special costs

Haghdust v BCLC 2011 BCSC	• **test for 9-6(5)(a) - importance of precedent** // P self-excluded under BC Lotto's VSE program // P kept gambling, won jackpots, but was denied winnings // D argued P's claim was bound to fail as it was precluded by VSE rules OR doctrine of ex turpi causa // **COURT** – P not bound to fail + D's arguments , while mainly legal, were novel --> issue not settled by authoritative case law and should therefore be determined in a more fulsome manner
International Taosit Church 2011 BCCA	• **some E is always required from the applicant (even though Rule doesn't say so)** // **COURT** – even though rule doesn't require P to adduce E, if they want the application granted in face of a filed defence, some E should be presented to show why defence is bound to fail // as for D's – they too should present some E establishing that P's claim is without merit // essentially, it was "inconceivable" to the court that either party could expect to get SJ, in the face of materials filed by the other party, without presenting any E

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) // SJ's provide final order which conclusively determines the issues

SUMMARY TRIAL

- **PURPOSE** – mechanism for obtaining judgment, after weighing E and applying law, without need for a conventional trial // ST's reduce wait time, time to conduct trial, and cost of trial --> satisfy objective of Rules (savings come mainly from the fact that, in general, ST's proceed on basis of documentary E alone)
- **HISTORY** – **9-7** was added because it was too easy under **9-6** to create doubt as to whether it was plain & obvious that no meritorious case existed – you can blame/credit the artful pleaders and their crafty legal arguments

SUMMARY TRIAL

9-7(2) – **WHEN AVAILABLE** – party can apply for ST generally, or on one issue

(a) action where response has been filed

(b) petitions converted to actions under **22-1(7)**

(c) third party proceeding where response has been filed

(d) counterclaim where response has been filed

9-7(5) – **EVIDENCE** – unless court orders otherwise, the following can be tendered as E

(a) affidavit
- affidavit hearsay exception does not apply – b/c ST is an actual trial // **NOTE** – can contain hearsay for determination of suitability (**Charest**)
- can obtain order for cross-examination on affidavit – **9-7(12)(b)**
- BUT – no way to force a witness to provide an affidavit! – if W refuses to provide affidavit, matter may not be suitable for SJ (**Western Delta**)

(b) interrogatories – whole/part of answer

(c) XFD transcripts – any part
(d) admissions
(e) expert reports – so long as they conform to **11-6**, or court gives an exception

9-7(3) – **TIMING** – application for summary trial must be heard at least 42 days before scheduled trial date

9-7(6) – **ALL OF THE RULES REGARDING EVIDENCE AT TRIAL IN 12-5 APPLY TO SUMMARY TRIALS**

SUMMARY TRIAL PROCESS

1. **BRING & RESPOND TO APPLICATION FOR ST**
   - **8-1** – governs materials to be provided & time limits
2. **APPLICATION FOR PRELIMINARY DIRECTIONS**
   - **9-7(13)** – the following applications can be made before a judge or master
   - **9-7(11)** – challenge to suitability – see section below (**Western Delta**)
   - **9-7(12)** – can obtain directions about evidence and conduct of application
3. **HEARING IN CHAMBERS**
   - must be heard by judge (not within jurisdiction of master)
   - **9-7(11)** – challenge to suitability – see section below (**Charest**)
4. **JUDGMENT**
   - **9-7(15)** – court may grant judgment, on an issue or generally UNLESS court is unable to do so on the E before it OR would be unjust to do so
   - **9-7(17)** – if unable to grant judgment & proceeding should be expedited, court can order trial AND may order parties to attend CPC, make any associated order, or any other order that would further the objectives of the Rules

SUITABILITY

9-7(11)(b) – **CHALLENGES TO SUITABILITY** – before, or at same time as ST hearing, court can dismiss application for SJ grounds that
- **(i)** issues raised are not suitable for disposition on summary trial (does court have necessary facts? would it be just to proceed by ST?)
- **(ii)** summary trial will not assist efficient resolution of proceedings

- **FACTORS** (**Inspiration Mgmt**)
  - **GENERAL CONSIDERATIONS** – amount involved, particularly in relation to cost of conventional trial + complexity of matter + urgency + prejudice that may result from delay + stage of proceedings + any other matter court thinks relevant
  - **SUFFICIENCY OF E** – is there enough before court to make decision
  - **CAUTION AGAINST "LITIGATION IN SLICES"** – ST may not be appropriate if other important matters must proceed to trial anyways // matter of judicial efficiency + prevents court from contradicting itself // BUT – if the matter up for SJ could lead to settlement, court may lean towards allowing ST
  - **CONFLICTS IN E** – conflicting affidavits may impact suitability // depends on whether court can make findings of fact using other E, or use other E to resolve the conflict // court may allow cross-ex on affidavits // may require full trial if credibility is seriously at issue

Inspiration Mgmt **1989 BCCA**	• **leading case on summary trials – factors to determine suitability** // dispute over terms of loan agreement – key issue was whether certain property was agreed to be collateral // P applied for SJ – denied – P appealed // **COURT** – while further process was required (cross-ex on the affidavits) case was still suitable for SJ as unresolved issues of fact were sufficiently narrow // FACTORS --> see above
Western Delta **2000 BCSC**	• **preliminary application to dismiss ST on suitability** // D's applied to dismiss P's application for ST in advance of ST hearing // **COURT** – preliminary application to dismiss is appropriate where --> 1. the summary trial is anticipated to be long 2. where suitability issue can be determined on its own (if however, suitability assessment will require much of the same E that will be at trial, then it's best to address suitability at same time as trial)
Charest v Poch **2011 BCSC**	• **concurrent application to dismiss ST on suitability** // D's applied under **9-7** // P did not want ST – argued credibility at issue + complex issues + sought to amend pleadings // **COURT** – application granted in part // **(a)** fact that P's want to amend pleadings is irrelevant; **(b)** conflict in E not a bar to ST, as other E available to resolve conflict; **(c)** ST appropriate even if it will only dispose of matter if decided in favor of D

OTHER SUMMARY RULES

STRIKING PLEADINGS

- **STRIKING PLEADINGS CAN LEAD TO JUDGEMENT OR STAY/DISMISSAL OF PROCEEDINGS** – court can also order costs of application as special costs
- **MASTER –** also has jurisdiction to make final order striking pleadings provided there's no determination of question of law relating to proceedings

STRIKING PLEADINGS – RULE 9-5

9-5(1) – **WHOLE/PART OF PLEADINGS CAN BE ORDERED STRUCK/AMENDED AT ANY STAGE OF PROCEEDINGS ON GROUDS THAT....**

(a) pleadings disclose no reasonable claim or defence --> most commonly used // high threshold (**National** & **Hunt**)
- **TEST** – must be plain and obvious that pleadings do not disclose reasonable claim or defence
- **9-5(2)** – no EVIDENCE admissible on 9-5(1)(a) --> facts as pleaded presumed to be true

- BUT – court may look behind allegations of fact to determine if they're based on speculation OR incapable of proof – can the refuse to assume such allegations are true – ex/ generalized accusations, failure to state adequate particulars about when, where, how allegations occurred (**Jerry Rose Jr**)
- court will attempt to save even the worst pleadings by allowing party to amend (**National**)

(b) unnecessary, scandalous, frivolous, or vexatious // can admit E when attempting to establish

- pleadings are "without substance, groundless, fanciful, and will waste the time of the court" (**Jerry Rose Jr**)

(c) pleadings may prejudice, embarrass or delay fair trial or hearing of proceeding // can admit E when attempting to establish

(d) pleadings are an abuse of process // can admit E when attempting to establish

9-5(1) – **COSTS** – court may order costs of the application to be paid as special costs

THINGS TO REMEMBER ABOUT STRIKING PLEADINGS

- **SOLE ISSUE IS SUFFICIENCY OF PLEADINGS –** only issue on application to strike is sufficiency of the pleadings as a matter of law // successful application is NOT a determination on the merits & the losing party will be given chance to try again (subject to time limits & LP's) // court will also likely look to whether amendment can solve issue
- **GLIMMER OF DEFENCE** – where there's some semblance of defence, court will be hesitant to strike, especially where lay litigant is involved (**National Leasing**)

Hunt v Carey 1990 SCC	• **test to strike on 9-5(1)(a) = plain and obvious to fail** // P claimed conspiracy for personal injury claim // D applied to strike claim – on basis that tort of conspiracy not yet extended to personal injury // **COURT** – refused to strike // purpose of test is not to ask if P will succeed, but whether pleadings disclose "radical defect" making it plain and obvious to fail
Willow v Chong 2013 BCSC	• **factors to strike on (b) unnecessary, frivolous, or vexatious pleadings OR (d) abuse of process --> bound to fail** // students of Chinese medicine school that was shuttered brought suit against variety of D's, including Crown & Ministers // C&M sought application to strike portions of NOCC // **COURT** – allowed // claims against government agencies can't found proper action outside of admin law context & were impermissible collateral attacks (pursuing civil claim where there's statutory remedy) // claims against Ministers were abuse of process (decision should be dealt with in admin tribunal) // FACTORS --->1. pleading does not go to establishing cause of action 2. pleading does not advance any claim known in law 3. would serve no purpose and be a waste of court time & public resources to proceed 4. pleading is so confusing that it cannot be understood

SPECIAL CASE

- **SPECIAL CASE** – alternate summary procedure where court opinion is sought on a question of law, fact, or mixed // parties must agree on relevant facts!
- **RESULT** – decision in the form of a non-binding opinion which can then serve as the basis for judgment or special relief, with the consent of the parties
- **PURPOSE** – allow parties to get an opinion from the court which will then facilitate resolution of dispute by the parties themselves in order to increase efficiency
- **NOT APPROPRIATE WHERE** --> no question of law would dispose central issue OR where evidential disputes must be resolved (**William v BC**) // the court is generally expected to act judicially (ie/ decide issues) – NOT to act in an advisory or consultive capacity on hypothetical facts

SPECIAL CASE

9-3(1) – PARTIES MAY CONCUR – parties may concur in statement of law/fact/mixed and seek opinion of court

9-3(2) – COURT MAY ORDER SC – court can order special case on any issue arising in proceedings, whether raised by pleadings or not

9-3(5) – ORDER AFTER HEARING – with consent, court can grant specific relief OR order judgement be entered

William v BC 2004 BCSC	• **parties must be able to agree on relevant facts** // parties couldn't come to agreement on which facts were relevant // **COURT** – special case is not appropriate here for the following reasons -->1. no question of law that could resolve the central issue as there were complex issues of fact 2. no agreement on relevant facts – **9-3** provides no mechanism to resolve factual disputes 3. case relatively important – should not proceed on basis of assumed facts

PROCEEDING ON POINT OF LAW

- **POINT OF LAW** – mechanism that allows court to consider question of law based on facts alleged in pleading, which are assumed to be true (no E allowed)
- **NOT AVAILABLE WHERE** --> facts are contested, evidence needs to be weighed, or where there's a serious question of law that would be more appropriately determined through a full factual inquiry
- **WHEN AVAILABLE?** – available any time before trial // **DISCRETIONARY** – court will consider whether a determination of point of law will be decisive of the litigation or of a substantial issue raised in the action // **KEY QUESTION** – will point of law result shorter trial OR substantial cost savings (**Harfield**)

PROCEEDING ON POINT OF LAW

9-4(1) – **POINT OF LAW ARISING FROM PLEADINGS** – may, by consent of parties, or order of court, be set down for hearing – available pre-trial

9-4(2) – **COURT MAY DISPOSE OF WHOLE ACTION** – if decision substantially disposes of whole action, particular claim, defence, set-off, or counterclaim court can dismiss the action OR make any order it thinks will further the object of the Rules

SCENARIOS

WHERE PARTIES CONSENT

1. point of law clearly defined + raised in pleadings
2. facts not in dispute + point of law capable of being addressed without evidence (facts assumed to be true)

WHERE PARTIES DO NOT CONSENT, COURT WILL ALSO LOOK AT (**Harfield**)

3. will question be decisive of litigation OR raise substantial issue
4. will PPL significantly shorten trial OR result in substantial cost savings
5. serious question of general importance? --> best resolved in full factual context of trial

SPECIAL CASE vs POINT OF LAW

- special case can issue opinion on matters of law, fact, or mixed law & fact // point of law only addressed questions of law
- special case questions need only "arise in the pleadings" // point of law questions must be raised by the pleadings
- special case can deal with any issue in the action // point of law must determine substantial issue in the action

INTERIM RELIEF

PRETRIAL INJUNCTIONS

- **SOURCE** – BC courts empowered to order party to act/refrain from acting under **LEA 39** and inherent jurisdiction of the court // can be given as final relief // are only issued by judges, as per **PD-42**
- **PRE-TRIAL INJ's** --> INTERIM – in place for specified period of time // INTERLOCUTORY – in place until trial or revised by further order // SPECIAL INJ's
- **2-PART TEST FOR PRE-TRIAL INJ** (**Wale**)
  1. FAIR (ARGUABLE) QUESTION TO BE TRIED (affirmed in **CBC**)
  2. BALANCE OF CONVENIENCE (**CBC** – factors for BOC analysis)
     - adequacy of damages as a remedy + likelihood that damages will be paid if awarded
     - preservation of contested property OR other harms that may result from granting/refusing
     - which party altered status quo? --> (1) who took first step?; (2) which party did thing said to be actionable; (3) nature of alleged wrongful conduct
     - the strength of applicant's case + factors affecting public interest + other factors affecting balance of justice & convenience

INJUNCTIONS

10-4(1) – **AVAILABILITY OF PRE-TRIAL INJ's** – can make application regardless of whether INJ is included in relief claimed – so basically, always available

10-4(2) – **CAN APPLY BEFORE PROCEEDINGS START** --> allows court to respond to situations of exceptional urgency

10-4(3) – **EX PARTE APPLICATIONS** – court may grant interim INJ for applications for pre-trial injunctions without notice // NOTE – this is increasingly the practice – allow other side to be heard // **PROFESSIONAL DUTIES** – **CPC 5.1-1-[6]** – ex parte applications require full and frank disclosure from party making application – and these INJ's are at greater risk of being set aside

10-4(5) – **UNDERTAKING AS TO DAMAGES** – expressly required for pre-trial and interim INJ's, unless otherwise ordered

- promise by applicant to pay damages as ordered by court, as result of INJ // provides court & enjoined party a degree of security

10-4(6) – **INJ AFTER TRIAL** – party can seek INJ after trial where INJ has been or might have been claimed – to restrain party from repetition or continuance of wrongful act or breach of contract

APPLYING FOR EX PARTE INJ's

8-5(3) – **NORMAL TIME & NOTICE RULES DON'T APPLY**

8-5(6) – **MAY BE MADE IN THE CASE OF URGENCY**

8-5(7) – **SERVICE** – party who obtained order must serve copy of order + all documents filed in support promptly on each person affected by order

8-5(8) – **APPLICATION TO SET ASIDE** – affected persons can apply for court to vary or set aside the order

AG v Wale **1986 BCCA**	• **2-part test for granting pre-trial INJ** // underlying fishing rights dispute – govnt sought to enjoin First Nations from enforcing their own bylaws and fishing in contravention to *Fisheries Act* // **COURT** – referred to 3-part test from **RJR MacDonald**, but preferred to incorporate irreparable harm into BOC analysis // KEY CONSIDERATION --> is it just and equitable in all the circ's to grant an INJ? • **irreparable harm** – harm that can't be compensated by damages – clear proof not required, mere doubt is sufficient • **balance of convenience** – where one party will suffer irreparable harm & other won't, BOC analysis will generally preserve status quo
CBC v CKPG Tv **1992 BCCA**	• **first prong of test = fair question to be tried** – **factors to assess BOC** // CBC sought INJ to prevent local affiliate from substituting local ads for regional ads // **COURT** – affirmed lower evidentiary threshold for first prong – found fair issue to be tried // BUT – CBC failed on BOC analysis // FACTORS – see above – will be weighed in the circumstances and not in mechanical way //
Vieweger v Rush **1964 SCC**	• **undertaking as to damages generally payable if INJ overturned** // construction project – supplier wanted to remove equipment b/c it had not been paid – P said supplier was bound by K to keep equipment on site // P got INJ to prevent removal + undertaking as to damages // supplier later found to be not bound by K // **COURT** – supplier entitled to damages b/c INJ had prevented its using equipment for other business // if case FAILS --> presumption that undertaking is triggered absent special circumstances • **special circumstances** – public body acting in public interest to preserve status quo OR where D succeeded on merits but engaged in misconduct such that it should not get damages – "unclean hands"

SPECIAL INJUNCTIONS

MAREVA INJUNCTIONS

- **MINJ** – order intended to prevent removal or assets from jurisdiction or reach of court // can be Draconian in its effect, so it is considered extraordinary relief
- **TEST** (**Aetna Financial**)
  1. **STRONG PRIMA FACIE CASE** – applicant must show strong prima facie case
  2. **REAL RISK OF ASSET DISSIPATION** – show real risk that respondent is about to remove assets from jurisdiction to avoid judgment OR that they're dissipating assets in manner outside ordinary course of business

Aetna Financial **1985 SCC**	• **test for MINJ – ordinary course of business** // Aetna was receiver for PreVue – was about to transfer assets held on receivership to its office in Quebec // PreVue got order preventing removal of assets from Manitoba // Aetna claimed this was in ordinary course of business // **COURT** – general principle = litigant should not be permitted to seize assets in advance of judgment // MINJ is extraordinary relief –-> requires higher threshold than ordinary INJ // here, funds were transferred in OCB – not to avoid judgment – and at any rate, bankruptcy legislation in Canada is federal – so moving assets to another province does not place them outside of jurisdiction // here – INJ set aside
Reynolds v Harmanis **1995 BCSC**	• **MINJ should not be entirely extraterritorial – avoid "litigious blackmail"**// BC resident claimed against former business parter, now residing in Australia // P claimed D was very business savvy – had arranged assets to make himself "judgement proof" // **COURT** – no E that Px agreement existed – on that basis alone, P failed to meet strong prima facie case threshold // regardless, MINJ should not be entirely extraterritorial in effect –-> to obtain MIJ assets or respondent must be in jurisdiction // WHY? –-> D can't apply to set aside order easily if not in jurisdiction + restraining assets worldwide is very serious & can affect third parties + avoid "litigious blackmail" + no real risk of imminent dissipation of assets
Silver Standard Resources **1998 BCCA**	• **ultimate test = whether MINJ would be fair & convenient – look at impact on innocent third parties** // action to recover loaned money – P's sought action to prevent payment of funds to third party // D applied to have INJ set aside – negative effect on innocent third party // **COURT** – payments being made in ordinary course of business // ULTIMATE TEST = was it fair & convenient to interfere with D's assets? // INJ not allowed –--> despite (1) P's strong case; (2) P would be left with "dry judgement" w/out the INJ; (3) more relaxed approach to MINJ

ANTON PILLAR ORDER

- **ANTON PILLAR ORDER** – order to preserve evidence pending trial – effectively authorize party to enter another's premises to seize property in advance of trial, without notice
- **TEST** (**Anton Pillar**) –-> reflects fact that AP orders require high threshold
  1. **EXTREMELY STRONG PRIMA FACIE CASE**
  2. **VERY SERIOUS POTENTIAL DAMAGE TO PLAINTIFF**
  3. **CLEAR EVIDENCE** –-> (1) D's have incriminating documents or other E in possession; AND (2) real possibility these docs or E will be destroyed if other party has notice of the application
- **ANTON PILLAR ORDER REQUIRES ADDITIONAL SAFEGUARDS**
  - party who obtained order must act with circumspection // Canada – issues limited orders + clear identification of material to be preserved
  - subject of order should be given opportunity to consult their counsel prior to providing access
  - supervision by independent solicitor – officer of court // Canada – this is key safeguard to ensure privileged material is not disclosed

Anton Pillar	P gave D confidential info to facilitate sale of its products in England // P found out that D's were giving the confidential info to P's rival // P wanted to enjoin D from disclosing info – concern that D would destroy E of breaches if it knew of application // **COURT** – can order D to give P permission to enter premises (gets around inability to order civil search warrant)

PRE-JUDGMENT GARNISHING ORDER

- **PJGO** – allows attachment of debts prior to judgment – extraordinary order // P typically has no recourse until judgment issued // ex parte application
- **COEA 3(2)** – judge may order debts owing from the garnishee to the 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 and 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
- **PROCESS – MUST BE STRICTLY ADHERED TO**
  - GO operative once it is served on garnishee – **COEA 9(1)**
  - cannot garnish wages pre-judgment – **3(4)**
  - garnishee can either (1) dispute the debt allegedly owing to D; or (2) pay garnished amount into court –-> if garnishee fails to act, court may order amount paid into court & pay costs of process – **11(a)**
  - D must be served with GO – **9(2)**
  - technical defects will result in GO being set aside

Knowles v Peter **1954 BCSC**	**meticulous observation of process required** // P obtained GO based on affidavit describing cause of action as "debt on chattel mortgage" // **COURT** – struck GO // description of nature of cause of action required – "succinct and informative statement" – missing here

EXPERTS - PART 11

PART 11 --> RULES GOVERN PROCEDURAL, VERSUS SUBSTANTIVE, MATTERS

APPLICATION OF PART 11

11-1(1) - DOES NOT APPLY - to summary trials under **9-7** OR where the expert is the one whose conduct is the subject of the action

11-1(2) - EXPERT OPINION EVIDENCE MUST APPEAR IN CPC - if CPC has been held, can't tender expert opinion E unless provided for in CPC

INDEPENDENCE & OBJECTIVITY

DUTY OF EXPERTS WITNESSES

11-2(1) - ASSIST NOT ADVOCATE - experts have a duty to assist the court - not to be an advocate for one side

11-2(2) - EXPERT MUST CERTIFY THEY ARE AWARE OF DUTY - and that their report conforms to this duty

VCC v Phillips 1988, BCSC	**independence of experts - counsel can't make suggestions wrt substance of report** // negligence claim // P's case relied on one expert in particular whose report was heavily revised, based on "considerable advice" from counsel // D's objected to report // **COURT** - report rejected // counsel may consult with experts but expert must remain independent and objective - should not be partisan and one-sided // here, report was "substantially rewritten by counsel"

APPOINTMENT

JOINT EXPERTS

11-3(1) - **JOINT EXPERT** - multiple parties can appoint joint expert if they agree on the following ---> (a) identity of expert; (b) issue in action needing an 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, or on application by one of the parties - subject to settlement of above issues // **(5)** if parties cannot reach agreement, court may settle terms of appointment & name the expert

- **RARE** - joint experts are RISKY // if you don't like your expert's report, you can ditch it in the solicitor's brief // not so with joint expert report

IF JOINT EXPERT IS APPOINTED....

- **AGREEMENT** - must be entered into and disclosed to all parties - **11-3(6)**
- **ONLY ONE WHO CAN GIVE OPINION** - where there's a joint expert, no other expert may give evidence on the same issue, without leave - **11-3(7)&(9)**
- **SUBJECT TO CROSS-EX BY ALL PARTIES** - feel sorry for the poor joint expert - **11-3(10)**

YOUR OWN EXPERT

11-4 - **PARTY CAN APPOINT OWN EXPERT** - subject to a case plan

11-3(11) - COMMON EXPERT - expert appointed by parties who are not adverse in interest

11-7(5) - **CALLING YOUR OWN EXPERT** - must not call your own expert to give oral evidence at trial unless

(i) party of record requested expert to attend for cross-examination under **11-7(3)** or;

(ii) report has been served in accordance with **11-6** AND you need to clarify terminology in report or otherwise make report more understandable

COURT APPOINTED EXPERT

11-5 - **COURT APPOINTED EXPERT** - 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

ADMISSIBILITY

- **ADMISSIBILITY** - Generally, evidence is only admissible at trial to establish facts. Expert opinion evidence is an exception to this rule. Properly qualified experts can testify to their opinions where that opinion is admissible. Admissibility is governed by CL (**R v Mohan**)**--> (a) logical relevance (b) necessity in assisting TOF (c) properly qualified expert (d) absence of any exclusionary rule**
- **EXPERTS CAN** - give E as to standard of care, and whether SOC was adhered to or breached on basis of **hypothetical or assumed facts** (**Surrey Credit**) - counsel will then have to prove those facts at trial (**Yewdale**)
- **EXPERTS CANNOT** - provide opinions on ultimate issue // find facts - they must render opinion on assumed facts // make conclusions of law // make self-evident statements // act as an advocate (**Yewdale**)

OBJECTIONS TO ADMISSIBILITY

11-6(10) - NOTICE OF OBJECTION - must be served earlier than TMC or 21 days before trial date

11-6(11) - OBJECTION AT TRIAL - won't be allowed if reasonable notice of objection could've been given under **(10)**

EXPERT EVIDENCE AT TRIAL

11-7(1) - EVIDENCE AT TRIAL LIMITED TO WHAT'S IN REPORT - and served in accordance with the rules

11-7(2) - REPORT AS EVIDENCE - report becomes E if expert not requested to attend for cross // expert not required to give oral testimony

11-7(3) - EXPERT'S ATTENDANCE FOR CROSS - party may require expert attend for cross // request attendance within 21 days of service under **(2)**

11-7(5) - ORAL TESTIMONY - **(a)(i)** - if request made to cross-examine // **(a)(ii)** if party believes direct exam is necessary to clarify terminology or to otherwise make the report more understandable

11-7(6) - COURT MAY DISPENSE WITH REQUIREMENTS OF PART 11 AT TRIAL IF --> (1) NEW FACTS COME TO KNOWLEDGE OF ONE OR MORE PARTIES THAT COULD NOT HAVE BEEN LEARNED THROUGH DUE DILIGENCE; **(2)** NO PREJUDICE WILL RESULT; **(3)** INTEREST OF JUSTICE REQUIRE IT.

Yewdale v ICBC 1995, BCSC	**admissibility of expert reports** // P was D in earlier personal injury trail --> now suing her counsel in that matter for professional negligence & ICBC for breach of duty of good faith & breach of contract // P sought general, special, and punitive damages - tendered expert reports // D's challenged admissibility of expert reports - claimed that reports based on inferences of fact & contained conclusions of law & self-evident statements // **COURT** - rejected most of the reports
Surrey Credit Union v Wilson 1990, BCSC	**admissibility at trial - no legal opinion - opinion can be based on hypothetical facts** // action wrt negligent accounting audit // expert called to give E on appropriate practice standards for CA's when conducting audits // D's objected - WHY? --> opinion E outside expertise or qualifications of expert + argument rather than opinion + large irrelevant passages // **COURT** - report rejected in current form - but allowed opportunity to rewrite // expert can comment on whether SOC was breached on basis of hypothetical facts if source of facts is provided // expert CAN'T give opinion on legal duty imposed by SOC and if breach was actionable at law

REPORTS

CONTENT OF REPORT

11-6(1) - **EXPERT REPORT MUST BE SIGNED & 11-2(2) CERTIFIED AND SET OUT THE FOLLOWING**

(a-b) - **QUALIFICATION** - expert's name, address, area of expertise, AND qualifications, employment, educational experience in area of expertise

- **Pro Tip** - append expert's CV to the report // assertion of qualifications of expert is evidence of those qualifications as per **11-6(2)**

(c) - **INSTRUCTION -** instructions provided to expert

(d) - **NATURE OF OPINION SOUGHT -** 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

11-6(7) - **SUPPLEMENTARY REPORTS** - **(a)** be identified as supplementary report; **(b)** be signed by expert; **(c)** include 11-2(2) certification; **(d)** material changes to expert's opinion must be set out + reasons for changes in opinion

SERVICE OF REPORTS

11-6(3) - **EXPERT REPORT** - must be served on every party of record 84 days before trial // does NOT apply to court-appointed experts

11-6(4) - RESPONDING REPORT - must be served on every party of record 42 days before trial to respond to reports served under **(3)**

11-6(5-6) - **SUPPLEMENTARY REPORTS** - must be promptly served on every party of record

11-7(1) - FAILURE TO SERVE IN ACCORDANCE WITH 11-6 - cannot tender expert's opinion evidence at trial - although court could grant leave to do so

PRODUCTION OF MATERIALS RELIED ON TO PRODUCE REPORT

- **NOTE** - only parties of record can request this production

11-6(8)(a) - must serve to any party of record promptly after being asked --> **(i)** written statement of facts, **(ii)** record of independent observations; **(iii)** data compiled, **(iv)** test results or inspections

- DOES NOT include opinions themselves, draft reports, notes from meetings with counsel, etc

11-6(8)(b) - must make available for review & copying the full contents of file upon request of any party of record at least 14 days before trial (**Delgamuukw**)

- DOES include opinions and draft reports

Turpin v MLI 2011, BCSC	**expert's qualifications & expertise must be stated and specifically relate to opinion to be given** // P claiming for coverage denied under travel insurance policy // D sough to tender "internal medicine expert" report re: whether P had obtained medical treatment as result of pre-existing condition // P objected - WHY? - (1) report did not set out expert's area of expertise; (2) opinion sought to answer ultimate issue for court; (3) docs relied on in forming report not listed // **COURT** - simply identifying expert as practicing in "internal medicine" not enough - qualifications must be specifically related to opinion to be given // here, no expertise in insurance policy definitions // AND - opinion sought offended "ultimate issue" question - over the bounds & strayed into advocacy
Delgamuukw 1988, BCSC	**disclosure and privilege considerations - solicitors brief privilege mostly waived wrt expert's file** // P's sought to rely on expert reports to corroborate oral history - expert's files disclosed // some documents blacked out for privilege - D's sought disclosure of clear copies // **COURT** - testifying expert must produce all documents in their possession - including draft reports or matters relevant to substance or credibility // solicitors brief privilege must be preserved as much as possible, but not at expense of trial integrity // WAIVED --> wrt matters of substance once E is called to testify (now codified in **Rule 11-6(8)(b)**) // MUST DISCLOSE --> letters of instruction, fee arrangements, written communications, memo's and drafts, suggestions from others, any other written material considered in preparing report (bibliography) // claims of privilege - must provide **(1)** reason; and **(2)** reasonable description of document

TRIAL PROCEDURES & COSTS

TRIAL PROCEDURES – RULE 12

SETTING TRIAL FOR HEARING

12-1(2) – FILE NOTICE OF TRIAL – **FORM 40** – must include **(3)** date of trial, and **(4)** be filed in registry

12-1(6) – SERVICE – must serve filed notice of trial promptly on all parties of record

- **DATE?** practice is to clear dates with other counsel // if you have a strong case, good idea to try and get an early date so you may want to file & deliver the notice asap // as for procedure on how to figure out the date, call the registry

TRIAL MANAGEMENT CONFERENCE

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

12-2(2) – **WHO PRESIDES** – rule says there's presumption that TMC should be before trial judge – in reality, this never happens, particularly since Master now routinely do TMC's // drafters may have intended these as chance for meaningful negotiation and actively managing trial

12-2(3) – TRIAL BRIEF REQUIRED – each party of record must file trial brief in advance of TMC & serve – **FORM 41**

12-2(4)&(5) – **PARTIES MUST ATTEND TMC** – you and your client must attend // **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 anyways!

12-2(9) – TMC ORDERS – long list of things the judge/master presiding can set

- **GENERAL COMMENTS** – TMC's are very intensive, so the time for them has now been limited // could be useful tool but are not complete pro forma – real use is to confirm that all parties are ready to proceed with trial

PRE-TRIAL FILINGS

7-4 – WITNESS LIST – must be filed and served by each party of record the earlier of TMC or 28 days prior to trial date -- except adverse & expert witnesses

12-3 – TRIAL RECORD – must be filed and served by party who filed Notice of Trial – between 28 and 14 days prior to trial date -- pleadings + particulars served under demand + case plan order + other orders relating to conduct of trial + any docs required by registrar

12-4 – TRIAL CERTIFICATE – must be filed by all parties of record between 28 and 14 days prior to trial date – **FORM 42** – statement that party ready to proceed

EVIDENCE & PROCEDURE AT TRIAL

- **BASIC IDEA OF 12-5 -->** certain types of evidence require more notice

12-5(21) – ADVERSE WITNESSES – must serve adverse party notice **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) – USE OF DEPOSITION EVIDENCE – transcript of video of deposition may be given in E // and 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 E in chief of witness be given via affidavit

FAST TRACK TRIALS

15-1(1) – FAST TRACK – APPLIES WHERE

- claim less than $100k (but no cap on damages as per **(3)**)
- trial can be completed within 3 days – BG thinks this is the major negative to FTT's
- parties consent OR court can order FT process apply

- **RARELY USED** – benefit of early trial date is often not available (b/c courts busy) – yet you still have to deal with the limitations
- **LIMITATIONS**
  - **(7)&(8)** – NO CONTESTED HEARINGS can be held without CPC or TMC having been held
  - **(11)** – DISCOVERIES limited to 2 hours total unless parties agree or court orders otherwise
  - **(13)** – TRIAL DATE within 4 months is meant to be provided – BUT – the registry may not have dates available within that time period!!!
  - **(15)** – COSTS – fixed amount based on the number of days of trial – not at discretion of judge

COSTS – RULE 14

- **OUR SYSTEM** --> partial indemnity system based on notional costs – what you actually paid doesn't normally enter the cost assessment process // party entitled to costs prepares **bill of costs** that identifies steps taken in the litigation – "units" on bill are assigned dollar values based on **tariff system**
- **PURPOSE OF COSTS** – (1) indemnify successful litigants in whole or in part for costs incurred in establishing their legal rights; (2) deter frivolous actions or defences; (3) encourage reduction of duration & expense of litigation; (4) encourage meaningful settlement offers & negotiation b/w parties (**Giles**)
  - **FLIP SIDE?** – P's with limited means may be more able to advance their claims
  - **LIMIT ACCESS TO JUSTICE?** P's with valid claims may not advance them b/c of risk they may have to pay costs of other side // could limit test cases
- **WHO ASSESSES?** Registrar is the assessment officer – **14-1(4)** // BUT – court can make cost directions order by which Registrar is bound – **14-1(7)**
- **14-1(33)** – **BAD LAWYER** – court can disallow lawyer from collecting their fees AND/OR can make lawyer personally responsible for costs of other side

QUANTUM OF THE AWARD

PARTY-AND-PARTY COSTS

14-1(1) – **PARTY-AND-PARTY COSTS** – DEFAULT RULE – assessed in accordance with Appendix B --> Scale A – less difficult matters; **Scale B (default)** – matters of ordinary difficulty; Scale C – matters of more than ordinary difficulty

- **14-1(2)** – **ASSESSMENT OF P&P COSTS** – must allow fees that are proper or reasonably necessary to conduct proceeding + consider **1-3** and any CP order
- **14-1(5)** – **DISBURSEMENTS** – separate from fees & can be included in bill of costs – also based on proper & reasonable test
- **14-1(17)** – **SET OFFS** – if the ultimately successful party owes costs to an unsuccessful party – for applications where costs in any event of the cause were awarded – then that amount may be deducted from the end cost award
- **P&P DOES NOT APPLY IF** – parties consent to costs // lump sum costs awarded // special costs awarded // fast track litigation

SPECIAL COSTS

- **PURPOSE** – RARE order – punishment for **reprehensible conduct worthy of rebuke** // higher indemnity that ordinary costs – though not necessarily actual indemnity, as it's still based on costs that were properly and reasonably incurred (**Rana**)

14-1(3) – **ASSESSMENT OF SPECIAL COSTS** – Registrar must allow **(a)** proper or reasonably necessary to conduct proceeding; and **(b)** consider all circumstances including --> complexity of proceedings + skill or responsibility required of lawyer + amount involved + time reasonably spent + conduct of parties that lengthened/shortened proceedings + importance of proceeding to party whose bill is being assessed

- **14-1(5)** – **DISBURSEMENTS** – separate from fees & can be included in bill of costs – also based on proper & reasonable test

OTHER TYPES OF COST QUANTUM

9-1(5)(b) – **DOUBLE COSTS** – doubles party-by-party costs – punitive measure // can be applied to portion of costs, such as cost after OTS given

14-1(30) – **LUMP SUM COSTS** – specific sum ordered payable to successful party, versus assessment based on bill of costs // rare order, but does happen

15-1(15) – **FAST TRACK ACTION COSTS** – $8000 for 1 day or less // $9,500 for 2 days or less // $11,000 for 3 days or less – unless court orders otherwise // **(16)** court can take OTS under discretion

PARTY TO WHOM COSTS PAYABLE

14-1(9) – **COSTS IN THE CAUSE** – DEFAULT RULE – cost of proceedings must be awarded to successful party unless court orders otherwise

- **TIME** – this award also implies timing of payment, since costs can't be paid until one party is found to be successful

14-1(12) – **COSTS OF APPLICATIONS** – DEFAULT RULE – party who is successful on application gets costs, in any event of the cause

- **NOTE** – this rule does NOT apply if the court orders otherwise --> if the application is legitimate, and both parties were reasonable, court may order costs of the application simply follow the cause

14-1(15) – **COSTS IN ANY EVENT OF CAUSE** – costs awarded to Party X for any particular application, step, or matter, in or related to the proceeding regardless of who wins the ultimate issue (**Lee v Jarvie**)

TIME AT WHICH COSTS PAYABLE

14-1(13) – **COSTS PAYABLE AT END OF PROCEEDINGS** – DEFAULT RULE unless court orders otherwise then COSTS PAYABLE FORTHWITH (usually with a time frame set within which costs must be paid)

Giles v WS&CU 2010, BCCA	**costs are purely discretionary – test to vary cost orders on appeal** // multiple P's brought claims relating to investments in corp – previous separate summary trials had been dismissed // yet P's still sought to maintain their claims // D claimed res judicata and asked for costs // **COURT** – P's ordered to pay large part of D's costs // **APPEAL** – costs are discretionary – appeal court will not vary unless **(1)** judge erred in principle; or **(2)** order plainly wrong // here, the P's not in circumstances where costs order would prevent access to justice, nor was this test case with public importance
Rana v Nagra 2011, BCCA	**special costs – reprehensible conduct** // D's alleged misconduct on part of P --> bringing claim without evidentiary basis, filing CPL for improper purpose, filing false affidavits, failing to disclose documents, and wrongly alleging forgery // **COURT** – special costs require more than substantial success – awarded to deter and punish "reprehensible conduct" // here, special costs awarded • **absence of merit** – but losing is not enough, must be something more // here, P's filed CPL to pressure D's • **failed allegations of dishonesty** – particularly problematic b/c this stays with person you accuse – here, claimed promissory notes forged • **reasonableness of underlying claim** – can speak for or against special costs • **failing to disclose documents** – can support special costs on its own // here, P's failed to properly disclose documents
Lee v Jarvie 2013, BCCA	**14-1(15) – substantially successful – court may apportion costs on issues if just** // MVA claim – liability admitted – only issue at trial was damages // P claimed $1mil – got $50k – was P substantially successful? // **TRIAL** – looked at heads of damages – found them to be discrete issues – P succeeded on one head primarily, but not others --> no party was substantially successful – ordered that each party would receive half their costs & those costs would be set off against each other // **APPEAL** – rule refers to MATTER as basis for allocating costs – here, the P is not helped b/c "matter" is broader than "issues" AND this approach accords with underlying goal of proportionality and court's high level of discretion on costs

OFFERS TO SETTLE

- **HISTORY** – Old Rules contained what was seen as a complete code for awarding costs. This included what costs would be awarded in cases where there was a formal offer to settle – and whether it was accepted or rejected. **NOW** – New Rules give the court many layers of discretion wrt costs & OTS are now only factor.

9-1(1) – **FORM OF OFFER TO SETTLE** – **(c)** after July 2008 --> in writing + served on all parties of record + contains special sentence --> "*The parties reserve the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment……*"
9-1(2) – **OFFER NOT TO BE DISCLOSED** – fact that formal OTS made can't be disclosed to TOF until all issues but costs have been determined
9-1(3) – **OTS NOT AN ADMISSION**
9-1(4) – **OTS MAY BE CONSIDERED WHEN DECIDING COSTS** – but court not required to take it into account
9-1(5) – **COST ORDER OPTIONS** – where OTS has been made, court may do one (or none) of the following -->
(a) DEPRIVE party of costs it would've been entitled to had OTS not been made;
(b) DOUBLE costs;
(c) AWARD party of costs it would've been entitled to had OTS not been made;
(d) award costs to D where P failed to beat the OTS at trial
9-1(6) – **CONSIDERATIONS FOR ORDERS UNDER (5)** --> **(a)** should OTS have reasonably been considered; **(b)** difference b/w OTS and final judgment; **(c)** relative financial circ's of parties; **(d)** any other factor

Ward v Klaus 2012, BCSC	**reasonable acceptance of OTS – must be undertaken (i) without referring to ultimate outcome and (ii) from Plaintiff's subjective POV** // P awarded $433k at trial – had been previously made two OTS – both higher // D's sought order limiting P's costs from the date of the second offer // **COURT** – looked at factors from **9-1(6)** // // D must get something for making the reasonable OTS – BUT – P should not be penalized too much since rejection of OTS was reasonable // awarded P costs to date of first OTS, with each party to bear its own costs thereafter • **final judgement > OTS** – only one factor – not determinative // here, rejection was reasonable // (1) P assessed her damages higher than either offer; but (2) at trial she ended up with less than the two offers • **weighed relative financial circ's** – P's costs would not leave her impoverished but will reduce her judgement's value – for D, no evidence given, but would likely be indemnified by insurance – so this factor had not effect

SECURITY FOR COSTS

- **PURPOSE** – prevent impecunious plaintiff from escaping costs (and therefore the intended deterrent against frivolous actions)
- **DO NOT HAVE TO POST SECURITY TO DEFEND** – but you may have to as a D if you file counterclaim that is significantly separate from original claim
- **BUT NO SCCR RULE TO IMPOSE!** – court instead make orders for security for costs based on inherent jurisdiction of courts // power to impose on individuals (**Han**) + power to impose such orders on corps (**Integrated Contractors**) – NOTE – **BCBCA 236** also provides for ordering security for cost where P is BC corp

Integrated Contractors 2009, BCSC	**TEST FOR CORPORATE PLAINTIFF** 1. INABILITY TO PAY – applicant for security must establish prima facie case that corp claimant would be unable to pay costs if claim fails 2. OPPORTUNITY TO REBUT – corp claimant can rebut prima facie case by showing **(a)** sufficient assets to satisfy cost award; or **(b)** that security applicant has no arguable defence to its claim 3. OTHER FACTORS – would ordering security unfairly stifle valid claim // does applicant have counterclaim which will be responsible for most of applicant's costs & counterclaim is intertwined with the main claim? // did applicant's actions at issue in claim place respondent under financial hardship? D filed counterclaim and added third party – both third party & P asked for security for costs // **COURT** – prima facie test satisfied b/c corp's only asset was property in foreclosure & no exigible assets // third party had not put forth arguable defence – all it did was deny material facts // D did not have resources to pay security – and may therefore have been prevented from proceeding if security required // AND counterclaim inherently intertwined with original claim – ie/ wasn't adding anything new into the proceedings, so not fair to require security
Han v Cho 2008, BCSC	**principles for awarding security against individuals** // P's who resided in Korea claimed in fraud & conspiracy – D's denied the allegations // **COURT** – looked at variety of factors – onus on applicant to establish they will be unable to recover costs • **is security in interests of justice** – delay in bringing app for security + merits of claim or defence + ability to order lesser security • **inability to recover not sufficient on own** – impecunious P // fact P lives outside jurisdiction // fact P has no assets within jurisdiction • **special circumstances required to impose security for costs** --> P is impecunious AND has weak claim // P has previously failed to pay costs // P has refused court order for payment of maintenance (or presumably for any other court ordered payment)