CIVIL PROCEDURE

Course Summary

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CONTENTS

1. Introduction & Scheme

Introduction

This course is chiefly about the rules governing the conduct of a civil action in the British Columbia Supreme Court. It is not about the conduct of a trial *per se*, and its focus on the process of a civil action means that it generally ignores, or treats cursorily, other civil procedure not related to bringing an action and pursuing it to settlement or some form of judgment.

Flow of a Civil Action

The following table illustrates the approximate "flow" of a civil action. In reality, things do not necessarily proceed in such a linear fashion—for example, a party might need to make an interlocutory application to compel document production, or for an order for substituted service—but the table shows the general contours of the process. Note that some topics canvassed in this course (for example, petitions, which we very briefly cover on p 13) are not listed in the table below.

Commencement	Discovery Phase	Pre-Trial	Trial	Post-Trial
Originating Pleadings: • Notice of Civil Claim (Rule 3-1) • Personal Service (Rule 4-3) • Alternative Service (Rule 4-4) Other Pleadings: • Response to Civil Claim (Rule 3-3) • Counterclaim (Rule 3-4) • Third-Party Claim (Rule 3-5) • Ordinary Service (Rule 4-2) Content of Pleadings (Rule 3-7) Failure to Respond • Default Judgment (Rule 3-8)	• Document Disclosure (Rule 7-1) • Examination for Discovery (Rule 7-2) • Interrogatories (Rule 7-3) • Admissions/Notice to Admit (Rule 7-7)	• Interlocutory Applications (Rules 8-1 to 8-5 and 22-1) • Garnishing Orders (*Court Order Enforcement Act*) • Mediation and Offer to Settle Injunctions (Rule 10-4) • *Mareva* Injunctions • *Anton Piller* Orders Summary Disposition • Striking Pleadings (Rule 9-5) • Summary Judgment (Rule 9-6)	• Summary Trial (Rule 9-7) • Trial Management Conference (Rule 12-2)	• Orders (Rule 13-1) • Costs (Rule 14-1) Appeals • Rule 18-3 • *Court of Appeal Act* • *Court of Appeal Rules*

Themes of the Course

Besides its substantive content, this course has two major themes:

1. Litigation keeps getting more costly both in time and money terms. It is unaffordable for regular people. How do we reverse this trend?
2. There is a fear that lawyers are behaving less professionally than they did previously. How do we arrest this apparent decline in professionalism?

Bound up with these themes is the overarching question: if things fail to improve, how long will the public continue to entrust the legal system to lawyers from an "independent" bar, and to judges drawn from their ranks? How long will Canadians be willing to suffer with ruinous expense combined with years of delay and uncertainty?

Obviously, many of the causes of the first problem are ***formally*** outside of the scope of this course: frivolous or downright awful claims under the *Charter* (and, more broadly, the *Constitution Act, 1982*); and the economic realities associated with allowing a monopolistic guild to run your legal system and then decreeing that guild members need 13 years of combined primary/secondary education plus an average of 7 years of post-secondary education before they are even permitted to write a research memo. But the ***rules*** governing civil litigation, and the ***courtesy and good faith*** which lawyers are capable of bringing to the task of resolving civil disputes civilly and expeditiously according to law, inevitably have some impact on cost. We are asked in this course to cast a ***critical*** eye on the rules of court and the ethical obligations of lawyers with a view to imagining how the litigation can be done faster, cheaper, better.

Speech of the Chief Justice

Our course materials include a tremendous speech by Allan McEachern when he was Chief Justice of British Columbia. BG's view is that **the speech calls for a balancing the search for the truth against the practical realities of cost and timeliness**. He isolates in particular the following **quotations**:

> *If it takes too long, and become [sic] too expensive to obtain perfect justice, then some will be deterred from the attempt, and others will be financially ruined by the process. Furthermore, there is no assurance that reasonable justice is not just as satisfactory as perfect justice.*

(Casebook p 17), and:

> *It seems obvious that we cannot carry on as we have in the past delivering* ***a kind of Mercedes or Lexus judicial product*** *where every issue is going to be litigated to the last warehouse full of documents, the evidence of countless experts, the longest imaginable cross-examinations, and unlimited new causes of action.*

(Casebook p 21). I hasten to add, with respect to the first quote excerpted above, that the notion of "perfect justice" to which the McEachern refers is an abuse of the word "justice". After all, no possible definition of "perfect" justice could include financial ruin of the "vindicated" party, or ruin beyond all possible fault of the "guilty" party, as a feature; nor could "perfect" justice possibly be defined so as to exclude all those who are deterred from achieving it because of its heavy cost. What is meant by "perfect justice" is "exhaustive procedure". Lawyers inevitably forget that the product delivered by our courts is not "justice" but rather orderly resolution of disputes according to a known set of rules which, in many cases, bears a kind of rough resemblance to justice.

Object of the Rules

The formal purpose of the ***Supreme Court Civil Rules*** has remained more or less the same throughout several iterations. Rule 1-3(1) states that the object of the rules is to:

> *. . . secure the just, speedy and inexpensive determination of every proceeding on its* ***merits****.*

The Merits

BG highlights the word ***merits*** **because the object is manifestly not to secure the determination of proceedings on technical and procedural grounds but rather on their substantive merits**. See also Rule 22-7(1).

The following table lists a number of cases in which the result was justified by the word ***merits*** in Rule 1-3(1). On an exam, remember that this word by itself can justify all manner of non-compliance and delay.

Case/Statute	Juris.	P	Key Points
Weldon v Agrium Inc	2012 BC/CA	164	Investigating the substantive merits in a Renewal hearing does not advance the object of the rules because of the likelihood of wrong assessment at that stage.

Case/Statute	Juris.	P	Key Points
Director of Civil Forfeiture v Doe (No. 1)	2010 BC/SC	127	Court bolsters its decision under Rule 22-4 with reference to Rule 1-3(1) and the merits.
TJA v RKM	2011 BC/SC	160	The rationale for allowing amendments (under Rule 6-1) is to enable the real issues to be determined.
Dufault v Stevens and Stevens	1978 BC/CA	128	Documents in the possession of third parties which meet document production standards should be disclosed to assist in deciding matters on their merits, unless the embarrassment or adverse impact on third parties is so great it would be unjust.

Consequences of Non-Compliance

With reference to Rule 22-7, which says that typically you won't lose anything for failing to comply with a rule, one might validly ask: given the well-known fact that people respond to incentives, how can looking benignly on failure to follow the rules result in speedy and inexpensive proceedings? The certainty of losing a substantive right provides a pretty big incentive to comply with the rules and would presumably better effect the **balancing** BG adverted to in his discussion of the McEachern speech than would making discretionary decisions at every stage according to vague notions of "justice". At the moment, since substantive rights are usually not forfeited for non-compliance, the principal tool to enforce compliance with the rules is Costs. However, BG says that **if a rule is broken sufficiently egregiously, it may result in the loss of a substantive right**.

Proportionality

When the New Rules replaced the Old *Rules of Court* in 2010, Rule 1-3(2) added the concept of ***proportionality***. The object set out in Rule 1-3(1) is to be pursued, so far as is ***practicable***, in a manner proportionate to (a) the amount involved; (b) the importance of the issues in dispute; and (c) the complexity of the proceeding. BG points out that **these concepts are described rather vaguely** in Rule 1-3(2) and it is not necessarily obvious what constitutes a large or small amount; an important or trivial issue; or a complex or simple proceeding. These matters are subject to argument. Accordingly, BG suggests that **many recent judgments under the New Rules are decided upon other grounds and then the decision is buttressed with an argument about proportionality**.

Scheme of this Summary

There are 9 substantive chapters following this one. Chapter 2 deals with lawyers' ***ethical obligations***, which is both crucially important to the orderly practice of law and, incidentally, a major focus of the final exam. Chapter 3 treats ***commencement of proceedings***, including pleadings, service, and parties, as well as limitation issues and default judgment. The topics in Chapter 4 are class actions and case planning—both of which appear to be minor facets of the course from an examination standpoint—and *Negligence Act* claims, which are more important. Chapter 5 is principally about ***discovery***, an area which features heavily on the exam, although it covers other non-discovery procedures for ascertaining facts as well. Chambers practice is the subject of Chapter 6. Chapter 7 discusses summary proceedings including the striking of pleadings, and Chapter 8 interim relief. Chapter 9 covers ***expert reports*** and expert opinion evidence, another area which tends to feature heavily on the final. Finally, trial procedures, offers to settle, and costs are combined in Chapter 10.

Following Chapter 10, Chapter 11 contains a complete case chart featuring briefs of all cases in this summary. References to these cases are typically hyperlinked to the case brief. Chapter 12 contains excerpts of all of the relevant statutes and quasi-statutes (most importantly, the *Supreme Court Civil Rules*). Again, typically, references to these materials throughout the summary are hyperlinked when reading the PDF online. Even if the text itself is not a hyperlink, if you see a reference to a page number, you can click on the page number to jump to that page). When

reading the PDF on a Windows PC, use ALT+← (Windows) to go jump “back” to your previous location if you followed a hyperlink. The equivalent keystroke on the Mac OS is ⌘+←.

2. Ethics

Sources of Ethical Obligations

Ethical obligations may come from all of the following sources:

1. the *Barrister's and Solicitor's Oath* (p 257);
2. the *Professional Conduct Handbook* (p 257);
3. the *Supreme Court Civil Rules* (p 168);
4. the common law; and
5. good conscience.

Aside from the written obligations in the Handbook and the Rules, the common law may impose ethical obligations on lawyers. For example, there are certain stringent requirements in respect of document discovery. There is also frequently overlap between the common law and various rules. For instance, failure to fairly advise the court of material adverse facts on an *ex parte* application—an ethical obligation under Chapter 8, rule 21 of the Handbook—is grounds at common law for setting aside the order so obtained.

Table of Ethical Obligations

The following table lists a ***subset*** of the most common ethical issues. I have omitted some which appear to be too obvious (e.g. don't bribe a judge, don't be drunk in court) or too obscure to make it onto an exam. If you feel there is a potential ethical issue and you don't see it here, check the *Professional Conduct Handbook* (p 257) for more.

Class	Obligation	Source	P
Integrity	Do not promote suits on frivolous pretences.	*Barrister's and Solicitor's Oath*	257
	Do not bring proceedings ***clearly*** motivated by client malice, brought ***solely*** to injure other party.	*Professional Conduct Handbook* 8:1(a). *Cf. Client*	258
	Do not knowingly help client or permit client to do anything dishonest or dishonourable.	*Professional Conduct Handbook* 8:1(b) *Cf. Client*	258
	Do not have a conflict of interest with a judicial officer.	*Professional Conduct Handbook* 8:1(c)	258
Advocacy	Do not knowingly assert something which has no reasonable basis in evidence or whose admissibility must first be decided.	*Professional Conduct Handbook* 8:1(e)	258
	Do not make reckless suggestions or suggestions you know are false to a witness.	*Professional Conduct Handbook* 8:1(e.1)	258
	Do not deliberately fail to inform court of authority ***directly on point*** and not mentioned by opponent.	*Professional Conduct Handbook* 8:1(f)	258
	Do not knowingly permit a witness to be presented in a false way or to impersonate anyone	*Professional Conduct Handbook* 8:1(h) *Cf. Witness*	258
	Do not call a witness who has told you he intends to give false testimony.	*Professional Conduct Handbook* 8:5-6 *Cf. Witness*	258
	(Lawyer as witness)	*Professional Conduct Handbook* 8:9-10 *Code of Professional Conduct* 4.02 *Cf. Witness*	259 261
	Give court all ***material adverse facts*** in without notice (***ex parte***) proceedings.	*Professional Conduct Handbook* 8:21	260

Class	Obligation	Source	P
	When you know a lawyer was consulted by the other side do not proceed in ***default*** without inquiry and reasonable notice.	***Professional Conduct Handbook*** 11:12 *Cf. Courtesy* Default Judgment	261 25
	(Public comments about case, legal profession, or client's affairs)	***Professional Conduct Handbook*** 8:23–24	260
Client	Do not bring proceedings ***clearly*** motivated by client malice, brought ***solely*** to injure other party.	***Professional Conduct Handbook*** 8:1(a). *Cf. Integrity*	258
	Do not knowingly help client or permit client to do anything dishonest or dishonourable.	***Professional Conduct Handbook*** 8:1(b) *Cf. Integrity*	258
	False testimony of client	***Professional Conduct Handbook*** 8:2-4 & 6	258
	You must do everything ***reasonable*** to stop client from breaching Chapter 8 and withdraw if you fail.	***Professional Conduct Handbook*** 8:7-8	258
	You must get client consent before making public statement about his affairs, plus it must be in client's best interests.	***Professional Conduct Handbook*** 8:24	260
Witness	Do not dissuade a ***material*** witness from giving evidence or advise him to be absent.	***Professional Conduct Handbook*** 8:1(g)	258
	In contacting a ***potential*** witness, take care not to subvert or suppress any evidence.	***Professional Conduct Handbook*** 8:12.3(a)	259
	In contacting a ***potential*** witness, take care not to procure him to stay out of the way.	***Professional Conduct Handbook*** 8:12.3(b)	259
	Do not advise a ***potential*** witness not to communicate with an opposing party or opposing party's lawyer.	***Professional Conduct Handbook*** 8:13	259
	Do not knowingly permit a witness to be presented in a false way or to impersonate anyone	***Professional Conduct Handbook*** 8:1(h) *Cf. Advocacy*	258
	Do not call a witness who has told you he intends to give false testimony.	***Professional Conduct Handbook*** 8:5-6 *Cf. Advocacy*	258
	There is no property in a witness (subject to certain rules).	***Professional Conduct Handbook*** 8:12	259
	If you know a potential witness has a ***lawyer***, you have to ***notify*** the lawyer before contacting the potential witness.	***Professional Conduct Handbook*** 8:12.1(a)	259
	If a potential witness is a ***party*** and has a ***lawyer***, you may ***only*** contact the potential witness through or with consent of his lawyer.	***Professional Conduct Handbook*** 8:12.1(b)	259
	You must disclose your interest in the proceeding to a potential witness before seeking information from him.	***Professional Conduct Handbook*** 8:12.2	259
	(Lawyer as witness)	***Professional Conduct Handbook*** 8:9-10 ***Code of Professional Conduct*** 4.02 *Cf. Advocacy*	259 261
Expert	Do not question opposing party's expert on matters protected by legal professional privilege unless privilege was waived.	***Professional Conduct Handbook*** 8:14 & 8:17	259
	Notify opposing party's counsel before contacting opposing party's expert.	***Professional Conduct Handbook*** 8:15 & 8:17	259
	(How to properly contact opposing party's expert)	***Professional Conduct Handbook*** 8:16-17	259
Courtesy	Be ***punctual*** in fulfilling professional commitments.	***Professional Conduct Handbook*** 11:5	260
	Reply reasonably ***promptly*** to any communication from another lawyer which requires a response.	***Professional Conduct Handbook*** 11:6	260
	When you know a lawyer was consulted by the other side do not proceed in ***default*** without inquiry and reasonable notice.	***Professional Conduct Handbook*** 11:12 *Cf. Advocacy*	261

Class	Obligation	Source	P
		Default Judgment	25
	Be courteous and act in good faith toward other lawyers.	***Professional Conduct Handbook*** 1:4(1)	257

OTHER PLACES TO LOOK

The following sections of this summary also deal with ethical obligations:

- Ethics of Document Discovery (p 38)
- Ethics of Examination for Discovery (p 44)
- Ethics and Affidavits (p 64)
- Ethics of Injunctions (p 93)

PRACTICAL APPROACH TO ETHICAL DILEMMAS

Two things that the best practising professionals constantly mention are that:

1. ethical dilemmas problems can be difficult to tackle on one's own, and consulting other lawyer's for advice is both wise and helpful; and
2. the Law Society has ethics advisors who are available to assist in ethical matters.

Thus in the post-law school real world it will be invaluable to consult with colleagues and, perhaps, seek the advice of one of the Law Society's knowledgeable advisors. In the pre-reality world of law school, on the other hand, it would likely be clever to mention these practical approaches on the ***exam*** at the first clear opportunity to do so.

3. Commencing Proceedings

Choosing the Form of Proceeding

There are three ways to kick off proceedings in the BC Supreme Court: (1) by notice of civil claim; (2) by petition; and (3) by requisition. According to the definitions in Rule 1-1(1), a notice of civil claim begins an "**action**" while a petition begins a "***petition proceeding***" and a requisition begins a "***requisition proceeding***", which appears to be a sub-category of petition proceeding in which there is no adversarial element.

Rule 2-1(1) makes the notice of civil claim the ***default*** manner to begin a proceeding. A notice of civil claim should be used ***unless*** the criteria of Rule 2-1(2) are met. This will never happen in this course, as we are focussing on actions.

Difference between Action and Petition Proceeding

Petitions are used for matters where there are no controversies over facts or evidence and which, consequently, likely do not require a trial. A petition proceeding can be converted into an action if a factual controversy requiring a trial arises. Although a petition is not an "originating pleading" as defined in Rule 1-1, it still requires personal service on all those whose interests may be affected by the order sought: Rule 16-1(3). Again, petitions are not going to factor on the exam and you do not need to know any more.

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 1-1(1)	/	175	An "***action***" is a proceeding started by notice of civil claim.
Rule 2-1	/	176	Subrule (1) says notice of civil claim is the default. Subrule (2) provides criteria for petitions.

Limitation Periods

Almost every matter brought to the Court must be filed within a prescribed period. Such limitation periods can be found in various statutes. In the absence of a limitation period in a specific statute, the *Limitation Act* typically applies.

In this course, we are only responsible for the Old Limitation Act (in force as of this writing) on the exam. However, BG also went over the New Act (which is awaiting proclamation into force by the Lieutenant Governor-in-Council) in class. As there is some possibility of an exam question comparing and contrasting the two enactments, it makes sense to know the bare bones content of the New Act.

Key practical tip: **if you are consulted by a potential plaintiff with respect to a prospective claim, it is crucial to find out what the limitation period is at the outset and notify the potential plaintiff, even if he is merely a prospective client rather than a client**. Failure to do this can result in liability in negligence if the claim is subsequently extinguished by the expiration of a statutory limitation period even if the potential plaintiff did not ask you to act for him in respect of that claim.

Old Act

Basic Description

The Old Act employs three major devices to govern the limitation periods which are in effect:

1. Classification of claims into categories having different limitation periods (2-year, 6-year, 10-year, and infinite limitation periods).
2. For claims with finite limitation periods, the running of the limitation period may be deferred until a specific event on two separate grounds:
    a. confirmation (time begins to run from moment of confirmation);
    b. postponement (time begins to run only when reason for postponement disappears).
3. For claims with finite limitation periods, an ultimate limitation period of 30 years governs despite any deferral of the running time by reason of confirmation or postponement.

The above masks some subtleties of the Act, but not subtleties which will be examined upon.

Exam Analysis

In previous years, the causes of action used on the examinations have been: breach of contract; misrepresentation (fraudulent or negligent); defamation; breach of confidence (tort); and injurious falsehood (tort). These claim all appear to fit within s 3(2), although it is just barely possible that one or more of the economic torts could fit within s 3(5) (I haven't looked this up). Moreover, BG has promised that **the s 6(4) postponement provision is not examinable**. If you have to do limitations analysis on an exam, it will thus follow this general outline:

1. Does the cause of action fall within s 3(2)?
    a. It almost certainly will.
    b. If you are truly unsure whether it falls under s 3(5), mention that it "could".
2. Ignoring deferral, has the appropriate limitation period expired? If not, just stop.
    a. If a notice of civil claim was renewed, you need to consider whether the initial filing, and not the renewal order, occurred within the limitation period.
3. If the limitation period has expired, could it have been deferred due to confirmation or postponement?
    a. Confirmation: you essentially need payment or acknowledgment in writing: s 5.
    b. Postponement
        i. If the claim is by a beneficiary against a trustee, s 6(1) might apply.
        ii. If the claim fits within s 6(3), mention ss 6(3–4) but do not attempt to apply them as this isn't examinable.

Relevant Provisions

Case/Statute	Juris.	P	Key Points
Rule 3-2(4)	/	177	A renewed notice of civil claim prevents the operation of any statutory limitation period.
Limitation Act (old) s 3(2)	RSBC 1996	252	2-year limitation period to bring certain claims, including: • injury to person or property, whether based in contract or in tort, including economic loss stemming from the injury; • various intentional torts: trespass to property, defamation, false imprisonment, and torts under the *Privacy Act*.
Limitation Act (old) s 3(3)	RSBC 1996	252	10-year limitation period for trust-related claims and claims for the enforcement of certain judgments.
Limitation Act (old) s 3(4)	RSBC 1996	252	Certain claims (a hodgepodge of real property and sexual torts) are not governed by any limitation period at all, including the ultimate limitation under s 8.
Limitation Act (old) s 3(5)	RSBC 1996	253	Default 6-year limitation period for all claims not listed in the other categories.
Limitation Act (old) s 5(1)	RSBC 1996	254	If before a limitation period expires, the person against whom the claim lies ***confirms*** it, the period up to the confirmation does not count.
Limitation Act (old) s 5(2)	RSBC 1996	254	How to ***confirm***: acknowledgment in writing, or making a payment in respect of the claim.

Case/Statute	Juris.	P	Key Points
Limitation Act (old) s 6(1)	RSBC 1996	254	Limitation period is ***postponed*** in claim for fraud or for recovery of trust property until the beneficiary in question becomes aware of the fraud or breach of trust.
Limitation Act (old) s 6(3)	RSBC 1996	255	Enumerates claims for which ***postponement*** system in s 6(4) operates.
Limitation Act (old) s 6(4)	RSBC 1996	255	Main ***postponement*** provision for claims listed in s 6(3). BG: **not examinable**.
Limitation Act (old) s 8(1)(c)	RSBC 1996	256	Subject to certain exceptions, including s 3(4), the ***ultimate limitation period*** is 30 years.

Old Act versus New Act

	Old Act	New Act
Basic Limitation Period	2, 6, or 10 years, depending on claim	2 years
Ultimate Limitation Period	30 years	15 years
Extension of Running Time	• Confirmation: s 5 • Postponement: s 6	There is a more-or-less unified set of "discovery rules" and time does not begin to run until the claim is "discovered".
Advantages	Once you know the nature of the claim and whether any postponements apply, the limitation period is fairly black and white.	Single limitation period (2 years) plus responsiveness to particular circumstances of the claim (discovery rules).
Disadvantages	Complicated rules which seem arbitrary at times.	Discoverability can make the limitation less certain and **can make the limitation period itself a matter of dispute**.

SERVICE

> *The object of all service is . . . only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him: and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.*
>
> —Lord Cranworth, LC, cited in *Orazio v Ciulla*

Personal Service

Personal service is required for originating pleadings and petitions. This is because the parties who have an interest in the relief sought must be made aware of the claim. For example, personal service ensures that a defendant in an action is sufficiently aware of the proceedings to be able to defend himself. Since the various filings required to be made contain the filing party's address for service, in the ordinary course of things personal service is not required beyond the originating process. However, whenever a new party (i.e. someone who is not yet a party of record) is brought in—either by way of counterclaim or third party notice—personal service is required. Certain less common cases where personal service is needed are enumerated under Rule 4-3(1).

The case of *Orazio v Ciulla* discussed a number of examples of good and bad personal service:

- Not Valid
  - Throwing a copy of the writ on the ground, holding up the original, and calling after the fleeing defendant, "There is the writ for you".
  - Handing the defendant a writ enclosed in an envelope, whether sealed or not, if he was not informed of its contents and is not aware that an action has been, or is about to be, begun against him.
- Valid

- Thrusting a document into an inner fold of the defendant's coat after the defendant has refused to accept the document.
- Giving the document to the defendant and explaining what it is, but accepting it when the defendant hands it back after he has read it (*Orazio v Ciulla* itself).

INDIVIDUALS

Case/Statute	Juris.	P	Key Points
Rule 4-3(1)	/	187	The documents which must be served by personal service include: (a) notice of civil claim; (b) petition; (c) counterclaim, but only if served on someone who is not a party of record; (d) third party notice, but only if served on someone who is not a party of record.
Rule 4-3(2)(a)	/	187	Personal service is effected on an individual by ***leaving*** a copy of the document to be served with the individual
Orazio v Ciulla	1966 BC/SC	148	Although the document was not ***left*** with the defendant, in the sense that he handed it back to the solicitor, he knew that the document was a writ of summons issued by the plaintiff against him. He also knew the ***general nature*** of the plaintiff's claim. Therefore personal service was validly done.
Wang v Wang	2012 BC/SC	163	• Being drunk is not a sufficient excuse to avoid personal service if the requirements for personal service were otherwise met. • On the other hand, approaching a car stopped at a traffic light, speaking some words through a closed window, and then stuffing papers under the windshield wipers as the car speeds away is not good personal service.

CORPORATIONS

Case/Statute	Juris.	P	Key Points
Rule 4-3(2)(b)	/	187	Various ways to effect personal service on a corporation, including: (i) by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation, (ii) by leaving a copy of the document with the city clerk or municipal clerk, (iii) by leaving a copy of the document with the manager, cashier, superintendent, treasurer, secretary, clerk or ***agent*** of the corporation or of any branch or agency of the corporation in British Columbia, or (iv) in the manner provided by the *Business Corporations Act* . . . There is also a deemed agency provision in the case of corporations whose chief place of business is outside of BC. This allows subrule (3) to kick in.
Rule 4-3(3)	/	188	In certain circumstances, a document destined for a principal may be served on the agent, but ***leave*** of the court is required.
Business Corporations Act s 9(1)(a)	SBC 2002	247	Any corporation can be served by delivering the document to the delivery address, or sending it by registered mail to the mailing address, of its registered office.
Business Corporations Act s 9(1)(c)	SBC 2002	247	Any corporation can be served by serving any director, senior officer, liquidator, or receiver manager.
Business Corporations Act s 9(2)	SBC 2002	247	Additional options for ***extraprovincial*** companies.

PARTNERSHIPS

Case/Statute	Juris.	P	Key Points
Rule 20-1(2)	/	236	Service is effected on a firm by leaving a copy of the document to be served with (a) a person who was a partner at the time the alleged right or liability arose, or (b) a person at a place of business of the firm who appears to manage or control the partnership business there.

Ordinary Service

Anything not requiring to be served by personal service can be served by ordinary service: Rule 4-2(1) subject to Rule 4-3(1). It is difficult to imagine an examination issue arising based on ordinary service.

Alternative Service

> *The mere fact that it may be a matter of some difficulty to reach him (unless, for example, he is evading service) does not of itself relieve the plaintiff of the obligation of serving [the defendant] personally.*
> —McTaggart, Co Ct J, cited in ***Luu v Wang***

Typically, a document requiring personal service must be served by personal service even if it requires the plaintiff to undergo inconvenience and expense. However, the court ***may*** waive the requirement of personal service if the following legal test is met:

(0) personal service is ***impracticable*** under the circumstances;
(a) the person to be served cannot be located after a ***diligent search***; or
(b) the person to be served is ***evading*** service.

The form of the alternative service is within the jurisdiction of the court and may include: posting at the courthouse; posting on the door of a residence; publishing an advertisement in the newspaper; or serving someone else who is in contact with the person to be served.

Case/Statute	Juris.	P	Key Points
Rule 4-4(1)	/	188	On application without notice, the court ***may*** grant an order for substituted service if the above criteria are met.
Luu v Wang	2011 BC/SC	146	• Rule 4-4 provides an exception to the requirement of personal service, not an automatic right for an order for substituted service. • Definition of ***impracticable***: ○ practically impossible; or ○ which cannot be done without laying out more than the thing is worth. • **The concept of impracticability builds a "proportionality" test into the alternative service criteria**.

Service *Ex Juris*

A plaintiff can serve a BC action within British Columbia as of right. However, to serve a BC action anywhere outside of British Columbia, the plaintiff must:

1. obtain leave of the court under Rule 4-5(3); or
2. plead facts enumerated under section 10 of the ***Court Jurisdiction and Proceedings Transfer Act***, as authorized by Rule 4-5(1).

The purpose of the latter requirement is to ensure an action in which the defendant does not reside in BC is only tried in BC if the subject matter of the action is sufficiently connected to British Columbia. Note that if any of the circumstances enumerated in *CJPTA* s 10 apply, the plaintiff need not seek leave of the court.

Common Circumstances Enumerated in the *CJPTA*

The following grounds for service *ex juris* enumerated in s 10 *CJPTA* which are most likely to arise on an examination:

- it concerns a proprietary interest in ***property*** in BC.....10(a);
- it concerns a ***contract*** which is
  - to be substantially performed in BC.....10(e)(i)

  - by its express terms governed by the law of BC ..... 10(e)(ii)
- it involves a ***tort*** committed in BC ..... 10(g)
- it is a claim for an ***injunction*** ordering a party to do or not do
  - anything in British Columbia ..... 10(g)(i)
  - anything in relation to property which is in British Columbia ..... 10(g)(ii)
- it concerns a ***business*** carried on in BC ..... 10(g)

RELEVANT PROVISIONS

Case/Statute	Juris.	P	Key Points
Rule 4-5(3)	/	189	If the facts pleaded do not fall within s 10 *CJPTA*, the person must obtain leave of the court to serve originating process outside of BC. Rule 4-5(4) says that this leave may be obtained on application without notice.
Rule 4-5(1)	/	189	A person may serve originating process outside of BC without leave of the court it the criteria of s 10 *CJPTA* are met.
Court Jurisdiction and Proceedings Transfer Act s 10	SBC 2003	248	See Common Circumstances Enumerated in the CJPTA (above).
Rule 4-5(2)	/	189	Where the originating process is served outside of BC without leave, it must state by endorsement which ground or grounds from s 10 *CJPTA* it is based on.

See Also

- Service of Counterclaim (p 22)
- Service Requirements for Third Party Proceedings (p 29)

RENEWAL

Rules Pertaining to Renewal

Rule 3-2 covers the expiry and ***renewal*** of notices of civil claim. The following general framework applies:

- The ***initial*** notice of civil claim remains in force for 12 months. If it is not served within this period, it expires: Rule 3-2(1).
- The plaintiff may apply to the court to renew the notice for a period of up to 12 months.
  - The plaintiff may make this application for the ***first*** time ***either*** before ***or*** after the initial 12 month period has expired: Rule 3-2(1).
  - Thus you can renew an expired notice of civil claim for the first time even if it has expired.
  - Whether the initial renewal is granted or not is a discretionary decision which the court will base on the *Bearhead v Moorehouse* factors (below).
- After the notice has been renewed once, the plaintiff may apply to the court ***within*** the renewal period to obtain a further renewal of up to 12 months: Rule 3-2(2).
  - A potentially infinite number of further renewals can be obtained in this manner.
  - However, if the renewed notice expires before the application for further renewal, the plaintiff is out of luck.
  - Whether the further renewal is granted or not is a discretionary decision which the court will base on the *Bearhead v Moorehouse* factors (below).

Factors to Bearing on Decision to Renew: *Bearhead v Moorehouse*

The *Swetlishnoff* and *Weldon* cases cite 5 factors which the court must consider when deciding whether the plaintiff will be permitted to renew a notice of civil claim. These are:

(a) Was the application brought ***promptly***? (*Time factor*)
(b) Did the defendant have ***notice*** of the claim from sources other than the writ?
(c) Has the defendant suffered ***prejudice***?
(d) Was the failure to serve the writ attributable to the ***actions of the defendant***?
(e) Was the failure to serve the writ attributable to the ***fault of the plaintiff***, or to the ***fault of his solicitor***?

Mere delay without more is insufficient to constitute ***prejudice*** (c). Typically, the defendant's ability to make his case must have been prejudiced, most often by the disappearance or deterioration of evidence. For example, documents might have been destroyed; the witnesses might have become unavailable; or perhaps in extreme cases the passage of time might degrade a witness' recollection to the point of prejudice.

The impact of the fault factor (e) depends upon who was at fault as between the plaintiff and his solicitor. If the plaintiff is responsible for the failure to serve the writ, this factor will weigh against him as it did in the *Swetlishnoff* case. On the other hand, if his solicitor inadvertently, or through honest mistake, was the cause of the failure of service, this error should not be visited on the plaintiff. Presumably, if the initial cause was the solicitor's fault, but the plaintiff was aware of the failure to serve and did nothing, the ultimate fault will be laid at the plaintiff's door.

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 3-2(1)	/	177	Initial renewal
Rule 3-2(2)	/	177	Subsequent renewal
Swetlishnoff v Swetlishnoff	2011 BC/SC	158	Initial renewal refused. All five of the *Bearhead v Moorehouse* factors pointed against the defendant.
Weldon v Agrium Inc	2012 BC/CA	164	• Merits can be considered on an application to renew only to the extent that it is ***obvious*** that the claim is ***bound to fail***. • If evidence is required to come to this conclusion, then generally, ***evidence*** will not be allowed on an application to renew.
Rule 3-2(4)	/	177	A renewed notice of civil claim is available to prevent the operation of any statutory limitation. See Limitation Periods (p 13).

PLEADINGS

Pleadings are written statements exchanged by the parties to an action that:

- identify the parties, events and facts giving rise to the lawsuit;
- identify the issues in dispute;
- identify the legal nature of the claims and defences; and
- set out the relief sought by the parties.

Rule 1-1 defines the term "pleading". The definition does not include petition, but comprises:

- notice of civil claim — see Notice of Civil Claim (below);
- response to civil claim — see Response to Civil Claim (below);
- reply;
- counterclaim — see Counterclaim (p 21);
- response to counterclaim;
- third party notice — see Third Party (p 27); and
- response to third party notice.

Generally

Subrules (1) to (17) of Rule 3-7 provide general guidance about how to draft pleadings. In addition to these subrules, there are subrules on particulars (see below) ***as well as*** particular requirements expressed in Rules 3-1, 3-3, 3-4, and 3-5 which are relevant to different classes of pleadings.

Case/Statute	Juris.	P	Key Points
Rule 3-7(1)	/	181	***No evidence*** is permitted in pleadings.
Rule 3-7(2)	/	181	Unless details of conversations and documents are material, pleadings should omit the details and summarize the ***effect*** of the conversation or document.
Rule 3-7(3)	/	181	A party can omit pleading a fact when the burden of disproving the fact falls on the other party, and also when the fact is presumed in law to be true.
Rule 3-7(6) and Rule 3-7(7)	/	181	Inconsistent allegations are not permitted [3-7(6)], but alternative allegations are permitted [3-7(7)]. If I understand BG correctly, **this essentially means that you need to preface your inconsistencies with "in the alternative"**.
Rule 3-7(7) and Rule 3-7(8)	/	182	A party may raise an objection in point of law (for example, a limitations defence). However, conclusions of law must not be pleaded unless the material facts supporting them are also pleaded.
Rule 3-7(11)	/	182	Authorizes ***counterclaims*** and claims for ***set off***. See the heading Counterclaim (below) and the subheading Set-Off (p 22).
Rule 3-7(12)	/	182	Special rules applying to all pleadings except notice of civil claim.
Rule 3-7(15)	/	182	The ***denial*** of a fact in a pleading must not be evasive but must squarely answer the fact denied.
Rule 3-7(16)	/	182	The ***bare*** denial of a ***contract***, promise, &c, without more, is a denial of the ***existence*** of the contract. The practical effect, *per* BG, is that **if you issue a bare denial, failing to plead your own version of the terms, you have lost the scope to make an issue of the terms themselves**.

Particulars

Particulars are the detailed facts on which a claim is based, for example the amount of an unpaid debt or the precise words which were spoken in a conversation. Particulars are the subject of subrules (18) to (24) of Rule 3-7 (beginning at p 182).

Purposes of Particulars

The following purposes of particulars are enumerated in the *Camp Development* case. Particulars exist to:

(a) inform the other side of the nature of the ***case to be met*** as distinguished from the mode in which the case is to be proved;
(b) prevent the other side from being taken by ***surprise***;
(c) enable the other side to determine which ***evidence*** it must prepare with, and to prepare for trial generally;
(d) limit the ***generality*** of the pleadings;
(e) limit and decide the ***issues*** to be tried, and as to which ***discovery*** is required; and
(f) ***tie the hands*** of the party providing the particulars so that he cannot go without leave into any matters not included.

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points

Case/Statute	Juris.	P	Key Points
Rule 3-7(18)	/	182	• Other parties are entitled to particulars for claims of: ○ misrepresentation; ○ fraud; ○ breach of trust; ○ wilful default; or ○ undue influence as of right. • Even outside of the above claims, if particulars "may be necessary", they must be stated in the pleading.
Rule 3-7(21)	/	183	In an action for libel or slander, there may be certain obligations to provide particulars on: (a) the plaintiff; and/or (b) the defendant.
Rule 3-7(22)	/	183	The court may order a party to provide particulars. This is the subrule on which the application in *Camp Development* was based.
Rule 3-7(23)	/	183	Before applying for particulars under subrule 3-7(22), a party must demand them in writing from the other party.
Camp Development v South Coast British Columbia Transportation Authority	2011 BC/SC	123	• Enumerates the Purposes of Particulars (above). • Test for whether particulars will be ordered under Rule 3-7(22): are the particulars **necessary to delineate the issues between the parties**? • Matters that would have to be the subject of evidence and assessment, rather than existing fact, were not appropriate for an order for particulars.
Rule 3-7(24)	/	183	A demand for particulars does ***not*** operate as a ***stay*** of proceedings, but a party may apply for an ***extension of time*** on the ground that it needs the particulars demanded to answer the originating pleading.
Roitman v Chan	1994 BC/SC	153	Interrogatories should not duplicate particulars.

Notice of Civil Claim

A plaintiff must file a ***notice of civil claim*** in Form 1 in order to begin an action: Rule 3-1(1). Rule 3-1(2) says what the content of a notice of civil claim must do, which includes setting out:

(a) a concise statement of the material ***facts*** giving rise to the claim;
(b) the ***relief*** sought by the plaintiff against each named defendant; and
(c) a concise summary of the ***legal basis*** for the relief.

Response to Civil Claim

A defendant who wishes to contest an action (thus avoiding default judgment) must file a ***response to civil claim*** in Form 2 and serve the response on the plaintiff by ordinary service: Rule 3-3(1).

Case/Statute	Juris.	P	Key Points
Rule 3-3(1)	/	177	Defendant must file and serve response to civil claim.
Rule 3-3(2)	/	177	Content requirements of a response to civil claim, analogous to Rule 3-1(2).
Rule 3-3(2)(a)(ii)	/	178	No blanket denials. For any fact in the notice of civil claim that is denied, the response must concisely set out the defendant's version of that fact.
Rule 3-3(3)(a)	/	178	Time allowed to serve a filed response to civil claim: (i) 21 days if the defendant served in Canada; (ii) 35 days if in USA; and (iii) 49 days if served anywhere else. • See also Default Judgment (p 25). • See also Chart of Common Time Requirements (p 76)
Rule 3-3(8)	/	178	If an allegation of fact from the notice of civil claim is not responded to, it is ***deemed*** to be ***outside the knowledge*** of the defendant.

Counterclaim

Counterclaims are authorized in Rule 3-7(11) and dealt with in detail in Rule 3-4. A counterclaim is a standalone claim which could be brought by the defendant in a separate action but which is brought within the existing action for the

sake of convenience. A counterclaim ***must*** pursue a claim against the plaintiff and ***may*** pursue a claim against one or more third parties. Counterclaims differ from Third Party Claims (p 27) because the latter do not involve claims against the plaintiff and the former need not involve claims against third parties.

Service of Counterclaim

Counterclaims must be served by ordinary service on all parties of record. In ***addition***, if the counterclaim names any new parties who are not yet parties of record, both:

(i) the counterclaim; and
(ii) the original notice of civil claim

must be served by ***personal service*** on the new parties within 60 days of the filing of the counterclaim.

Set-Off

A counterclaim is similar to a claim for set-off. However, a ***set-off*** claim is raised as a ***defence*** (in the response to civil claim) whereas a counterclaim is an independent claim against the plaintiff. A successful claim for set-off is only capable of reducing the relief awarded to the plaintiff. The practical difference is that if the plaintiff's action is dismissed or abandoned, any set-off claims fall away but the defendant can continue to pursue a counterclaim.

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 3-7(11)	/	182	Counterclaim authorized.
Rule 3-4(1)	/	178	Time limit to serve a counterclaim. Chart of Common Time Requirements (p 76).
Rule 3-4(2)	/	178	Third parties may be joined.
Rule 3-4(4)	/	179	How to serve counterclaim. See Service of Counterclaim (above).
Rule 3-3(2)(a)(ii)	/	178	No blanket denials. For any fact in the notice of civil claim that is denied, the response must concisely set out the defendant's version of that fact.
Rule 3-4(6)	/	179	Except to the extent that Rule 3-4 provides otherwise, Rules 3-3 and 3-8 apply to a response to counterclaim as if it were a response to civil claim. This is particularly important in terms of: • the prohibition on blanket denials: see Rule 3-3(2)(a)(ii); and • the time to respond: see Chart of Common Time Requirements (p 76).
Rule 21-9(1)(a)	/	239	A defendant who claims ***contribution or indemnity*** against a plaintiff under section 4 of the ***Negligence Act*** must do so by counterclaim. See also Negligence Act Issues (p 33).

Amendments

At the dawn of time, when men were men and cases were set down for trial in less than two years, pleadings were set, so to speak, in stone. Failings in pleadings could be determinative of cases. In more modern times, our newfound appreciation for "flexibility" and the therapeutic benefits of permitting our disputes to molder away for months has meant that amendments to pleadings are now allowed liberally. Errors in pleadings are thus rarely a serious problem for the erring party. Indeed, amendments to pleadings may even be allowed during the trial of the action! The British Columbia courts find their justification for such a permissive approach to amendments in the famous ***merits*** clause of Rule 1-3(1): we need to allow the ***real issues*** to be determined.

Part 6 of the Supreme Court Civil Rules governs the various types of amendments permitted to parties. Rule 6-1 is concerned with basic amendments to pleadings while Rule 6-2 is concerned with the special case of addition, substitution, and removal of parties.

AMENDMENTS TO PLEADINGS

A party can amend pleadings once ***as of right*** if this is done before the earlier of the date of service of the notice of trial and the date on which a case planning conference is held: Rule 6-1(1). After the one "free" amendment is used up or becomes impossible, a party may only amend its pleadings with ***leave*** of the court or by ***consent*** of the parties of record.

TEST FOR LEAVE TO AMEND

Even if a party has exhausted its "free" amendment, the bar for getting leave to amend is not particularly high. The court will grant leave to amend pleadings unless:

1. ***prejudice*** can be demonstrated by the opposite party; or
2. the amendment will be ***useless***.

Amendments are only useless in the "clearest of cases": where the pleading meets the test for striking pleadings.

FACTORS RELEVANT TO APPLICATION TO AMEND PLEADINGS

The *Teal Cedar Products* case involved an application by the plaintiff to amend its pleadings under Rule 6-1(1)(b) to add a ***fresh cause of action*** after a limitation period had expired. Perhaps since adding a new cause of action is highly analogous to adding a new party, the court looked at the wording and jurisprudence under Rule 6-2(7)(c). The court read the phrase "***just and convenient***", which is a criterion stipulated for granting leave under Rule 6-2(7)(c) into leave applications brought under Rule 6-1(1)(b). While this reading in was done under the Old Rules, it is likely that "***just and convenient***" is a criterion for leave under Rule 6-1(1)(b).

Some ***factors*** considered by the court in determining whether it would be ***just and convenient*** to exercise its discretion to grant an amendment are:

(a) the ***length of any delay*** in bringing the application;
(b) the ***explanation*** for that delay;
(c) whether a ***limitation period*** that would appear to bar any fresh cause of action in the amendment has expired;
(d) whether another party or parties would suffer ***prejudice***† by reason of the amendment;
(e) the ***degree of connection*** between the existing claims and any fresh cause of action disclosed by the amendments.

†: Keeping in mind our normal definition of prejudice in civil procedure as something more than mere passage of time. Presumably, prejudice to another party's ability to prosecute or defend a claim is required.

MISNOMER

Substituting a party under Rule 6-2(7) requires leave of the court. Thus a party can be saved time, expense, and the possibility of failing to obtain the necessary order, if it can achieve a result like substitution under Rule 6-1(1). This can be done under the doctrine of ***misnomer***.

The courts distinguish between a misnomer, which can be addressed using an amendment, and a substitution. A misnomer arises where one party deliberately (or inadvertently) misnames another party in its pleadings because it doesn't know that party's real name. If the misnamed party is described in sufficient detail that it is clear to whom the misnomer is intended to refer, the courts will permit an amendment to correct the misnomer. If the misnamed

party is not described in sufficient detail, a substitution will be required. The usual practice is to use the misnomers "John Doe" and "Jane Doe" to refer to parties whose true identity is unknown.

The ***test*** for misnomer is set out in ***Broom v The Royal Centre***:

> *How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself, "Of course, it must mean me, but they had got my name wrong". Then there is a case of mere misnomer.*

Where the ***conduct*** of the misnamed person caused or contributed to the necessity of misnaming him, the case for correcting a misnomer is more compelling.

Relevant Rules and Cases

Case/Statute	Juris.	P	Key Points
Rule 6-1(1)	/	193	When pleadings may be amended.
Rule 6-1(2)(c)	/	194	Amended pleadings must be filed.
Rule 6-1(4)	/	194	How to serve amended documents.
Rule 6-1(5)	/	194	A party of record may amend its pleadings in response to an amendment and must serve its amended pleading on all parties of record within ***14 days***.
Rule 6-1(6)	/	194	If a party fails to respond to an amended pleading (the "primary pleading"): (a) the pleading he filed in response to the original version of the primary pleading is deemed to be his response to the amended pleading; and (b) any new facts in the amended pleading are deemed to be outside his knowledge.
Rule 6-1(7)	/	194	What happens if an ***originating pleading*** is amended on a person who is not yet a party of record.
TJA v RKM	2011 BC/SC	160	• While the defendants had earlier failed to have the plaintiff's claim struck out on the basis of absolute privilege, this did not mean that this defence was ***useless*** in the sense that it would certainly fail. • Thus defendants were permitted to amend their response to civil claim to raise a ***fresh defence***, absolute privilege, for the first time.
Limitation Act (old) s 4(4)	RSBC 1996	254	Court may permit amendment of a pleading even if, between the filing of the notice of civil claim and the application to amend, a fresh cause of action disclosed by the amendment would have become time barred.
Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd	1996 BC/CA	159	• An application to add a ***fresh cause of action*** by amendment under Old Rule 24(1)—now Rule 6-1(1)(b)—was granted even though the claim had become time barred by the time the application was made. • The court read the "***just and convenient***" language into Old Rule 24(1) and decided based on the Factors Relevant to Application to Amend Pleadings (above).
Charest v Poch	2011 BC/SC	125	It would be ***unfair*** to the defendants to permit plaintiffs to argue the application on the basis of a ***new cause of action***.
Broom v The Royal Centre	2005 BC/SC	123	• The test for ***misnomer*** is: how would a ***reasonable person*** receiving the document take it? If he would understand the document to refer to him despite the incorrect name, it is a case of misnomer. • Where the conduct of the misnamed person caused or contributed to the necessity of misnaming him, the case for correcting a misnomer is more compelling.
Hurn v McLellan	2011 BC/SC	137	A party seeking to withdraw an ***admission*** made in a pleading cannot do so under Rule 6-1. Admissions in pleadings fall under Rule 7-7(5)(c). See, generally, under the heading Admissions (p 53).
Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong	2011 BC/CA	139	When there is an attack on a pleading as showing no reasonable claim or defence, the court is well advised to first consider whether the pleading can be preserved by ***amendment***.

Change of Parties

We did not deal with change of parties in any great detail in class. Subrules 6-2(1) to 6-2(5) deal with changes of parties in an action arising from changed circumstances. Rule 6-2(7) is more commonly invoked. It governs the addition, removal, and substitution of parties. All paragraphs of Rule 6-2(7) require leave of the court.

Paragraph (c) of Rule 6-2(7) permits a person to be added as a party if there may exist, between that person and any party, a question or issue connected to the subject matter of the proceeding or any relief claimed in the proceeding. This paragraph is subject to the proviso that it must be ***just and convenient***, in the opinion of the court, to determine the issue between the person sought to be added and the party seeking to add him. Presumably similar factors would be applicable in the court's decision under Rule 6-2(7)(c) as would be applicable under Rule 6-1(1)(b) as affected by *Teal Cedar Products*. See Factors Relevant to Application to Amend Pleadings (above).

Case/Statute	Juris.	P	Key Points
Rule 6-2(7)(a)	/	195	The court can order a party ***removed*** if he is not a proper or necessary party.
Rule 6-2(7)(b)	/	195	The court can order a party ***added*** or ***substituted*** if the person ***ought*** to have been joined or his participation is ***necessary***.
Rule 6-2(7)(c)	/	195	The court can order a party ***added*** under certain circumstances where it would be ***just and convenient*** to do so.
Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd	1996 BC/CA	159	Deals with the old version of Rule 6-2(7)(c).

Default Judgment

Despite being a trivial concept, default judgment is more complicated than it would first appear due to various special rules of court and rules of ethics which must be considered. The basic framework is described by Rule 3-8, which sets out how to seek default judgment, which claims default judgment is available for, and the manner in which the relief will be assessed if assessment is required.

Factors Bearing on Decision to Set Aside Default Judgment: *Miracle Feeds*

In both of the *Director of Civil Forfeiture* cases, reference is made to four factors set out in *Miracle Feeds v D & H Enterprises* (1979), 10 BCLR 58 (Co Ct). These factors are intended to guide the court in the exercise of its discretion to set aside a default judgment under Rule 3-8(11). The defendant is required to:

1. demonstrate that his failure to file a response to civil claim was ***not deliberate***;
2. either:
    a. demonstrate that he made the application to set aside the default judgment ***as soon as reasonably possible*** after learning of the default judgment; or
    b. provide an ***explanation*** for any ***delay*** in the application being brought;
3. demonstrate that he has a ***defence worthy of investigation***; and
4. do all of the foregoing based on ***admissible affidavit evidence***.†

†: Content of Affidavits: What Evidence is Admissible? (p 65)

There is some tension between *Director No. 1* and *Director No. 2* because *Director No. 1* says that failure to meet any one of the *Miracle Feeds* factors is not fatal to the application, while *Director No. 2* stands, *inter alia*, for the proposition that if the defendant cannot demonstrate that his failure to file a response was not deliberate, the application must be dismissed.

With respect to the third factor, the burden on the defendant is a low one. Nevertheless, it is the defendant's burden, and not the plaintiff's, and the defendant must bring forward some actual evidence that he has a meritorious defence.

Relevant Cases and Provisions

Case/Statute	Juris.	P	Key Points
Rule 3-8	/	183	Rule (mostly) governing default judgment.
Professional Conduct Handbook 1:4(3)	/	257	General requirement to avoid sharp practice against other lawyers.
Professional Conduct Handbook 11:12	/	261	A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable ***notice***.
Rule 20-2(14)	/	237	A party must not take a step in default against a person under a ***legal disability*** without ***leave*** of the court.
Rule 14-1(26)	/	/	Costs on default judgment.
Rule 3-8(11)	/	185	The court may set aside or vary any default judgment order.
Director of Civil Forfeiture v Doe (No. 1)	2010 BC/SC	127	Court gave defendant a time extension to meet the requirements of a default judgment order. In so doing, it opined that failure to meet some of the *Miracle Feeds* factors is not fatal to an application to set aside a default judgment. This is in **tension** with *No. 2*!
Director of Civil Forfeiture v Doe (No. 2)	2010 BC/SC	128	1. Failure to meet the first prong of *Miracle Feeds* is ***fatal*** to an application to set aside a default judgment. This is in **tension** with *No. 1*! 2. In an application to set aside a default judgment, the defendant must advance a ***positive defence***. Simply pointing to plaintiff's alleged failure to prove its case does not meet the third prong of *Miracle Feeds*.
Rule 3-8(1)	/	183	Plaintiff may proceed in default if two conditions are satisfied: (a) defendant has not filed ***and*** served a response to civil claim; and (b) the period for filing and serving the response has expired.
Rule 3-8(2)	/	183	Four filing requirements for any plaintiff who wishes to proceed in default.
Rule 3-4(6)	/	179	Same rules apply to default of response to counterclaim as reply to default of response to notice of civil claim; Rule 3-8 is incorporated by reference.
Rule 3-5(16)	/	181	Slightly different rules apply to default of response to a third party notice than apply to default of response to notice of civil claim or counterclaim: ***notice*** of the application must be served on all parties of record.
Rule 3-8(3)	/	184	Once a default judgment is obtained, if the claim was for a specific or ascertainable amount, the plaintiff may take judgment for that amount. **A specific or ascertainable amount typically means a debt**: BG.
Rule 3-8(12) and Rule 3-8(13)	/	185	If the claim is for damages to be assessed, the plaintiff may take judgment and then have the damages assessed by way of trial or summary application.
Bache Halsey Stuart Shields Inc v Charles	1982 BC/SC	121	Be aware that ***apart from the professional ethics obligation and Rule 3-5(16)***, there is no notice requirement for seeking default judgment in general. The issue in *Bache Halsey* was that default judgment was sought on an application to strike Dobell's defence.
PD-34 — Master's Jurisdiction ¶ 6(e)	/	246	Under the guidance section of the practice direction, granting default judgment is within the jurisdiction of a master. You should know the *why* behind this, so see Jurisdiction of Masters (p 62).

PARTIES

Identification

There isn't much to be said about the identification of parties. The terms party, party of record, plaintiff, and third party are defined in Rule 1-1(1), while defendant is not. Generally, a party has only one identity throughout the action and to this end, Rule 3-4(3) establishes certain rules in respect of counterclaims: a plaintiff against whom a counterclaim is brought continues to be called a "plaintiff"; a defendant against whom a counterclaim is brought continues to be identified as "defendant"; and any other person against whom the counterclaim is brought is called a "defendant by way of counterclaim".

Multiple Claims and Parties

Rule 22-5 allows multiple claims, and claims against multiple parties to be brought in the same proceeding. The following table summarizes the most important subrules.

Case/Statute	Juris.	P	Key Points
Rule 22-5(1)	/	243	A person may join several claims in the same proceeding.
Rule 22-5(2)	/	243	A proceeding may be started against (or by) two or more parties (e.g. plaintiff naming two or more defendants in an action) as long as: (a) ∃ common question of law or fact; (b) relief claimed arises out of a common transaction or series of transactions; or (c) the court grants leave.
Rule 22-5(6)	/	244	A party can apply to separate trials or hearings if joinder unduly complicates things.
Rule 22-5(7)	/	244	The court can order a counterclaim or third party claim tried separately.
Rule 22-5(8)	/	244	The court can order two separate proceedings consolidated at any time. It can also order that they be tried at the same time.

Special Rules for Certain Parties

Partnerships

Rule 20-1 sets out certain special rules which apply to partnerships. The following table summarizes the key points.

Case/Statute	Juris.	P	Key Points
Rule 20-1(1)	/	236	Partnerships can sue ***and*** be sued in the firm name.
Rule 20-1(2)	/	236	How to effect ***personal service*** on Partnerships. See p 16.
Rule 20-1(3)	/	236	The firm itself must file a responding pleading but a partner or person served as a partner may respond and defend in his own name.
Rule 20-1(7)	/	236	A judgment against a partnership can be enforced against anyone who: (a) responded individually in his own name as a partner; (b) was served as a partner and failed to respond; (c) admitted to being a partner; or (d) was ruled to be a partner.

Persons under a Legal Disability

Rule 20-2 lays down special rules applicable to persons under a ***legal disability***, such as infants and the mentally incompetent. The main gist of the Rule is that a person under a legal disability must have a litigation guardian and that all litigation guardians except the Public Trustee must act through a lawyer. In addition, there are two subrules which relate to topics of this course: default judgment, and offers to settle.

Case/Statute	Juris.	P	Key Points
Rule 20-2(14)	/	237	Leave of the court required to take steps toward Default Judgment (p 25).
Rule 20-2(17)	/	238	Leave of the court required to approve Offers to Settle (p 115).
PD-34 — Master's Jurisdiction ¶ 2(c)	/	245	Masters do not have jurisdiction to pronounce judgment by ***consent*** where one of the parties is under a legal disability.
PD-34 — Master's Jurisdiction ¶ 2(d)	/	245	Masters do not have jurisdiction to grant court approval of a ***settlement*** where one of the parties is under a legal disability.

Third Party Claims

Third party proceedings are a form of pleading by which a defendant asserts a claim against someone other than the plaintiff in the event the defendant is found liable to the plaintiff. . .

*. . . The **object** of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and*

> *inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. . .*
> —McLachlin JA, ***McNaughton v Baker***, as cited by Newbury JA in *Laidar*

Third party proceedings allow a party other than the plaintiff† to assert a claim against someone else for the party's liability. A third party claim can be independent or dependent upon the cause of action between the plaintiff and the defendant, but there must be some connection to the underlying action. A simple third party claim might take the form: "If I breached my contract with the plaintiff, it is only because the third party breached his contract with me".

†: Note that this refers to the plaintiff *qua* plaintiff. A plaintiff can assert a third party claim in his capacity as defendant on a counterclaim: Rule 3-5(1.1).

Third Party Claims Generally

Object of Third Party Claims

The purposes of third party proceedings include (see the quote from *McNaughton* above):

1. to avoid a multiplicity of actions about the same subject matter:
    a. avoids inconsistent findings of fact; and
    b. limits total cost of litigation in terms of time and money;
2. to allow the third party to participate in the defence of the underlying matter (i.e. to defend the plaintiffs original claim);
3. to ensure that the defendant's rights with respect to the third party are decided before the plaintiff can force the defendant to pay the full amount the judgment.

Grounds for Bringing a Third Party Claim

According to Rule 3-5(1), a third party claim may be pursued in three different scenarios:

(a) where the party bringing the claim is entitled to ***contribution or indemnity*** from the proposed third party;
(b) where the party bringing the claim is ***entitled to relief*** against the proposed third party which is ***connected to the underlying subject matter*** of the action; or
(c) where the ***question or issue*** between the party bringing the claim and the proposed third party is substantially the same as a ***question or issue*** which relates to the relief claimed in, or the subject matter of, the action; and the ***question or issue*** should properly be determined in the action (i.e. in the opinion of the court).

According to BG, **most third party claims are brought under paragraphs (a) or (b) and very few are brought in scenario (c)**. The "chain of contract breaches" described above is an example of scenario (b), as is the third party notice brought in ***McNaughton v Baker***; ***Negligence Act***-type claims in which the party bringing the third party claim alleges joint fault, are examples of paragraph (a). The claims advanced in the *Adams* and *Laidar* cases do not fit within any of the scenarios and thus were not properly the subject of third party proceedings.

Who Can Bring Third Party Claims?

Subject to Rule 3-5(1.1), Rule 3-5(1) says that a party who is not a plaintiff can bring a third party claim against another person, regardless of whether the proposed third party is already a party to the action or not. This means, for example, that a defendant may third-party another defendant of record.

However, a third party claim ought not to be brought by a defendant against a plaintiff, since in this case, one of several things should be done:

1. the defendant should bring a Counterclaim (p 21);
2. the defendant should claim Set-Off (p 22); or
3. the defendant should raise a defence, such as ***contributory negligence***.

When Can a Third Party Claim Be Brought?

Rule 3-5(4) governs the timing of third party notices. A party may file a third party notice:

(a) at any time with leave; or

(b) as of right if filed within 42 days after being served with the notice of civil claim or counterclaim to which the relief claimed in the third party notice relates.

Whether or not the notice was brought under paragraph (a) or (b), it is vulnerable to being set aside on application by a party under Rule 3-5(8).

Note that parties only provide their list of documents 35 days after the pleading period. This can be problematic for a defendant since a third party notice can only brought as of right within 42 days of being served with the notice of civil claim, leaving the defendant very little time with the list of documents, let alone the documents themselves, to discover a third party claim. See Documents (p 37).

Service Requirements for Third Party Proceedings

Service of Application for Leave to File a Third Party Notice

If the party proposing to make a third party claim intends to do so under Rule 3-5(4)(a)—in other words, if the party must seek leave—the notice of application for leave must be filed both on the proposed third party and on all parties of record: Rule 3-5(6).

Service of Third Party Notice

Rule 3-5(7) governs service of a filed third party notice. The notice must be served within 60 days of being filed. Depending on whether the third party was or was not previously a party of record, there may be slightly different service requirements for the third party and for the existing parties of record.

Service on Third Party Itself

The party bringing the third party claim must serve the third party with a copy of the filed third party notice: Rule 3-5(7)(a)(i). Moreover, if the third party was not previously a party of record, the party bringing the claim must serve the third party, also within 60 days, with a copy of every filed pleading in the proceeding which was previously served on any of the parties to the action: Rule 3-5(7)(a)(ii). The motivation for this second requirement is obvious.

Service on Existing Parties of Record

The party bringing the third party claim must serve all the existing parties of record with a copy of the filed third party notice: Rule 3-5(7)(b).

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 3-5(1)	/	179	Grounds for Bringing a Third Party Claim (p 28), Who Can Bring Third Party Claims? (p 28)
Rule 3-5(1.1)	/	179	A plaintiff can bring a third party notice in his capacity as defendant to counterclaim.

Case/Statute	Juris.	P	Key Points
Rule 3-5(2)	/	180	Third party claims can be brought against non-parties.
Rule 3-5(4)	/	180	When Can a Third Party Claim Be Brought? (p 29)
Rule 3-5(6)	/	180	Service of Application for Leave to File a Third Party Notice under Rule 3-5(4)(a)
Rule 3-5(7)	/	180	Service of Third Party Notice (must be served within 60 days of filing).
Rule 3-5(8)	/	180	The court is authorized to set aside a third party notice at any time.
Rule 3-5(9)	/	180	The third party responds just like a defendant unless Rule 3-5(10) applies.
Rule 3-5(11)	/	181	Rules 3-1 and 3-3 apply, respectively, to a third party notice and a response to third party notice as if they were, respectively, a notice of civil claim and a response to civil claim. This is particularly important in terms of: • the prohibition on blanket denials: see Rule 3-3(2)(a)(ii); and • the time to respond: see Chart of Common Time Requirements (p 76).
Rule 3-5(16)	/	181	Default of response to third party notice. Covered under Default Judgment (p 25).
Rule 21-9(1)(b)	/	239	If a defendant wants to make a claim for ***contribution or indemnity*** under section 4 of the ***Negligence Act*** against anyone who is not a plaintiff, regardless of whether the person is a party to the action or not, the claim must be by way of third party notice. I'm not sure what the purpose of this rule is, but it would prevent a defendant from claiming contribution or indemnity in a response to third party notice responding to a third party notice served on the defendant by a second defendant!

Unnecessary Third Party Proceedings: *Adams*

The Two-Branches of *Adams*

In ***Adams v Thompson, Berwick, Pratt & Partners***, McLachlin JA summarized a rule which Newbury later described in the *Laidar* case as having two "branches":

Branch #1

A defendant may not bring a third party claim against some third person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence.

McLachlin JA described two scenarios in which this rule would bar a third party claim:

1. where harm allegedly caused by the third party fell within the scope of an ***agency*** relationship with the plaintiff (because a plaintiff is responsible for the actions of his agent); and
2. where the substance of the claim is that the third party failed to help the plaintiff ***mitigate*** his loss (because mitigation is always the responsibility of the plaintiff).

In these cases, the defendant has no claim against the third party in any event. The defendant's claim is against the plaintiff. If the defence is successful, the plaintiff's judgment will be reduced accordingly. The reduced judgment to the plaintiff is a harm that the plaintiff might then claim against the third party.

Branch #2

Notwithstanding Branch #1, where the ***pleadings*** raise the possibility that the defendant may have an independent claim against the third party (i.e. one for which the plaintiff may not be responsible), the third party claim will be allowed to stand.

In considering the second branch of *Adams*, keep in mind that the court will assume the truth of the facts stated in the pleadings when deciding whether or not to grant leave.

The Ontario Cases

In *Laidar*, Newbury JA cites two Ontario cases, *478649 Ontario Ltd v Corcoran* (1994), 118 DLR (4th) 682 (Ont CA) [*Corcoran*] and *Davy Estate v CIBC World Markets*, 2009 ONCA 763 [*Davy Estate*] and BG briefly went over them in class. Since BG **says, accurately, that the Court in *Laidar* was sceptical of the Ontario Court of Appeal's decision in *Corcoran***, probably the only thing you really need to know for exam purposes is that *Corcoran* and *Davy Estate* do not represent the law in British Columbia.

Nevertheless, here is the gist of those decisions. In *Corcoran*, Laskin JA wrote that under some circumstances, a plaintiff could escape responsibility for the conduct of his ***agent***. In *Davy Estate*, Sharpe JA (joined by Laskin JA) appeared to qualify *Corcoran* by saying the plaintiff cannot ever escape responsibility for a failure to ***mitigate*** which may have been caused by bad advice from a third party. Once more, however, the law in BC is as described in *Laidar*, *Adams*, and *McNaughton*.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Adams v Thompson, Berwick, Pratt & Partners	1987 BC/CA	119	Two-branch *Adams* test.
McNaughton v Baker	1988 BC/CA	146	Where the ***pleadings*** (i.e. the third party notice) allege that the third party owed the defendants an ***independent duty***, they disclose a possible third party claim and should be allowed to stand.
Laidar Holdings Ltd v Lindt and Sprungli (Canada) Inc	2012 BC/CA	144	The alleged acts of the proposed fourth party, Blakes, fell within the scope of the ***agency*** relationship between Lindt and Blakes. Thus the third party, DTZ, had a complete remedy against Lindt by raising the defence of contributory negligence.
Rule 3-5(8)	/	180	The court may set aside a third party notice at any time.
Rule 3-5(1)	/	179	Grounds for Bringing a Third Party Claim (p 28)

Note: BG **took *Adams* and *McNaughton* off of the syllabus because *Laidar* summarizes them both. Cites should be to *Laidar***.

Jurisdictional Disputes

Rule 21-8 describes how a party can dispute the jurisdiction of the court to hear a proceeding. The crucial point to remember is if a party takes ***any step*** whatsoever besides filing a jurisdictional response form prior to disputing the court's jurisdiction, it may find that it has attorned to the jurisdiction of the court and forfeited its ability to dispute jurisdiction. **Thus if a party has any doubts about the jurisdiction of the court, it should file a jurisdictional response form under Rule 21-8(1) before taking any other action**.

Case/Statute	Juris.	P	Key Points
Rule 21-8(1)	/	238	A party can dispute jurisdiction after filing a jurisdictional response form.
Rule 21-8(2)	/	239	A party can apply for a stay on the ground that the court ought to decline to exercise jurisdiction over that party.
Rule 21-8(3)	/	239	A party can challenge the validity of the originating process or service after filing the jurisdictional response form.
Rule 21-8(5)	/	239	• If a party brings an application or files a pleading which challenges the court's jurisdiction within 30 days of filing the jurisdictional response form, it does not attorn to the jurisdiction of the court. • It can thus defend the case on its merits without attorning pending a determination of jurisdiction.
Court Jurisdiction and Proceedings Transfer Act s 10	SBC 2003	248	Enumerates circumstances in which a ***real and substantial connection*** between British Columbia and the facts on which a proceeding is based is presumed to exist for the purposes of determining whether the court should exercise jurisdiction. See Common Circumstances Enumerated in the CJPTA (p 17), under Service Ex Juris.

4. Class Actions, Negligence Act Issues, Case Planning

CLASS ACTIONS

The right to bring class actions in British Columbia is statute based. It was enacted by the legislature in the ***Class Proceedings Act***. The ostensible purpose of the statute is to permit small but numerous related claims to be brought in one action.

Class Action Certification: The Threshold Question

Any member of the class can bring a class proceeding. However, before the matter is allowed to proceed, the representative plaintiff must obtain an order certifying the action as a class proceeding. Certification is thus a ***threshold question*** which must be resolved before the action can proceed.

Case/Statute	Juris.	P	Key Points
Class Proceedings Act s 4(1)	RSBC 1996	248	Certification is mandatory ("must") if certain factors are established: (a) there is a cause of action; (b) there is an identifiable class; (c) there are common issues among the class members; (d) a class proceeding is ***preferable*** for the ***fair and efficient resolution*** of the common issues according to the criteria in s 4(2); and (e) there is a representative plaintiff meeting certain criteria.
Class Proceedings Act s 4(2)	RSBC 1996	248	Criteria for determining whether class proceedings are ***preferable*** under s 4(1)(d).
Tiemstra v ICBC	1997 BC/CA	160	A class action must not be certified where the ***common issue*** does not settle an important element in the dispute.
Rumley v British Columbia	1999 BC/CA	153	The claims of student sexual abuse victims are certified with respect to the narrow ***common issue*** of standard of care. All other claims for certification (student non-sexual abuse victims; family; secondary abuse victims) are dismissed.

Note about Exams

It is unlikely—not impossible, but unlikely—that class actions will feature on the exam. The reason for this is that the final exam format is that of an initial claim (between one or several plaintiffs, one or several defendants, and one or several third parties) which is successively developed as new facts are added in subsequent questions. Since class actions don't fit quite as conveniently into the general case of civil litigation between individual parties, they don't really have an obvious place on the exam.

Representative Proceedings

We were asked to read Rule 20-3, which deals with representative proceedings, but BG **did not cover it in class**. We were assigned no representative proceedings cases. Moreover, Rule 20-3 is unlikely to make it onto the exam for the same reason that class actions are not likely to feature.

For the sake of completeness, the principal difference between a representative proceeding and a class action is that representative actions involve persons who have the ***same interest*** in the proceedings whereas class proceedings are brought on behalf of a class of plaintiffs sharing a ***common issue*** of law or fact. In other words, the former type of proceeding is concerned with the nature of the ***parties***, while the latter is concerned with the nature of the ***issues***.

Another difference is that a representative action can be brought against a representative defendant (and binds everyone represented by that defendant), whereas the "class" in class actions refers only to a class of plaintiffs.

Negligence Act Issues

The two top-level issues under the ***Negligence Act*** are:

1. how to deal with Contributory Negligence; and
2. how to deal with Concurrent Fault (i.e. multiple concurrent tortfeasors).

In this class, we mainly looked at the second issue, that of concurrent fault, and in particular the following question. How does a settlement agreement between the plaintiff and one of the named parties affect the liability of the parties who did not settle?

Contributory Negligence

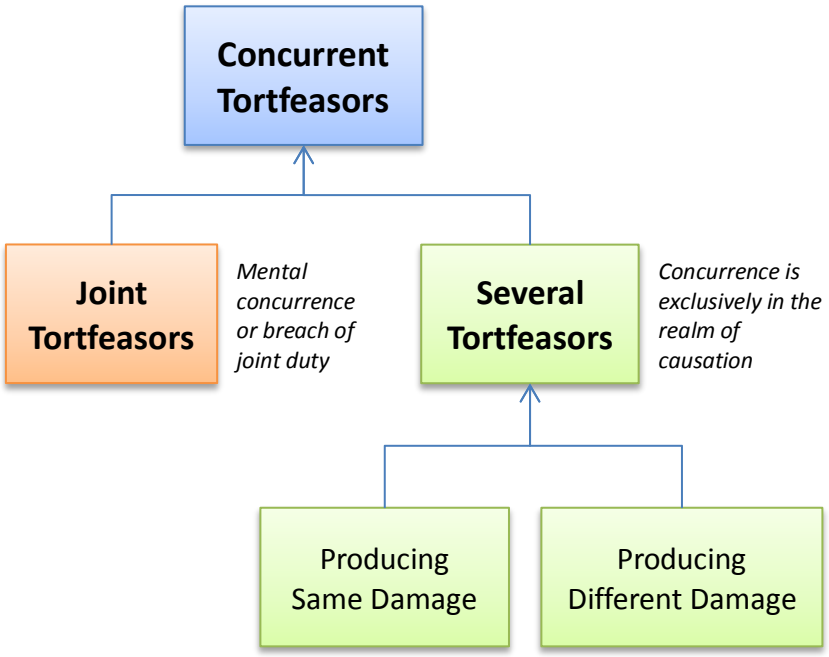
Section 1 of the ***Negligence Act***, which is chiefly concerned with ***contributory negligence***, codifies the principle that ultimate liability is in proportion to fault. The intent of the provision is "remedial", in the sense that it alters the common law notion that contributory negligence in any degree is a complete defence.

Concurrent Fault

Section 4 of the ***Negligence Act*** deals with ***concurrent fault***. Essentially, the section operates to make each concurrent tortfeasor ***jointly and severally liable*** to the person harmed for the totality of the damage. The purpose of the provision is to make it easy for the plaintiff to collect the entire judgment because the plaintiff can collect the whole amount from any of the tortfeasors, regardless of their degree of fault. Thus, the plaintiff will always collect the whole judgment from Mr Deep Pockets, even if Mr Pockets is only 1% at fault. Since this provision would be utterly unconscionable by itself, section 4(2)(b) makes each tortfeasor liable to contribute and indemnify the one(s) who paid the plaintiff in proportion to that tortfeasors degree of fault.

Joint Tortfeasors versus Several Tortfeasors: *Tucker v Asleson*

In ***Tucker v Asleson***, Madam Justice Southin drew a distinction between different kinds of concurrent tortfeasors.



Quoting from Glanville Williams, she defined ***concurrent tortfeasors*** as "tortfeasors whose torts concur (run together)". The term ***co-tortfeasor*** may be used to describe one concurrent tortfeasor in relation to his fellow concurrent tortfeasors.

The class of concurrent tortfeasors further subdivides into:

1. joint tortfeasors; and
2. several tortfeasors.

Two or more tortfeasors ***are joint tortfeasors*** (a) where one is the principal of or vicariously liable for the other; (b) where

there is concerted action between them for a common end; or (c) where a duty imposed jointly upon them is not performed. Except in the case of (c), therefore, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.

Any concurrent tortfeasors who are not joint tortfeasors are ***several tortfeasors***, also called separate, or independent, tortfeasors (i.e. this is a residual category defined in relation to joint tortfeasors). The concurrence in the case of several tortfeasors is solely in the ***realm of causation***.

When BG discussed this concept in class, **he incorrectly set up the dichotomy as between "joint" and "concurrent" tortfeasors**. This is based on a misreading of the Glanville Williams passage quoted in *Tucker*, since a "joint" tortfeasor is merely a specific type of "concurrent" tortfeasor. If this comes up on an ***exam***, however, you can state things correctly and still avoid looking wrong to BG by using the term "***several concurrent tortfeasor***" to describe a several tortfeasor. Not only is this a correct usage of the term, but it also includes the word "**concurrent**", which is what BG used in class to mean "**several**".

Effect of Settlement Agreements on Joint and Several Liability under the *Negligence Act*

In the ordinary course of things, if a plaintiff settles with one of several co-tortfeasors, that co-tortfeasor will likely cease to defend, but the court will still be bound to make a finding of the degree to which the settling co-tortfeasor was at fault. This is where the distinction between ***joint tortfeasors*** and ***several tortfeasors*** becomes important.

In ***Tucker v Asleson***, Madam Justice Southin held the plaintiff's release of one ***several tortfeasor*** from liability does not operate to release the other several co-tortfeasors from liability. Accordingly, it does not operate to sever the ***joint and several liability*** imposed by section 4(2)(a) of the ***Negligence Act***. This means that the plaintiff is still free to enforce 100% of the judgment against the defendant who remained in to defend the action. Presumably, that non-settling defendant is still entitled, under section 4(2)(b), to seek contribution and indemnity from the defendant who did settle. Thus a settlement with a several tortfeasor, without more, does not appear to change the obligations of the several tortfeasor as between himself and his co-several tortfeasors who remained in to defend the action. Nor does it change the obligations of the co-several tortfeasors who stayed to defend as between any among them and the plaintiff. The settling several tortfeasor must use a *BC Ferries* Agreement to effect such a change.

On the other hand, Madam Justice Southin held that "there would be a formidable argument" that no division of fault should occur as between ***joint tortfeasors*** and therefore that the release of one joint tortfeasor should release them all.

BC Ferries Agreements

Despite the *Tucker* case, the parties can still do away with ***joint and several liability*** by executing a *BC Ferries* Agreement, which is named for the case in which it was first employed, ***BC Ferry Corporation v T&N Plc*** (*BC Ferries*). The court in *BC Ferries* explained that a defendant can only claim contribution and indemnity from a co-tortfeasor under section 4(2)(b) of the *Negligence Act* for that part of the plaintiff's damage which the defendant did not cause yet was compelled to pay under section 4(2)(a).

Thus if the plaintiff settles with one co-tortfeasor and does not seek from those who remain in to defend the action that portion of the damages for which the settling co-tortfeasor was at fault, then ***joint and several liability*** is effectively severed between the settling co-tortfeasor and the defendant(s) remaining in the action. This is usually accomplished in a *BC Ferries* Agreement by the plaintiff agreeing:

1. not to seek the portion of its losses attributable to the settling co-tortfeasor from the defendants remaining in the action; and
2. to advise the court, at the first available opportunity, that it expressly waives any right to recover from the defendants remaining in the action the portion of its loss attributable to the settling co-tortfeasor.

Keep in mind that *BC Ferries* Agreements represent a risk for both the plaintiff and the party who settles out. If the court allocates more fault to the settling co-tortfeasor than the plaintiff bargained for, the plaintiff loses. Conversely, if the court allocates less fault to the settling co-tortfeasor than he bargained for, this is a gain to the plaintiff.

Relevant Cases and Provisions

Case/Statute	Juris.	P	Key Points
Negligence Act s 1	RSBC 1996	257	If there was contributory negligence, defendants are only liable to pay the portion of damage which they caused to the plaintiff.
Negligence Act s 4	RSBC 1996	257	Concurrent tortfeasors are ***jointly and severally liable*** to the plaintiff for the whole portion of the damage which was not caused by contributory negligence.
Rule 21-9(1)	/	239	How to claim under section 4 of the *Negligence Act*.
Rule 21-9(2)	/	239	How to claim under section 1 of the *Negligence Act*.
Tucker v Asleson	1993 BC/CA	161	When one ***several tortfeasor*** settles out, the plaintiff is still entitled to collect that tortfeasor's portion of the total judgment from the defendants remaining in the action. . .
BC Ferry Corporation v T&N Plc	1993 BC/SC	122	. . . However, if the plaintiff expressly seeks only that portion of the damages from the remaining defendants which they are found to have caused, the remaining defendants may not seek contribution and indemnity from the tortfeasors who settled out.

CASE PLANNING & CASE MANAGEMENT

Case planning was intended to be a significant aspect of civil litigation under the new Rules, presumably in support of the "speedy" and "inexpensive" aspects of Rule 1-3(1) and the "proportionality" requirement in Rule 1-3(2).

While case planning can be a useful tool, BG says that **the problem with case planning is that it can be a costly, time-consuming process in and of itself**. In other words, case planning frequently frustrates the object of the rules rather than furthering it! Whether case planning is a good idea will depend on the particular circumstances of each case. Because of the double-edge nature of case-planning, it is not mandatory under the new Rules, unlike the trial management conference[1], with which it should not be confused.

Conduct of Case Planning Conference

Case/Statute	Juris.	P	Key Points
Rule 5-1(1)	/	191	The first way to initiate a case planning conference: any party can request a CPC once the pleading period has expired.
Rule 5-1(2)	/	191	The second way to initiate a case planning conference: the court may direct that it be held.
Rule 5-1(3)	/	191	The first CPC requires 35 days' notice, and then 7 days thereafter.
Rules 5-1(5) & 5-1(6)	/	191	• Once a CPC is scheduled, each party provides a case plan setting out its proposal for the various steps in the action. • Plaintiff must provide its case plan within 14 days after notice of the CPC. • Other parties must provide their case plans within 14 days of receipt of the plaintiff's case plan.
Rule 5-2(2)	/	192	CPCs must be attended by ∀ lawyer representing a party of record plus any unrepresented parties.

[1] See Rule 12-2 and Run-Up to Trial (p 113).

Case/Statute	Juris.	P	Key Points
Rule 5-2(3)	/	192	Anyone who is required to attend under subrule (2) ***must*** attend the first conference in person and ***may*** attend thereafter in person, by phone, or by videoconference.
Rule 5-2(6)	/	192	Failure to attend can have costs consequences.
Rule 5-2(7)	/	192	Proceedings at a CPC must be recorded, but the recording is only available by way of court order.
Parti v Pokorny	2011 BC/SC	149	Court will only order CPC recordings made under Rule 5-2(7) produced in ***exceptional cases***, on ***reasonable grounds***, such reasonable grounds to be ***compelling***.

Case Planning Conference Orders

Case/Statute	Juris.	P	Key Points
Rule 5-3(1)	/	192	• A master or judge has broad powers to control the action by issuing just about any kind of order at a case planning conference. • However, these broad powers are limited by subrule (2).
Rule 5-3(2)	/	193	At a case planning conference, the master or judge may not make either of the following orders: (a) any order at all based on ***affidavit evidence***, except under subrule (6), which relates to non-compliance with Part 5 of the Rules or a previous CPC order; (b) an order for ***final judgment*** in the action, except by consent.
Rule 5-3(3)	/	193	A CPC order is mandatory at the close of the CPC.
Rule 5-3(6)	/	193	• If a party doesn't comply with a CPC order, the court may make an order under Rule 22-7, or order ***costs***. • Note that a possible remedy under Rule 22-7 is dismissing the proceeding (punish plaintiff) or striking out the response to civil claim (punish defendant). See subrule (2) paragraph (d). Thus despite Rule 5-3(2), the court can for all intents and purposes make an order for ***final judgment*** without consent, but only in the case of egregious non-compliance.
Stockbrugger v Bigney	2011 BC/SC	157	Parties may file a consent case planning order without actually holding a CPC.
Rule 5-4(1)	/	193	Case plan orders can be amended by consent or by application.
Rule 11-1(2)	/	220	If a CPC has been held, ***expert opinion evidence*** must not be tendered at trial unless provided for in the case plan order applicable to the action.

5. Ascertaining Facts

DISCOVERY

The discovery phase essentially begins after the pleading period ends. The object of discovery is to "discover" the other party's case and, more broadly, to further the purpose of the trial as a truth-finding exercise. Discovery aims at narrowing the scope of the issues to be decided and preventing parties from being taken by surprise at trial. Like everything else provided for in the Rules, discovery is also supposed to fulfil the objects set out in Rule 1-3 and, naturally, to encourage settlement wherever possible.

There are two principal forms of discovery which are available as of right:

1. document discovery; and
2. oral examination for discovery.

In addition, the following may be used for discovery:

3. interrogatories (but only by consent of the party being served, or with leave of the court); and
4. physical examination.

Documents

> *In more leisurely days, litigants could afford perfect disclosure of every document that might lead to a chain of enquiry that might assist a party on any issue in a case. Such was the rule established in the 1882 Peruvian Guano Case, which is cited in almost every dispute over the production of documents. This is the rule that really jams the filter because very often it seriously delays the commencement of a trial.*
>
> *I have commented in a number of cases that the documents in the Peruvian Guano case probably didn't fill a medium sized manila envelope, and the rule enunciated was probably very fair and sensible in 1882.*
> —Allan McEachern, "Speech of the Chief Justice" (Casebook at p 20)

DEFINITION OF DOCUMENT

Before diving into the document discovery regime enacted under the *Supreme Court Civil Rules*, it is important to be aware that the term document is expansively defined in Rule 1-1(1) to include:

- photographs;
- film;
- recording of sound;

and more broadly,

- any information of a permanent or semi-permanent character; and
- any information recorded or stored by means of any device.

Just about anything that stores information (apart from what is intrinsic in the thing itself) outside of the human body is a document.

Ethics of Document Discovery

Document discovery is a crucial part of the system of civil litigation in British Columbia, particularly because while most cases will never see the inside of a courtroom (or at least, never see trial), the vast majority will get to the document discovery phase. Moreover, a considerable amount of the discovery process is placed in the hands of the parties. In the first instance, at least, the parties are in large part ***self-policing***. The party who provides documents on discovery is responsible for deciding what is, and is not, a material document.

There is thus a considerable ethical obligation placed upon lawyers, as ***officers of the court***, to ensure that their clients provide the disclosure required by law. Failure to do so can result in costs consequences falling personally upon the lawyer (*Myers v Elman*) and discipline by the law society. And of course, for the client, knowingly providing inaccurate discovery is liable to result in consequences under Rule 22-7, including the remedy sought for in *GWL Properties*, striking a claim or defence; or potentially less drastic consequences under Rule 7-1(21).

Under the New Rules, counsel have two ethical obligation:

1. to ensure all documents that may ***prove or disprove a material fact*** are disclosed in Stage 1, as well as any further disclosure ordered or agreed to in Stage 2; and
2. to investigate anything suspicious in disclosure provided by the client under the duty described in *Myers v Elman*.

Case/Statute	Juris.	P	Key Points
Myers v Elman	1940 Eng/HL	147	A solicitor is an ***officer of the court*** and cannot allow the client to make whatever affidavit of documents he thinks fit.
Professional Conduct Handbook 8:1(b)/ & 8:7–8		258	A solicitor must not knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable. He must also do everything ***reasonable*** to prevent the client from breaching Chapter 8 and withdraw if he fails.
GWL Properties v WR Grace & Co	1992 BC/SC	131	Since plaintiff failed to establish that Grace truly had a list of the 1 million documents, it did not prove that Grace misled the court and thus there were no grounds to strike Grace's defence.

Our Two-Stage Document Discovery Regime: Rule 7-1

Introduction on the Old Rules

Under the Old Rules, the scope of document discovery was the same as that of oral examination for discovery. In both cases, a party had to disclose something if it ***might be relevant***, in the sense that it might fairly lead to a line of inquiry which might either directly or indirectly enable a party to advance his own case or damage that of his adversary. This rule, first set out in the 19th century *Peruvian Guano* case, is sometimes referred to as the ***relevance standard***, although it would probably be more accurate to call it the "may be relevant" standard.

Since 1882, modern technology increased the document creation and storage capacity of people and businesses by orders of magnitude. Cases began to involve the exchange of hundreds of thousands or millions of documents. Producing parties would inundate the other side with documents of questionable value. The producing party frequently had no choice under the law stated in *Peruvian Guano* but to produce these documents. The receiving party had little choice but to review them on the chance that they might contain something important. In many cases, the cost of document discovery was ***disproportionate*** to the amounts in issue in the litigation. The New Rules seek to mitigate this cost by introducing the concept of ***proportionality*** and a new, higher, initial threshold for disclosure.

THE NEW SYSTEM

Under the New Rules, the document discovery regime was significantly overhauled. Instead of using the *Peruvian Guano* "may be relevant" standard, Rule 7-1 implicitly creates a two-stage system in which the first stage puts in place a much higher threshold for disclosure.

STAGE 1: MATERIALITY

Broadly speaking, the first stage is embodied in subrules (1) to (10) of Rule 7-1. Of these subrules, Rule 7-1(1) is the most important because it sets out:

1. the documents which a party is potentially responsible to list;
2. the threshold for listing these documents; and
3. the deadline for delivering a list of documents.

Documents Which a Party is Potentially Responsible to List

Rule 7-1(1)(a)(i) states that a party is responsible to list documents that:

- are in its possession ***or control***; or
- ***have been*** in its possession ***or control***.

The phrases "***have been***" and "***or control***" make the listing obligation potentially very broad. Read literally, a party is potentially liable to list a document which it never possessed, and cannot presently compel anyone to give to it, as long as at one time it was able to compel someone to produce it.

Threshold for Listing

The threshold for disclosure is defined in Rule 7-1(a)(i) to be all documents which can ***prove or disprove a material fact***, a standard which is often referred to as the ***materiality standard***. The ***pleadings*** define what constitutes a material fact. The parties (and the courts) determine what can prove or disprove a material fact exclusively by reference to the pleadings.

In addition to documents which can prove or disprove a material fact, a party must disclose all other documents which ***it intends to refer to at trial***: Rule 7-1(a)(ii). BG points out that **if you intend to refer to a document at trial, it ought to be able to prove or disprove a material fact**, so it is not entirely clear what this rule adds. It is possible that it covers some class of documents over which privilege is claimed that somehow do not find into subparagraph 7-1(1)(a)(i).

BG says that **the main effect of the new materiality threshold has been to shift the cost of reviewing a party's documents to that party from the opposing party**. His experience suggests that the New Rules may not have done as much to promote proportionality as they set out to.

Deadline for Delivering List

The list of documents must be delivered within 35 days of the end of the pleading period: Rule 7-1(1).

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 1-1(1)	/	175	Definition of document.
Rule 1-3(2)	/	175	Proportionality is an object of the New Rules.
Rule 7-1(1)	/	196	List of documents must be delivered within 35 days of the end of the pleading period.
Rule 7-1(2)	/	196	Subject to the subrules on claims for Privilege (p 41), each list of documents must contain a brief description of each listed document.

Case/Statute	Juris.	P	Key Points
GWL Properties v WR Grace & Co	1992 BC/SC	131	Qualifies Rule 7-1(2): parties have ***flexibility*** in tailoring their lists to the circumstances of the case. Grouping is permitted.
Rule 7-1(3-4)	/	196	Insurance policies must be disclosed to the other party but not to the court. BG: **this is blatantly settlement-driven**.
Rule 7-1(8)	/	197	A party can apply to court for an affidavit of documents from another party.
Rule 7-1(9)	/	197	There is a ***continuing obligation*** to disclose.
Rule 7-1(10)	/	197	A party who doesn't believe the listing party listed all of the documents the first party is entitled to can make a written demand that the listing party add: • documents; or • classes of documents to its list. Note, the difference between this subrule and subrule (11). Under this subrule, a party may only demand documents which meet the requirements of subrule (1).
Rule 7-1(21)	/	199	Aside from the general consequences in Rule 22-7, the ***specific consequence of failure to disclose*** or produce a document under Rule 7-1(21) is that the party failing to disclose can't put the document in evidence or use it in examination or cross-examination.

Stage 2: Lower Threshold, Entitlement Must Be Established

Rule 7-1(11) implies a second stage of document discovery. In a nutshell, the difference between subrule (10) and subrule (11) is that the former is ***mandatory*** while the latter is ***permissive***. More precisely, unlike subrule (10), subrule (11) does not depend on meeting the criteria of subrules (1)(a) or (9). Instead, the requirements for a demand under subrule (11) are:

- the demanding party ***believes*** the list should include
  - documents; or
  - classes of documents (e.g. financial statements);
- the documents demanded are (not have been!) within the listing party's possession or control;
- the documents demanded are ***additional to*** those required under subrules (1)(a) or (9);
- the demanding party identifies the documents with reasonable ***specificity***; and
- the demanding party explains the ***reason*** why the documents should be disclosed.

Since these documents are additional to those required under subrules (1)(a) and (9), it follows that the threshold under subrule (11) is ***lower than materiality***. In order to control the process at Stage 2 somewhat and to discourage ***fishing expeditions***, the courts will generally require some ***evidence*** in support of an application for production under subrules (11) and (13): *Kaladjian v Jose*. The most obvious forum to collect such evidence is on Examination for Discovery (p 44).

Case/Statute	Juris.	P	Key Points
Rule 7-1(11)	/	197	A party may demand additional documents which do not meet the materiality threshold.
Rule 7-1(13)	/	198	A listing party is unlikely to offer up documents it is not clearly compelled to. If the listing party's Rule 7-1(12) does not fully comply with the demand, the demanding party can apply under this rule for an order requiring compliance.
Rule 7-1(18)	/	198	An application under Rule 7-1(18) is held to the same standard as Rule 7-1(11): *Kaladjian v Jose*.
Kaladjian v Jose	2012 BC/SC	141	• It would be inconsistent with the object of ***proportionality***, and arbitrary, if you could get around materiality in Stage 1 by seeking production of the same document from a third party instead of from the opposing party. • An applicant under Rules 7-1(11) or (18) must establish entitlement to the additional documents sought. ∴ The application will generally need to be supported by ***evidence***.

Inspection and Copies of Documents

Lists of documents are great, but they are not created for their own sake, but rather to allow the party receiving the list to more easily navigate to the underlying documents. Hence the following rules:

Case/Statute	Juris.	P	Key Points
Rule 7-1(15)	/	198	The listing party must make the listed documents, with the exception of those whose production is objected to (i.e. those listed as privileged), available for inspection and copying.
Rule 7-1(16)	/	198	The listing party must on request provide a copy of any document the requesting party is entitled to inspect.
Rule 7-1(17)	/	198	The court may order the production of a document for inspection and copying.

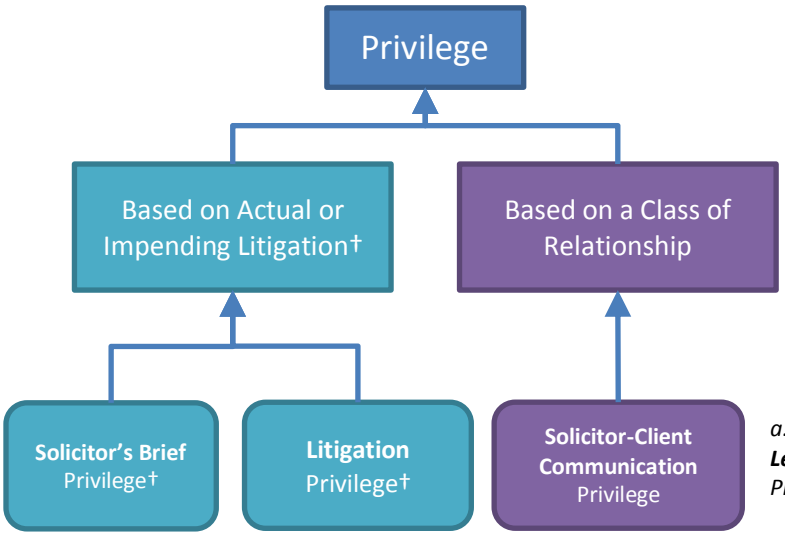
Seeking Documents from Third Parties

Case/Statute	Juris.	P	Key Points
Rule 7-1(18)	/	198	A party can apply for an order compelling a third party to produce a document.
Kaladjian v Jose	2012 BC/SC	141	• An applicant under Rules 7-1(11) or (18) must establish entitlement to the additional documents sought. ∴ The application will generally need to be supported by ***evidence***.
Dufault v Stevens and Stevens	1978 BC/CA	128	If a party establishes entitlement to a document in the possession of a third party under Rule 7-1(18), the court should only refuse to order production if it would cause unjust embarrassment or adverse impact to the third party.

Privilege

Parties are exempt from producing privileged documents, although they are not exempt from listing them. In the two headings below, Types of Privilege summarizes the flavours of privilege which are relevant to civil procedure; Practical Aspect of Privilege: Listing Privileged Documents discusses how privileged documents are to be listed, and the remedy available to a party who disputes a claim of privilege.

Types of Privilege



a.k.a. ***Legal Advice*** *Privilege*

We are primarily concerned with three types of privilege in this course:

1. Solicitor's Brief Privilege†;
2. Litigation Privilege†; and
3. Solicitor-Client Communications Privilege.

The former two types of privilege, which I have marked with a †, are qualitatively different from the latter one because they aren't based on a relationship *per se*, but on the need to prepare for, prosecute, or defend litigation which is either ongoing or in reasonable prospect. Moreover, despite its official name, I contend that so-called solicitor's brief privilege would be available to a self-represented litigant for the simple reason that to deny him this protection would be a monstrous injustice. The same goes for litigation privilege.

Solicitor's Brief Privilege

Solicitor's brief protects documents, including copies of non-privileged original documents, produced by a lawyer exercising legal knowledge, skill, judgment and industry for the purpose of advising on or conducting anticipated or pending litigation.

The ***test*** for solicitor's brief privilege is whether the ***dominant purpose*** of creating the documents was to obtain legal advice or aid in the conduct of litigation which at the time of their creation was in reasonable prospect.

The *Hodgkinson* case contains two of oddities worth mentioning. First, McEachern CJBC holds in *Hodgkinson* that solicitor's brief privilege is part of "one all-embracing privilege that permits the client to speak in confidence to the solicitor" &c. Second, there is a dissent by Craig JA, which BG mentioned in class, although I doubt if it could possibly relate to an exam question. Craig JA contends that copies of non-privileged document should not qualify for solicitor's brief privilege, at least partly on the dual grounds that matters should be determined on their ***merits*** and there is a possibility that such documents could take the other party by surprise. To which I can only wonder: if lawyers are to be compelled to turn over every piece of value they can add to a client's case to the other side, what possibly justification could there be in charging the gargantuan legal fees which nowadays are commonplace? Surely a client can turn his entire strategy over to the other side with much less expense than is incurred employing a lawyer…

Case/Statute	Juris.	P	Key Points
Hodgkinson v Simms	1988 BC/CA	136	Test for solicitor's brief privilege.

Litigation Privilege

Litigation privilege is hard to distinguish from solicitor's brief privilege, since they cover very similar situations and essentially have the same test. The main difference is that litigation privilege extends to documents produced by a party or another agent of the party.

The ***test*** for litigation privilege is whether the sole or ***dominant purpose*** of creating the document was to obtain legal advice in current or probable litigation.

Case/Statute	Juris.	P	Key Points
Shaughnessy Golf & Country Club v Uniguard Services	1986 BC/CA	154	Test for litigation privilege: was the sole or ***dominant purpose*** of creating the document to obtain legal advice in current or probable litigation?

Solicitor-Client Communications Privilege

> *A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged. Nor will privilege extend to physical objects or "neutral facts" that exist independent of clients' communications.*
>
> —Gray J, *Keefer Laundry v Pellerin Milnor Corp*

Solicitor-client privilege, also known as ***legal advice privilege***, differs from the other two types of privilege discussed above in that it attaches not to a lawsuit or anticipated lawsuit, but to the relationship of solicitor and client. Nevertheless, not all communications between solicitor and client are privileged. They must satisfy the following test:

1. a communication ***between lawyer and client***;
2. entailing the seeking or giving of ***legal advice***; and
3. intended to be ***confidential***.

It is generally accepted that apparently mundane details, such as dates, fee amounts, or even names of lawyers, may be privileged if disclosing them would divulge the nature of the legal advice being sought by the client.

One dead giveaway to watch for on the exam is a business relationship in which the lawyer is giving business advice, as will frequently happen in the case of corporate in-house counsel. Pure business advice given by a lawyer will never be privileged.

Case/Statute	Juris.	P	Key Points
Keefer Laundry v Pellerin Milnor Corp	2006 BC/SC	142	Test for solicitor-client communication privilege.

Practical Aspect of Privilege: Listing Privileged Documents

The practical aspect of privilege in relation to document discovery is that otherwise producible privileged documents must be listed, and each item listed must contain a description. This creates a tension between two related problems:

1. How can the listing party describe the document without giving away privileged information?
2. How can the party receiving the list assess the claim of privilege if the description is too cryptic?

The following table should hopefully make clear the state of the law with respect to these problems.

Case/Statute	Juris.	P	Key Points
Rule 7-1(6)	/	197	If the listing party claims a document is privileged from production, it must make this claim in its list of documents and state the grounds of the asserted privilege.
Rule 7-1(7)	/	197	The nature of a document in respect of which privilege is claimed must: • be described; • in a manner that will enable other parties to assess the validity of the claim to privilege; • but without revealing information that is privileged.
Rule 7-1(20)	/	199	A party can apply to have the court inspect a document to decide whether it is privilege or not.
Leung v Hanna	1999 BC/SC	145	• The relief available to a party that believes documents have been inappropriately or not fully described is an application to have the court inspect the document under Rule 7-1(20). • A solicitor is an ***officer of the court*** and must be ***presumed*** to have provided the most extensive description possible short of disclosing privileged information.
Keefer Laundry v Pellerin Milnor Corp	2006 BC/SC	142	In disputes over whether documents are privileged, the court's decision whether to review the disputed documents under Rule 7-1(20) depends on factors such as the volume of documents and the nature of the dispute. • It is preferable if the parties establish privilege by affidavit evidence. • If they cannot do this without revealing the privileged information itself, it is appropriate for the court to review the documents.

Onus of Establishing Privilege

The ***burden*** of establishing privilege falls on the party asserting it: *Keefer Laundry*. (In reality, any of the privilege cases will do for this, but BG **singled *Keefer* out** for the proposition).

Confidentiality of Documents Produced

In the 1986 case of *Kyuquot Logging v British Columbia Forest Products*, a majority of the Court of Appeal held that there was no implied undertaking of confidentiality, imposed upon a party receiving discovery documents, not to use the documents outside of the action in which they were produced (which undertaking, had it existed, would have been punishable by the court's power of contempt). Under the rule in *Kyuquot*, if a party producing documents wanted to ensure that they were kept confidential, it had apply to court for an injunction and show a reason why the documents should not be used as the party receiving the documents desired.

In ***Hunt v T&N Plc***, the Court of Appeal, sitting as a five-judge panel, overturned *Kyuquot*. Documents produced on discovery are now subject to an implied undertaking of confidentiality. The party receiving the documents may only use them outside of the proceedings in which they are produced by consent, with leave of the court, or for certain very narrow "proper purposes".

Case/Statute	Juris.	P	Key Points
Hunt v T&N Plc	1995 BC/CA	137	Discovery documents are subject to an implied undertaking of confidentiality.

See Also: Confidentiality of Evidence Given on Examination for Discovery (p 51)

Examination for Discovery

Aside from document discovery, the other principal discovery tool—and the only other discovery tool available ***as of right***—is the examination for discovery (XFD), which is covered by Rule 7-2. The examination for discovery is only the other tool in Part 7 of the rules which BG and JF **really seem to care about**. The subsequent parts of this chapter are comparatively less important.

Examination for discovery is a different tool than document discovery. Counsel should take care not to waste the XFD attempting to replicate a story already told by the documents.

> *[I]n many cases—particularly cases where the **documents** tell the story—. . . much of what is done on [examination for] discovery is unnecessary, and will not be useful at trial.*
> —McEachern CJSC, ***Allarco Broadcasting v Duke*** (p 120)

An examination for discovery is an examination, on oath and in the nature of a ***cross-examination***, of one party to the action by a party ***adverse in interest***. An XFD takes place in private, typically in the boardroom of a law office, with only the parties and their counsel present: unlike a regular court proceeding, the general public has no right to be there. There is no judge. The examination is done before a court reporter who produces a ***transcript***, in the form of questions and answers, which is available to the parties (see Use of Examination for Discovery, below).

Ethics of Examination for Discovery

Communication Between Counsel and Witness Giving Evidence

The major ***ethical*** issue to watch for is communication between counsel and the party being examined. The rule here, which is a version of the rule on communication during cross-examination at trial modified to fit the circumstances of examinations for discovery, is set out in ***Fraser River Pile and Dredge v Can-Dive Services***. It stipulates that:

1. Where XFD will last no longer than a day, counsel should ***refrain any discussion with the witness***. They should not even be seen to converse during any recess. (JF: Don't go for lunch together, don't do anything!)
2. Where XFD is scheduled for more than one day, counsel is ***permitted to discuss*** all issues relating to the case, including evidence given or to be given, at the end of the day. However, before this discussion takes place, counsel must ***advise the other side*** of his intention to do so.

This is an example of an ethical rule set out in the common law, rather than the ***Professional Conduct Handbook***. It isn't entirely clear from the *Fraser River* case what the consequences for the client would be if a solicitor breaks the rule, but I would hazard a guess that for the solicitor, the consequences could potentially be similar to those in ***Myers v Elman***.

PROFESSIONALISM

While obviously counsel need always behave professionally, there are two special aspects of XFD that merit particular scrupulousness.

1. Examinations for discovery take place in private, not in court. This means that counsel must be self-policing and take care to be both courteous and respectful of the object of the Rules.
2. Examinations for discovery produce a ***transcript***, which may well be put before a court either at trial or perhaps as part of an application to get a ruling on an objection. Counsel have to constantly ensure that they are being ***fair*** to the witness being examined and that a court reading through written document afterward will get the impression that what was said during the discovery was professional.

PURPOSE OF EXAMINATION FOR DISCOVERY

An examination for discovery has the following purposes:

- understand the other side's case, in order to ***know the case you will have to meet*** (discover facts, strengths and weaknesses);
- tie the other side down and thereby avoid surprises at trial;
- obtain ***admissions*** of fact which can be used as evidence at trial;
- assess your client for effectiveness and believability as a witness;
- assess the other side for effectiveness and believability as a witness;
- narrow the issues; and
- facilitate settlement.

WHO MAY BE EXAMINED FOR DISCOVERY?

According to Rule 7-2(1), two criteria must be met to be entitled to an examination for discovery. Any party of record may examine, as of right:

1. any other party of record;
2. who is ***adverse in interest***.

Adversity of interest is determined with respect to the ***pleadings***. The most obvious adversity of interest is that commonly arising between a plaintiff and a defendant (although one can imagine scenarios in which there would be no adversity of interest between a *particular* plaintiff and a *particular* defendant in a multi-party lawsuit). There may also be adversity of interest between two parties with the same litigation "label". For example, if the pleadings disclose an issue which, if decided one way, would benefit D_1 to the detriment of D_2 and, if decided the other way, would benefit D_2 to the detriment of D_1, then defendants D_1 and D_2 are adverse in interest.

EXAMINING CORPORATE PARTIES

In the circumstances defined in subrules (5) to (10) of Rule 7-2, a party may examine a representative of an adverse party. The scenario we are concerned with in this course is subrule (5): examination of a party who is not an individual. This includes corporations and presumably partnerships as well.

Subject to the case law in the table below, the basic framework for examining a representative of a corporate defendant under Rule 7-2(5) is:

(a) the examining party is entitled to examine precisely one representative of the corporate party;

(b) the corporate party is required to nominate a representative who is knowledgeable about the issues in the litigation; and
(c) the examining party is entitled to pick either the nominated representative or anyone else who either is presently, or has been in the past, a director, officer, employee, agent, or external auditor of the corporate party.

Despite the framework given above, the entire subrule is subject to those magic words of discretion: "***unless the court otherwise orders***". In the cases, this discretionary wiggle room has led to two kinds of issues:

1. The defendant tries to block the plaintiff from picking the representative of the plaintiff's choice under (c). This was the issue in the *First Majestic* and *Rainbow Caterers* cases.
2. The plaintiff tries to examine an additional representative beyond the one it is entitled to under (a). This was the issue in the *Westcoast* case.

Case/Statute	Juris.	P	Key Points
Rule 7-2(5)	/	200	Framework for XFD of a party who is not an individual (e.g. a corporation).
First Majestic Silver Corp v Davila	2011 BC/SC	129	Multiple plaintiffs—at least where they have a ***common interest***—must all examine the same representative of a corporate defendant.
Rainbow Industrial Caterers v Canadian National Railways	1986 BC/SC	151	The court may substitute the corporate defendant's choice as a representative to examine for discovery for the plaintiff's choice if this is necessary to achieve justice and fairness.
Westcoast Transmission v Interprovincial Steel	1984 BC/SC	164	On an application for the examination of a second representative, the ***test*** for whether an XFD has been ***satisfactory***, is ***objective***, not subjective. Has there been a full questioning on all matters which may be relevant to the issues raised on the pleadings, and have the questions been answered either of the witness' own knowledge or upon his informing himself? To show that an XFD is ***unsatisfactory***, questions must have been either not answered or given incomplete, unresponsive, or ambiguous answers.

Differentiating the Examination for Discovery

JF says that **on every exam, a few students confuse XFD with** Pre-Trial Examination of a Witness (p 55). This seems like a difficult error to fall into because XFD exclusively involves parties and Rule 7-5 examinations exclusively involve non-parties, but I can see one case where there might be confusion. Suppose a plaintiff is suing a corporate defendant and wants, for some reason, to examine the defendant's CEO as the defendant's representative on XFD. Suppose also that a low-level employee of the defendant was a witness to the alleged wrong. It might be that the plaintiff still wants to examine the CEO for discovery but as part of its investigation wants to examine the employee-witness under Rule 7-5 as well.

Use of Examination for Discovery

To what uses may evidence obtained on an examination for discovery be put? Many of the uses of XFD evidence are apparent from list enumerated in Purpose of Examination for Discovery (above). One that may not be so obvious is that XFD evidence can be used as evidence:

- on Summary Trial: Rule 9-7(5)(c), 9-7(6), and 12-5(46); and
- at trial: Rule 12-5(46).

The scope of permissible use of XFD evidence is the same on summary trial and at trial because Rule 9-7(6) imports Rule 12-5(46) into summary trials. In both kinds of trial, XFD evidence may only be used:

- if otherwise admissible; and

- against the adverse party who (or whose representative) provided the evidence.

Examination for Discovery Evidence at Trial

Is XFD Evidence Hearsay?

Since XFD evidence must be "otherwise admissible" to use at trial, the first question is whether it is hearsay. It should be obvious that the answer depends upon what the party or representative being examined said. Since ***admissions*** of a party are ***presumptively admissible*** according to the law of evidence (and it is doubtful whether they are indeed hearsay at all), any evidence given on XFD which is considered in law to be an admission of the party being examined, will likely be admissible against that party.

Use of XFD During the Plaintiff's Case

During the plaintiff's case, XFD evidence is of no use to the plaintiff in impeaching the credibility of the defendant or defendants, since typically no defence witnesses have yet been called. However, if it is otherwise admissible, the plaintiff can read the parts of the ***transcript*** which support his case into evidence at trial. Doing a ***read-in*** may be more convenient to the plaintiff's case than calling an adverse party as a witness.[2]

A ***read-in*** is exactly what it sounds like: counsel stands at the podium and reads the selected parts of the transcript to the court. Read-ins are often done after the plaintiff opens his case, but before any *vica voce* evidence is led.

During the plaintiff's case, the defence may use the XFD transcript to impeach the plaintiff's credibility on ***cross-examination*** (note that in a simple one plaintiff, one defendant case, the plaintiff is the only witness in the plaintiff's case who has submitted to XFD). This is typically done when the plaintiff gives an answer on ***cross-examination*** which differs from the answer given on examination for discovery according to the following formula:

Q *And you did X, didn't you?*
A *No, I did Y.*

Q *Are you quite sure you did Y, and not X?*
A *Yes.*

Q *Do you remember when you came to my office on such-and-such a date and I did what is called an examination for discovery?*
A *Yes.*

Q *Do you remember swearing to tell the truth?*
A *Yes.*

Q *I am placing a copy of the transcript of that examination for discovery in front of you. Would you read questions 38 and 39 for me, please?*
A *Queue, did you do X, or Y? Eh, I did X. Queue, are you sure you did X and not Y? Eh, I'm positive.*

Q *Do you remember being asked those questions?*
A *Yes.*

Q *And do you remember giving those answers?*
A *It's written here so I must have said it.*

[2] The plaintiff is permitted to do so, if desired, subject to Rule 12-5(19–26).

Q *And were those answers truthful?*

A *Yes.*

Use of XFD During the Defence Case

There is less scope to use XFD transcripts during the defence case. The defence will not often *need* to lead evidence by way of ***read-in*** because the plaintiff will usually have testified during his case-in-chief and the defence ought to have put any useful admissions in the plaintiff's discovery evidence to the plaintiff during ***cross-examination*** to satisfy the "rule" in *Browne v Dunn*. If the plaintiff denies the proposition put to him, the defence would have impeached his credibility using the formula outlined above. Thus in the ordinary course, only the transcript of the defendant's XFD will ever be alluded to during the defence case, and only during ***cross-examination*** of the defendant by plaintiff's counsel.

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 12-5(46)	/	228	If otherwise admissible, evidence given on XFD is admissible at trial, but only against the party examined (or whose representative was examined).
Rule 9-7(5)(c)	/	217	XFD evidence is admissible on Summary Trial (p 85).
Rule 9-7(6)	/	217	XFD evidence given on summary trial is subject to Rule 12-5(46).
Rule 22-2(12)	/	242	Subject to the subrule (13) information and belief exception, an affidavit must state only what the person swearing the ***affidavit*** would be permitted to state in evidence at trial.
Haughian v Jiwa	2011 BC/SC	135	Plaintiff attached her own XFD testimony to an ***affidavit***, seeking to rely on it. It is not admissible for the truth of its contents, but is admissible to decide the issue of whether the action is suitable to be decided by Rule 9-7 summary trial.

Scope of Examination for Discovery

Time Limit on Examination for Discovery

Under the Old Rules, there was no limit on the amount of examination for discovery to which a party could be subjected, a state of affairs which eventually led to widespread abuse and interminable examinations. The New Rules therefore sharply limit the amount of time XFD can go on. The amount of time permitted depends on whether the action is going forward under the standard or under the "fast track" rules.

Standard Time Limit

The "normal" time limit is given in Rule 7-2(2). Each party has the right to examine each adverse party for either:

(a) 7 hours; or
(b) any greater amount of time to which the party being examined consents.

Thus in an action involving m plaintiffs and n defendants, as long as there is no adversity of interest between any two plaintiffs or defendants, Rule 7-2(2) creates the right to $7mn + 7nm = 14mn$ total hours of discovery. The following caveats should be kept in mind:

- Rule 7-2(2) governs "***unless the court orders otherwise***", meaning that on application, the court may compress or expand the default discovery rights. On an application to extend the time limit, the court must take into account the ***factors*** given in Rule 7-2(3), including:
  (a) the conduct of the person who has been or is to be examined;
  (b) any unreasonable denial or refusal to admit by the person who has been or is to be examined;
  (c) the conduct of the examining party (for example, walking out, as in *Kendall*);
  (d) whether or not it was reasonably practicable to complete the examinations within 7 hours; and

(e) the number of parties and XFDs and the proximity of interests of the parties.

- In complex litigation, adverse parties may feel the need for more discovery time and might mutually agree to ***consent*** to additional examination.

Time Limit for Fast Track Litigation

The time limit on XFD in fast-track actions is constrained in two ways, according to Rule 15-1(11):

- No party may be examined for discovery for more than 2 hours (except by consent).
- This 2-hour limit is a total for ***all*** adverse parties with respect to any examinee. Therefore, if a plaintiff sues two defendants, those defendants must co-operate to share the 2 hours which they are collectively entitled to use to examine the plaintiff.

In other words, for m plaintiffs and n defendants, the maximum discovery time is $2m + 2n = 2(m + n)$ total hours. As with Rule 7-2(2), Rule 15-1(11) is subject to variation by ***order of the court*** or by ***consent*** of the parties. Fast track litigation also comes with the additional requirement that XFD must be completed 14 days before the scheduled trial date: Rule 15-1(12).

Scope of Questioning

An examination for discovery is in the nature of a ***cross-examination***: Rule 7-2(18). Unlike document discovery, the scope of XFD was not reduced by the New Rules. The scope of XFD remains very broad, but is ultimately constrained by the ***pleadings*** (*Allarco Broadcasting v Duke*) bearing in mind that the pleadings may subsequently be ***amended*** (*Kendall v Sun Life Assurance Co of Canada*). As long as it "***relates to a matter in question***", as defined by the pleadings, the examining party is absolutely free to elicit ***hearsay***.

A witness being examined for discovery must answer relevant, non-privileged, questions within his knowledge or means of knowledge: Rule 7-2(19)(a). The means of knowledge requirement places the witness under a ***duty to inform*** himself which is further codified in Rule 7-2(22). The examination for discovery may be adjourned so that the witness may inform himself and the witness may provide his responses by ***letter***: Rule 7-2(23). Responses by letter are deemed to be given under oath during the XFD, meaning they can be used at trial in the same way as the XFD transcript.

Once the examining party gets the response letter, he may opt to ***continue*** the XFD: Rule 7-2(24)(b), subject to the time limit given in subrule (2). This alleviates a major problem with response letters, which is that they can be carefully drafted by counsel to be as ***sanitized*** and as little damaging as possible. In any case in which the examining party thinks it likely that an adjournment to inform will be required, he should plan to keep some of his 7 hours in reserve so that he can cross-examine the witness on any response letters which are requested.

Objections

> ***[18]*** *A largely "hands off" approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the Rules of Court, particularly the newly stated object of* ***proportionality****, effective July 1, 2010. Allowing a wide-ranging cross-examination on examinations for discovery is far more cost-effective than a practice that encourages objections, which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel to raise objections to the admissibility of evidence at trial, rather than on examination for discovery.*
>
> —Griffin J, *Kendall v Sun Life Assurance Co of Canada*

Because the parties are self-policing on XFD, there is no one present at the examination who can rule on objections. The proper practice is for the court reporter to take down the question and the objection so that the court can rule on it later on application by the examining party: Rule 7-2(25).

The following are among the valid bases for objections:

- privilege—see Rule 7-2(18)(a);
- irrelevance—see ***Kendall v Sun Life Assurance Co of Canada*** and ***Allarco Broadcasting v Duke***;
- ambiguity (but it had better be real ambiguity);
- unfair or incorrect summary of the evidence;
- asking for the subjective view of the examinee (except where it is relevant);
- soliciting an "expert" opinion from an unqualified person;
- speculative or hypothetical question;
- asking the witness' opinion on a conclusion of law, even if he is a lawyer: ***Allarco Broadcasting v Duke***;
- question contains embedded assumptions ("where did you spend the money you stole from my client?")

The following are never valid objections by counsel:

- Confusing question. The witness, not counsel, can say whether he is confused by the question.
- "Asked and answered". If the examining party wants to waste 7 hours getting the witness to repeat himself, he is entitled to do so and can only cause himself prejudice that way. If he runs out of time, the court is unlikely to look favourably on an application to extend when presented with a transcript replete with unreasonably repetitious questions!

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 7-2(2)	/	199	Time limit for standard XFD is 7 hours per examining party per adverse party being examined, subject to (a) order of the court or (b) consent of the parties.
Rule 7-2(3)	/	199	Factors to consider in deciding an application to extend the discovery period under Rule 7-2(2).
Rule 15-1(11)	/	233	Time limit in Fast Track Litigation (p 111) is 2 hours total per party being examined.
Rule 15-1(12)	/	233	In a fast track action, XFD must be completed 14 days before trial.
Rule 5-3(1)(g)	/	192	JF points out that **Rule 5-3(1)(g) permits a court to make a trial management conference order expanding, limiting, or generally governing XFD**. This is of course just a restatement of Rule 5-3(1)(v) and generally the discretion given under Rules 7-2(2) and 15-1(11).
First Majestic Silver Corp v Davila	2011 BC/SC	129	The new plaintiff must examine the representative who was already XFD'd by the existing plaintiffs. This may impose a practical limit on the amount of time the new plaintiff will discover the defendant: because it is limited to the representative already chosen by the existing plaintiffs, there would seem to be little to gain by rehashing the existing plaintiffs' XFD of the representative.
Rule 7-2(17)	/	201	An examination for discovery is in the nature of a ***cross-examination***.
Rule 7-2(18)	/	201	Party being examined must answer any question: • within his knowledge; or • within his means of knowledge regarding any non-privileged issue ***relating*** to a matter in question in the action.
Rule 7-2(22)	/	201	In order to comply with Rule 7-2(18), person being examined is under a ***duty to inform*** himself and the examination may be adjourned for that purpose.
Rule 7-2(23)	/	201	If the examination is adjourned under Rule 7-2(22) so that examinee can inform himself, the examining party may request that he deliver his responses by letter.

Case/Statute	Juris.	P	Key Points
Rule 7-2(24)	/	201	If the examining party receives a letter under subrule (23), he may ***continue*** the XFD, subject to Rule 7-2(2).
Rule 7-2(25)	/	201	If the examinee ***objects*** to a question, the official reporter is to take down the question and the objection. The examining party may then apply to have the court decide on the validity of the objection.
Kendall v Sun Life Assurance Co of Canada	2010 BC/SC	143	• Only in rare cases will a court endorse request to continue XFD by party who unilaterally ended it. • In this case, plaintiff's ***right*** of cross-examination was ***thwarted*** by the defendant's constant objections. Applying principles from Rules 7-2(3) and 7-2(25), plaintiff should be able to begin discovery afresh.
Allarco Broadcasting v Duke	1981 BC/SC	120	1. What is a "matter in question" and therefore what "relates to" it within the meaning of Rule 7-2(18)(a) is governed by the ***pleadings***. 2. No witness on XFD (not even a lawyer) is required to give or verify a ***legal opinion*** about a matter in question. 3. However, a ***professional man*** can be asked for an opinion on discovery about a matter of fact ***within his knowledge*** on matters directly connected with the issues.

See Also: Scope of Examination of Non-Party Witness (p 56)

Confidentiality of Evidence Given on Examination for Discovery

JF says that **evidence given on examination for discovery is subject to the same implied undertaking of confidentiality as documents produced on discovery**. We read no cases for this proposition, but see ***Hunt v T&N Plc*** (p 137).

Interrogatories

Interrogatories are a form of ***written discovery***, governed by Rule 7-3, in which a party seeking information can serve written questions on another party which the party so served is obliged to answer. Under the Old Rules, interrogatories were available as of right. Because they were subject to abuse, interrogatories now require either ***consent*** of the party being discovered or ***leave*** of the court: Rule 7-3(1). Answers to interrogatories are by ***affidavit***: Rule 7-3(4).

Purpose of Interrogatories

The purpose of interrogatories is to enable the party serving them to obtain ***admissions*** of fact to establish his case and to provide a foundation upon which cross-examination can proceed when examinations for discovery are held: ***Roitman v Chan***.

Who May Be Sent Interrogatories?

Unlike examinations for discovery, which are clearly only available against adverse parties or their representatives, interrogatories seem to be available against ***any*** party of record, or director, officer, partner, agent, employee or external auditor of the party: Rule 7-3(1).[3] This is, however, subject to the overriding requirements of leave or consent.

When May Interrogatories Be Used?

General Principles

> ***[11]*** *. . . [A]n important general principle governing the propriety of interrogatories should be the practicality of the procedure in any given case. . . . [T]he law should encourage the selection of the tool which is likely to achieve the best result for the least effort and cost.*

[3] Interestingly, Rule 7-3(1) includes the term "partner", but Rule 7-2(5) does not. . .

> ***[12]*** *. . . Generally speaking, issues involving **extensive research**, such as **precise chronologies** or **exhaustive lists**, would seem to be more appropriate for the more expansive time-frame permitted by interrogatories than for a more confrontational, time-pressured examination for discovery. Conversely, questions requiring a narrative answer are much more likely to remain in focus at an examination for discovery, where counsel can expand on and limit the witness' questions as appropriate.*
>
> —Master Bolton, ***Roitman v Chan***

JF: **In each case, you should ask which discovery mode will ensure the most "just, speedy, and inexpensive determination of the case on its merits", having regard to considerations of proportionality**. Interrogatories should only be used, as a general proposition, for issues requiring extensive research, such as:

- precise chronologies; or
- exhaustive lists.

Interrogatories are useful for preparing for an XFD. The actual XFD itself is the best place to get the ***narrative*** of the story.

More Specific Principles

The courts will take into account the following specific principles, enumerated by Master Bolton in ***Roitman v Chan***, in deciding whether to grant leave to issue interrogatories:

✓ Principles of Interrogatories	✖ What an Interrogatory Isn't
• Interrogatories must be ***relevant*** to a matter in issue in the action. • Interrogatories are ***narrower in scope*** than an XFD. • The ***purpose*** of interrogatories is to enable the party delivering them to obtain admissions of fact to establish his case and to provide a foundation on which cross-examination can proceed in XFD. • The court may permit the party interrogated to ***defer*** its response until other discovery processes have been completed, including XFD.	• Interrogatories may ***not*** include a demand for ***document discovery***. • Interrogatories should ***not*** duplicate Particulars (p 20). • Interrogatories should ***not*** be used to obtain the ***names of witnesses***. ○ Except where the identity of the witness is a ***material fact*** (i.e. because the witness played an active role, as was alleged in *Roitman*).

Physical Examinations

Physical examination of a witness whose physical or mental condition is ***in issue*** is governed by Rule 7-6. The rules don't specifically call this procedure a form of "discovery" but, because a witness who needs to be physically examined will typically be a party to the action, it will typically function similarly to discovery rights. Physical examinations are most likely to arise in the context of personal injury cases.

Case/Statute	Juris.	P	Key Points
Rule 7-6(1)	/	205	If the physical or mental condition of a person is ***in issue***, the court may order an examination by a medical practitioner or other qualified person.
Jones v Donaghey	2011 BC/CA	141	• The phrase ***in issue*** means an ***ultimate fact*** that has to be proved to make out the cause of action. An alternative definition is a fact which, if proved, would in and of itself have legal consequences for the parties. • Ms Donaghey's mental condition is not ***in issue*** and therefore plaintiff's application to have her examined for personality disorder is denied.
Rule 7-6(2)	/	205	The court may order a further examination to any examination ordered under Rule 7-1(1).

Case/Statute	Juris.	P	Key Points
Hamilton v Pavlova	2010 BC/SC	133	While the application in this case was ***timely*** and counts as an ***exceptional case***, there is no new question. • Defendants already have Dr Moll's opinion that there is no brain injury. • ∄ anything in plaintiff's or defence expert reports which requires a psychiatric evaluation.

Other Procedures for Obtaining Evidence

In addition to the discovery procedures available under Rules 7-1, 7-2, 7-3 (and, at least arguably, 7-6), Part 7 of the Rules codifies two methods for obtaining evidence for use at trial†:

1. admissions (Rule 7-7); and
2. depositions (Rule 7-8)

†: Admissions are not limited to being used at trial—they may be used in applications as well: Rule 7-7(6).

Admissions

As we know from the law of evidence, the admission of a party is presumptively admissible in evidence against that party. Rule 7-7 provides some rules on admissions from different sources and some guidance on situations in which admissions are permitted to be withdrawn.

Types of Admissions

Rule 7-7 covers three main types of admission:

1. those requested in a ***notice to admit*** and either made or deemed to have been made;
2. those made in a pleading, petition, or response to petition; and
3. those made by a party in an affidavit or on examination for discovery.

Notice to Admit

Under Rule 7-7(1), any party of record to an ***action*** in which a response to civil claim has been filed may serve a ***notice to admit*** on any other party of record. A notice to admit requests that the party served admit the truth of a fact or the authenticity of a document for the purposes of the action only. The party served with the notice of admit has 14 days to respond with an admission, a denial, or a refusal to admit with accompanying reasons. In default of a response within the 14 day limit, the party served is ***deemed to have admitted*** the truth of the fact or authenticity of the document specified in the notice to admit: Rule 7-7(2). If the party served ***unreasonably refuses*** to admit the fact or authenticity, there may be ***costs*** consequences: Rule 7-7(4).

Other Sources of Admissions

The notice to admit procedure is not the only source of admissions. A party may admit facts of its own initiative in documentary form in a petition, response to petition, or—as was the case in *Hurn v McLellan*—in a pleading. A party can also make admissions in an affidavit (either responding to an interrogatory or otherwise), in a letter under Rule 7-2(23), or on examination for discovery.

Issue: Withdrawing an Admission

The one issue we looked at in class regarding admissions is whether a party can withdraw an admission once made.

Admissions Which Are More Difficult to Withdraw

The following types of admissions require leave of the court, under Rule 7-7(5), to withdraw:

(a) admissions made in response to a notice to admit;
(b) deemed admissions; and
(c) admissions in pleadings, petitions, or responses to petition.

Notice that this list does not include admissions made in affidavits or on examination for discovery.

Test for Leave to Withdraw Under Rule 7-7(5)

The ***test*** for leave to withdraw these types of admissions is whether there is a ***triable issue*** which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.

In the two cases we studied, the presiding masters applied the above test based on the following factors:

Factor	*Hurn v McLellan* (p 137)	*Piso v Thompson* (p 149)
• whether the admission was made inadvertently, hastily or without knowledge;	×	✓
• whether the admission is counsel's fault, not the party's fault;	×	✓
• whether the fact admitted was not within the knowledge of the party admitting it;	?	?
• whether the fact admitted is not true;	?	?
• whether the admission can be withdrawn without prejudicing a party;	×	?
• whether the admission can be withdrawn without causing loss of a trial date; and	×	×
• whether the application to withdraw was made without delay (presumably, measured from when the applicant becomes aware of the need to withdraw it).	×	✓
• whether withdrawal will further the objective of proportionality	?	✓
OUTCOME	×	✓

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 7-7(5)	/	206	Admissions made by notice to admit, deemed admissions, and admissions in pleadings, petitions, and petition responses, may only be withdrawn by consent or with leave.
Hurn v McLellan	2011 BC/SC	137	It is not enough that a ***triable issue*** exists. The interests of justice must require the withdrawal of the admission.
Piso v Thompson	2010 BC/SC	149	Rule 7-7 does not create a trap or add an inescapable obstacle to ensnare or trip up sloppy or inattentive counsel to the detriment of the ***parties*** to the litigation.

Admissions Which Are Less Difficult to Withdraw

Rule 7-7(5) makes no mention of admissions made in affidavits or on examination for discovery. JF says that **admissions made on XFD are easier to withdraw. The correct procedure is for the party wishing to withdraw the admission to write a letter to examining counsel**.

Depositions

It sometimes occurs that a witness with material evidence is unwilling or unable—or in any event *will be* unable by the time the trial finally rolls around—to testify in person. When this happens, it may be necessary or convenient to take the witness' evidence by deposition under Rule 7-8. A deposition is a form of pre-recorded sworn evidence. A witness may only be deposed by ***consent*** of the parties or with ***leave*** of the court.

A deposition can be recorded in the form of questions and answers, although nowadays it is more likely to be video-recorded. The examining party conducts a direct examination and the witness is subject to cross-examination, presumably by the adverse parties. The recording of the deposition is then adduced into evidence ***in its entirety*** at trial.

Issue: Should Leave to Depose a Witness Be Granted?

Real time evidence is preferred to deposition for a number of reasons. Partly this has to do with the court's ability to assess the credibility of the witness. But it also has to do with the quality of the evidence given by the witness. Depositions take away the court's ability to control the conduct of examinations by ruling on objections in real time. Furthermore, depositions prevent counsel from adjusting their examination of the witness in response to rulings on objections and in response to other evidence coming to light during the course of the trial. Thus where possible, the court will nearly always prefer evidence given in real time to recorded depositions. Where live testimony by way of videoconference is available, JF says that **the court will almost always prefer live video evidence to deposition**.

Case/Statute	Juris.	P	Key Points
Rule 7-8(3)	/	206	Factors the court is to consider in deciding whether to order a deposition: (a) the convenience of the person sought to be examined; (b) the possibility that the person may be unavailable to testify at trial; (c) the possibility that the person will be beyond the jurisdiction of the court during the trial; (d) the possibility and desirability of having the person testify at trial by video conference or other electronic means; and (e) the expense of bringing the person to trial.
Campbell v McDougall	2011 BC/SC	124	• Dr Maloon must testify by videoconference rather than being deposed. • The deciding factor is (d): the ***possibility*** of Dr Maloon testifying by videoconferencing.

Other Procedures for Ascertaining Facts

~~Pre-Trial~~ Examination of a Witness

The final procedure for ascertaining facts in Part 7 of the Rules is "Pre-Trial Examination of Witnesses" under Rule 7-5. The title of the rule is something of a misnomer since in the first place there is no hard requirement that the examination take place before trial (see *Delgamuukw No. 1*), and in the second place only a subset of witnesses is permitted to be examined under the rule, namely non-party witnesses. A better title for the rule would be "Examination of Non-Party Witnesses".

Examination of non-party witnesses under Rule 7-5 is not in aid of discovery. It is a ***cross-examination*** of an uncooperative ***non-party*** witness, on oath, for ***purely informational*** purposes. The witness may only be examined with ***leave*** of the court.

Who May Be Examined?

A person who:

- is ***not*** a party of record; and
- may have ***material evidence*** relating to a matter in question in the action

may be examined with leave of the court: Rule 7-5(1). This raises the question how the court decides whether or not to grant leave. The ***test***, which varies depending on whether the witness in question is an expert retained by a party, is given in the sub-headings below.

Test for Examination of a Witness Who is Not a Retained Expert

Rule 7-5(3) stipulates the ***affidavit*** evidence that an applicant must bring in support of an application to examine a non-party witness. The applicant must provide evidence:

- of the matter in question to which it believes the proposed witness' evidence may be material; and

- that the proposed witness either
  - has refused or neglected to give a responsive statement†; or
  - has given conflicting statements.

†: JF says that **refusal to come down to your office doesn't count as refusal to provide a responsive statement**. The proposed witness is well within his rights to speak with you on the telephone or provide a written statement, at his option. As long as the substance of the statement is responsive, you will not get a Rule 7-5 order.

Test for Examination of a Witness Who Is a Retained Expert

The test for examination of a witness who has been retained as an expert by a party to the litigation is the same as that provided in Rule 7-5(3) with the addition of one extra requirement. The extra requirement is that the party seeking to examine the expert must be ***unable to obtain facts or opinions*** on the subject ***by other means***: Rules 7-5(2) and 7-5(3)(b).

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 7-5(1)	/	204	A non-party witness who may have material evidence relating to a matter in question in the action may be examined on oath with leave of the court, subject to the requirements of subrules (2) and (3).
Professional Conduct Handbook 8:12	/	259	The ability to examine a recalcitrant non-party witness flows from the principle that ***there is no property in a witness***.
Rule 7-5(2)	/	204	If the non-party witness is an expert retained by another party, he may not be examined unless the party seeking to examine him is ***unable to obtain facts and opinions*** on the same subject ***by other means***.
Rule 7-5(3)	/	204	Evidence required to support an application to examine an on-party witness (i.e. this rule contains the test).
Sinclair v March	2001 BC/SC	156	• While Dr Christensen is an expert, he is not retained by either of the parties. • He has ***unique and irreplaceable knowledge*** and is required to submit to examination by the plaintiff.
Delgamuukw v British Columbia (No. 1)	1988 BC/SC	126	Ms Harris has material evidence relating to the Gitksan genealogy. The defendants are unable to obtain facts and opinions by other means and Ms Harris has failed to provide a responsive statement.
Professional Conduct Handbook 8:14	/	259	A lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional ***privilege***, unless the privilege has been waived.

Use of Examination of Non-Party Witness

Examination of non-party witnesses may only be used for informational purposes. It cannot be used to record evidence or to provide admissions. Indeed, the "admission" of a non-party witness isn't an admission in the sense the term is used in the law of evidence and would be presumptively inadmissible hearsay if one of the parties attempted to lead it at trial. A party obtaining an order under Rule 7-5 can thus use the examination of a non-party witness only to find out what evidence the witness has and might give at trial, and for general investigation of the facts of the case.

Scope of Examination of Non-Party Witness

Time Limit on Examination of Non-Party Witness

Unless the court otherwise orders, no witness can be subjected to more than 3 hours of total examination time by all parties of record together: Rule 7-5(9). There is no provision for consent in the text of the rule.

Scope of Questioning

A Rule 7-5 examination is in the nature of a ***cross-examination*** and has a broad scope similar to that of examination for discovery. However, there is one difference between the two, which would only seem to apply when there are either multiple plaintiffs or multiple defendants:

> *[13] . . . The scope of inquiry is broader under [Rule 7-5] because it is not limited to matters at issue between the parties as defined in the pleadings but includes all that is generally relevant between all parties. [Rule 7-2] discovery does not examine all of the facts whereas [Rule 7-5] allows factual information to come from anyone who was ". . . on the spot" or knew ". . . exactly what happened . . ."*
>
> —Dillon J, ***Sinclair v March***

Case/Statute	Juris.	P	Key Points
Rule 7-5(8)	/	204	The witness may be cross-examined by the party who obtained the order, then may be cross-examined by any other party of record and then may be further cross-examined by the party who obtained the order.
Rule 7-5(10)	/	205	Rule 7-2, subrules (12), (16), (18), (22) and (25) to (28) apply to examinations under Rule 7-5. Those subrules which are relevant to this course are excerpted in this table.
Rule 7-2(12)	/	200	By way of Rule 7-5(10): examination of a non-party witness must be conducted before an official reporter who is empowered to administer the oath.
Rule 7-2(18)	/	201	By way of Rule 7-5(10): the witness (a) must answer any question within his knowledge ***or means of knowledge*** regarding any matter, not privileged, ***relating*** to a matter in question in the action; and (b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.
Rule 7-2(22)	/	201	By way of Rule 7-5(10): the witness is under a duty to inform himself.
Rule 7-2(25)	/	201	By way of Rule 7-5(10): objections to be taken down by the court reporter and may be ruled on by the court.
Rule 7-2(26)	/	202	By way of Rule 7-5(10): examination to be transcribed in the form of questions and answers.
Sinclair v March	2001 BC/SC	156	Dr Christensen must give his expert opinion on matters of fact (i.e. opinions he formed from seeing or hearing something "on the scene").

See Also: Scope of Examination for Discovery (p 48)

Comparison Chart

The following table provides a side-by-side comparison of the most comparable procedures for ascertaining facts.

	Examination for Discovery	Interrogatories	Physical Exam	Pre-Trial Examination	Deposition
Rule	7-2	7-3	7-6	7-5	7-8
Type	Discovery	Discovery	~Discovery	Investigation	Trial Evidence
Form	Oral, cross-examination on oath	Written, with responses provided by affidavit	Physical + oral	Oral cross-examination on oath	Oral direct examination subject to cross-examination and re-examination
How?	As of right	Leave or consent	Leave	Leave	Leave
Who?	Rule 7-2(1) 1. party of record 2. adverse in interest	Any party of record or director, officer, partner, agent, or employee of party of record	Person†	Rule 7-5(1) Uncooperative non-party witness who may have material evidence relating to an issue	Witness

	Examination for Discovery	Interrogatories	Physical Exam	Pre-Trial Examination	Deposition
Time	• Rule 7-2(2): 7h/party • Rule 7-2(2): court may extend • Rule 15-1(11): $\sum_{\forall party} t_{party} \leq 2h$	∅	∅	Rule 7-5(9): $\sum_{\forall party} t_{party} \leq 3h$	∅
Use at Trial	Trial: 12-5(46) Summary Trial: 9-7(5)(c)	Trial: 12-5(58) Summary Trial: 9-7(5)(b)	Presumably mainly through Part 11	Only to impeach the witness	The whole thing, as the testimony of the witness deposed

†: But because physical or mental condition must be in issue, you have to assume this will frequently be a party.

6. Chambers

This chapter is *mostly* about general aspects of chambers practice: the mechanics of making an application; the kinds of evidence which may be adduced in chambers; the difference between the jurisdiction of superior court judges and provincially-appointed masters; and how to appeal from orders made in chambers. However, certain topics in this chapter are applicable beyond the context of chambers. The most importance of these is the final section on calculating time. In addition, the sections on orders and appeals have aspects which apply outside of the chambers world.

CHAMBERS GENERALLY

Chambers proceedings are governed generally by Rule 22-1. Additional rules relevant to chambers are found in Part 8 of the Rules and Rules 18-3, 22-2, and 23-6. Even more rules are to be found in enactments of the BC legislature, Practice Directions issued by the Chief Justice of the Supreme Court, the *Constitution Act, 1867*, and the common law.

Who Presides in Chambers?

Days of yore, the term "chambers" referred to a judge's actual chambers, in which the judge would hear various applications of an interlocutory nature. Given the massive delays now built into our court system and the—perhaps consequent—increase in the number of interlocutory applications, chambers applications are now heard in dedicated courtrooms.

In British Columbia, a judge of the Supreme Court presides in some chambers courtrooms and a master presides in others. Whether a matter will be heard in judge's chambers or master's chambers depends on the nature of the matter. If it falls within the jurisdiction of a master, it will likely be heard in master's chambers for reasons of efficiency. If it is not within the jurisdiction of a master, it will be heard in judge's chambers.

What Matters Are Heard in Chambers?

Chambers is the venue for hearing ***interlocutory*** matters. An interlocutory application takes place at an interim stage of the proceedings and does not result in a final disposition of the proceeding on its merits. For example, an application for an order that an opposing party produce a further and better list of documents under Rules 7-1(10) and (13) is interlocutory in nature.

Not all questions heard in chambers are interlocutory matters, however. Both masters and judges may make ***final orders*** in chambers. In the case of masters, the final order must be within the jurisdiction of a master. For example, a master can make an order for default judgment. A judge can make any final order in chambers which is permitted by law. For example, a Summary Trial (p 85) application is heard by a judge in chambers and the judge may pronounce final judgment after the hearing.

What Kinds of Evidence May Be Adduced in Chambers?

The general rule is that evidence in chambers ***must*** be given by sworn Affidavits: Rule 22-1(4). Nevertheless, paragraphs (a) to (e) of Rule 22-1(4) also allow five other "kinds of evidence" to be adduced at the ***discretion*** of the court. The most importance of these forms are:

- Cross-examination on an affidavit, which is permitted by paragraph (a) and is discussed in more detail below.

- Direct examination of a party or witness, either before the court or before another person as directed by the court. This is permitted by paragraph (b).
- The catch-all "other forms of evidence" under paragraph (e), which is discussed in more detail below.

Cross-Examination on an Affidavit

At its discretion, the court may order ***cross-examination on an affidavit***. This means that the court may order the deponent who swore an affidavit to submit to cross-examination either:

- before the court; or
- before another person as the court directs.

The former option (before the court) is more likely to be ordered where there is a serious issue of ***credibility***. The latter option (before another person) would typically be conducted in the offices of a law firm, before a court reporter, in a manner similar to an Examination for Discovery. Keep in mind that the court may order this kind of evidence on any chambers proceeding, and a party conducting a summary trial or an application for summary judgment, for example, could apply to court under Rule 22-4 in order to cross-examine a witness or party who swore an affidavit.

On an application to cross-examine on an affidavit, the court will consider the following factors:

- whether there are ***material*** facts in issue;
- whether the cross-examination is ***relevant*** to an issue that may affect the outcome of the substantive application; and
- whether the cross examination will serve a ***useful purpose*** in terms of eliciting evidence that would assist in determining the issue.

The ***scope*** of cross-examination on an affidavit is ***narrower*** than in examinations for discovery and ~~pre-trial~~ examination of a witness. The deponent can only be cross-examined on facts he has sworn to and matters relevant to the application.

The Catch-All Clause: Rule 22-1(4)(e)

Rule 22-1(4)(e) is a catch-all provision permitting the court to receive "other forms of evidence". This provision is most commonly invoked to permit the court to rely on unsworn ***statements of counsel*** as evidence in chambers proceedings. The *MTU Maintenance* case suggests that such unsworn statements may be permitted, subject to the discretion of the court, if:

- they do not attempt to establish ***new facts*** but rather seek to explain or amplify other affidavit evidence;
- they do not seek to establish facts of ***singular importance*** to the outcome of the application; and
- the facts they attempt to establish are within counsel's ***personal knowledge*** (i.e. not hearsay).

NOTE: JF is adamant that we be cautious with paragraph (e) and **never rely on the ability to rely on unsworn statements of counsel**.

Relevant Rules and Cases

Case/Statute	Juris.	P	Key Points
Rule 22-1(4)	/	240	As a general rule, evidence in chambers ***must*** be given by ***affidavit***.
Rule 22-1(4)(a)	/	240	The court may order cross-examination on an affidavit.

Case/Statute	Juris.	P	Key Points
Rule 22-1(4)(b)	/	240	The court may order direct examination of a party or witness, either before the court, or before someone else.
Rule 22-1(4)(e)	/	240	The court may receive "other forms of evidence", of which the most prominent example is unsworn statements by counsel.
MTU Maintenance Canada v Kuehne & Nagel Int'l	2007 BC/CA	147	**While unsworn statements by counsel may be permissible in some circumstances, they should not be relied on to establish new facts, not within the personal knowledge of counsel, or facts which are of singular importance to the outcome of the application.** (JF)

See Also: Affidavits (p 64)

What Powers Does the Court Have in Chambers?

The powers of the court on the hearing of a chambers proceeding are given in a general way by Rule 22-1(7). Of the powers enumerated in paragraphs (a) to (d) of subrule (7), the following are the most important for the purpose of this course:

- Not only may the court "grant or refuse the relief claimed in whole or in part", under paragraph (a), but it may also "dispose of any question arising on the chambers proceeding". This latter power is discussed in more detail under the heading below.
- Under paragraph (d), the court may order the trial of a chambers proceeding, a power which includes the power to convert a petition proceeding into an action. The test for converting a petition proceeding is discussed under a heading below.

Disposing of Any Question Arising

If an issue arises during the hearing of a chambers proceeding which was not raised in the documents filed for the hearing (i.e. petition and response to petition, notice of application and response to notice of application, &c), Rule 22-1(7)(a) empowers the court to dispose of that question on the hearing of the chambers proceeding. This power is, however, ***subject to*** the rules of ***natural justice*** and in particular, the ***right to be heard***: *Bache Halsey Stuart Shields Inc v Charles*. Therefore, if one party does not have sufficient ***notice*** of the issue (which will often, but not necessarily exclusively, happen when one party does not appear at the hearing), the court is not permitted to dispose of the issue.

Converting a Petition Proceeding into an Action

The ***test*** for converting a petition proceeding into an action under Rule 22-1(7)(d) is whether there are *bona fide* triable issues between the parties that cannot be resolved on the documentary evidence: *Southpaw Credit v Asian Coast Development (Canada) Ltd*. The following ***factors*** assist in deciding this question:

(a) the undesirability of a ***multiplicity of proceedings***;
(b) the desirability of avoiding unnecessary ***costs and delay***;
(c) whether any issues require an assessment of the ***credibility*** of witnesses;
(d) the need for the court to have a ***full grasp of all the evidence***; and
(e) whether it is in the interests of justice to have ***pleadings and discovery*** in the usual way.

With respect to factor (d), the need for the court to have a full grasp of all the evidence, JF says that **the courts in British Columbia take a robust view of what can be done summarily, and of their ability to resolve complex matters on documentary evidence**. With respect to factor (c), and probably (d) as well, keep in mind that Rule 22-1(4)(a) gives the court the discretion to order cross-examination on affidavits. This evidentiary device may be

sufficient to allow the court to assess credibility, or achieve a full grasp of the evidence, without the need to order a full trial.

RELEVANT RULES AND CASES

Case/Statute	Juris.	P	Key Points
Rule 22-1(1)(a)	/	240	A chambers proceeding includes a petition proceeding.
Rule 22-1(7)(a)	/	240	In addition to the power to grant or refuse the relief claimed in whole or in part, the court has the power to dispose of any question arising on a chambers proceeding.
Rule 22-7(1)	/	244	Unless the court otherwise orders, a failure to comply with the Rules is an irregularity and does not nullify a proceeding, step take in a proceeding, or any document or order made in a proceeding.
Bache Halsey Stuart Shields Inc v Charles	1982 BC/SC	121	• Despite Rules 22-1(7)(a) and 22-7(1), an irregularity which causes a failure of ***natural justice*** is a ***nullity*** and the court may set aside its own order in that case. • Failure to give the defendant notice that default judgment would be sought against him in an application to strike his defence deprived him of his ***right to be heard***.
Rule 22-1(7)(d)	/	240	The court has the power on a chambers proceeding to order the trial of an issue or generally, including converting a petition proceeding into an action.
Southpaw Credit v Asian Coast Development (Canada) Ltd	2012 BC/SC	156	• Test for converting petition proceedings into an action, including factors to consider. See Converting a Petition Proceeding into an Action (above). • Southpaw's application to convert the oppression proceeding into an action is denied because the factors do not suggest it is required.
Rule 22-1(4)(a)	/	240	When applying the *Southpaw* factors, keep in mind that the court has the power to order cross-examination on affidavits on a chambers proceeding.
Rule 22-1(4)(b)	/	240	When applying the *Southpaw* factors, keep in mind that the court has the power to order direct examination of a party or witness on a chambers proceeding.

MASTERS

Unlike superior court judges, who are appointed by the Governor General (i.e. the Prime Minister) under section 96 of the *Constitution Act, 1867*, Supreme Court masters are appointed under section 11 of the provincial ***Supreme Court Act*** by the Lieutenant Governor in Council. The main examinable issue we face with respect to masters is the question of whether a particular matter is within the ***jurisdiction*** of masters.[4]

Jurisdiction of Masters

Because they are provincially appointed, masters have only statutory, and not inherent, ***jurisdiction***, and this jurisdiction is subject to ***constitutional limitations***, since the province is not constitutionally able to appoint judicial officers who have the same powers as superior court judges and just call them something different.

The starting point for an analysis of the jurisdiction of a master is section 11(7) of the ***Supreme Court Act***, which states that masters have the same jurisdiction as a ***judge in chambers***, subject to the following two limitations:

1. a direction by the Chief Justice of the Supreme Court that the master is not to exercise a particular jurisdiction; and
2. constitutional limitations.

These two types of limitations are addressed under the headings below.

[4] There is a corresponding real life practice question. In their preparation for chambers matters, counsel need to know whether that matter can be heard by a master or must be heard by a judge.

Directions by the Chief Justice

On April 25, 2012, Chief Justice Bauman issued a Practice Direction, entitled ***PD-34 — Master's Jurisdiction***, which does place certain limits on what masters are permitted to do. The practice direction is structured in two parts. Part A (paragraphs 1–2) directs that a master is not to exercise his jurisdiction in certain cases. Part B (paragraphs 3–7) offers guidelines on certain types of ***final orders*** which a master is permitted to make. The following table summarizes the most important of these:

Part A Orders a master is not permitted to make		**Part B** Orders a master can make, subject to constitutional limitations	
¶	Order	¶	Order
2(a)	Grant relief where power to do so is expressly conferred on a judge by a statute or rule.	4(a)	Interlocutory applications under the Rules. . .
2(b)	Dispose of an ***appeal*** or application in the nature of an appeal on the merits.	5	Certain interim orders in family law cases.
2(c–d)	Approve settlements and grant judgment by consent when one of the parties is under a ***legal disability***.	6(a)	Final orders by consent, except where one of the parties is under a ***legal disability*** as described in ¶ 2(c).
2(g)	Grant ***injunctions*** except for interim relief in certain enumerated family law matters.	6(b)	Final orders under Rule 22-7.
2(i)	Set aside, amend, or vary the order of a judge other than: 1. to change a time limit prescribed by an order provided that the original order was one a master has the jurisdiction to make; and 2. to vary interim orders which a master has the constitutional jurisdiction to make.	6(c)	Final orders for Summary Judgment under Rule 9-6 where there is no triable issue.
		6(d)	Final orders Striking Pleadings under Rule 9-5 1) provided that there is no determination of a question of law relating to issues in the action.
		6(e)	Final orders granting Default Judgment.

Constitutional Limitations

The constitutional limitations on the jurisdiction of masters are explained in the case of ***Pye v Pye***. A master may not:

- weigh evidence;
- decide appeals; or
- decide contested issues of fact or law.

NOTE: JF is adamant that **we must not apply a simplistic framework of interlocutory versus final orders**. Masters have the jurisdiction to make some final orders. See for example ¶ 6 of PD-34.

Relevant Legal Rules

Case/Statute	Juris.	P	Key Points
Supreme Court Act s 11(7)	RSBC 1996	246	A master has the same jurisdiction as a judge in chambers except that this is subject to constitutional limitations and prohibitions on the exercise of that jurisdiction by the Chief Justice of the Supreme Court.
PD-34 — Master's Jurisdiction	/	245	Part A indicates the prohibitions permitted by s 11(7) of the *Supreme Court Act*. Part B provides guidance on what is permitted, subject to constitutional limitations.
Pye v Pye	2006 BC/CA	150	Describes the constitutional limitations on a master's jurisdiction.

See Also: Appealing the Order of a Master (p 69)

Practice Note from Master Scarth

If you have a question as to the jurisdiction of a master, advise the registrar promptly so that you and your friend can have 5 minutes to argue jurisdiction in the morning. If you do this, you will be able to avoid sitting around all day waiting for a 40 minute application that won't be heard because of jurisdiction.

AFFIDAVITS

An affidavit is a ***written statement*** of evidence ***sworn*** by the person giving the evidence (the ***deponent***) by a person authorized to take affidavits. A court relies on affidavit evidence in the same way as it relies on oral testimony. Moreover, affidavits are the principle type of evidence in chambers proceedings: Rule 22-1-(4).

Ethics and Affidavits

COUNSEL AS DEPONENT

The basic rule is that counsel who is appearing as an advocate should not be giving evidence. The courts do not like being placed in the position of having to rule on counsel's credibility. For this reason, counsel should not swear an affidavit in a proceeding in which he is acting as an advocate. The ***Professional Conduct Handbook*** is quite clear on the Law Society expects lawyer to withdraw in the event that they are compelled to give material testimony. The new ***Code of Professional Conduct*** which is to take effect in 2013 is a little bit more ambiguous due the addition of a new clause, but overall seems to be saying the same thing.

Case/Statute		Juris.	P	Key Points
Professional Conduct Handbook	8:9	/	259	A lawyer who gives *viva voce* or affidavit evidence in a proceeding must not continue to act as counsel in that proceeding unless (a) the evidence relates to a purely formal or uncontroverted matter, or (b) it is necessary in the interests of justice.
Code of Professional Conduct	4.02	/	261	• Paragraph 4.02(1)(a), adds an option permitting the lawyer who appears as an advocate to testify or submit his own affidavit evidence if "permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal". • Since this option is part of a disjunction, and since I'm not aware of any rule of law forbidding the lawyer from testifying, this new paragraph seems to be very permissive. • However, the ***commentary*** associated with the rule is significantly less permissive. It says in part: "The lawyer who is a necessary witness should testify and ***entrust the conduct of the case to another lawyer***."

OTHER ETHICAL REQUIREMENTS

PURPOSE OF AFFIDAVITS

You can only have a witness swear an affidavit if you intend to rely on the affidavit as evidence. You may not have a witness swear an affidavit to use for the purpose of impeaching that witness.

THE REALITY: LAWYERS DRAFT AFFIDAVITS

Lawyers draft the vast majority of affidavits. JF says that **lawyers must draft according to the evidence, education, and understanding of the client or witness who must review and swear the affidavit**.

TRUTH OF AFFIDAVITS

Affidavits are sworn evidence. Intentionally swearing a false affidavit is perjury, a criminal offence. It follows that a lawyer who drafts an affidavit for a client or witness is under an obligation to ensure the deponent knows what is in the affidavit so that he can truthfully swear or affirm its accuracy. We didn't really get into this in class, but the following rules seem to be relevant.

Case/Statute		Juris.	P	Key Points
Professional Conduct Handbook	8:1(b)	/	258	A lawyer must not knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable

Case/Statute	Juris.	P	Key Points
Myers v Elman	1940 Eng/HL	147	• A solicitor is an ***officer of the court*** and cannot allow the client to make whatever affidavit of documents he thinks fit. • There is no reason to believe this rule doesn't apply to affidavits generally, and not only affidavits of documents.
Professional Conduct Handbook 8:1(h)	/	258	A lawyer must not knowingly permit a witness to be ***presented in a false way***.
Professional Conduct Handbook 8:2–5	/	258	Prohibitions against permitting your client or a witness to give false testimony.
Professional Conduct Handbook Appendix 1:1(c)	/	261	• A lawyer must not swear an affidavit or take a solemn declaration unless the deponent understands or appears to understand the statement contained in the document. • This would seem to indicate that the deponent has to have read, or had read to him, the entire document. Otherwise, how can it be said that he understands or appears to understand the statement?

Content of Affidavits: What Evidence is Admissible?

The general rule is that an affidavit may only state what the person swearing it would be permitted to state in evidence at trial: Rule 22-2(12). There is, however, one significant exception to this rule. Provided that the application is ***not*** made in respect of an application which seeks a ***final order***, the affidavit may contain statements as to the ***information and belief*** of the person swearing or affirming the affidavit, provided that the source of the information and belief is stated in the affidavit. In other words, affidavits in support of ***interlocutory*** applications can contain ***hearsay*** as long as the deponent identifies the source of the hearsay.

Striking Portions of an Affidavit

If an affidavit served on a party to an application is defective, the party can apply under Rule 22-2(12) or (13) to have the defective portions struck in advance of the hearing on the merits. This will entail a hearing for the application to strike at some date before the main hearing. Alternatively, the application to strike can be heard concurrently with the main hearing, in which case the court will "strike" the defective portions by according them no weight in its decision on the merits: *Haughian v Jiwa*.

Exhibits

Exhibits can be attached to affidavits, but exhibits must themselves be admissible evidence. For example, if a document is attached as an exhibit, the affidavit must identify the document just as the witness would do if giving *viva voce* evidence from the box. A ***written statement*** given by the witness, such as the one which was attached as an exhibit in *Haughian v Jiwa*, is only admissible if it is admissible under the applicable rules of evidence (*Haughian* suggests present memory revived, although I suspect that it would have to be admitted under ***past recollection recorded***). The deponent must therefore lay the groundwork for the admissibility of the statement by swearing to the facts required to make it admissible (i.e. "I have exhausted my whole memory on this point", &c).

Relevant Rules and Cases

Case/Statute	Juris.	P	Key Points
Rule 22-2(12)	/	242	Subject to subrule (13), an affidavit must state only what a person swearing it would be permitted to state in evidence at trial.
Rule 22-2(13)	/	242	An affidavit in support of an ***interlocutory*** application can contain ***hearsay***, as long as the source of the hearsay is stated.
Tate v Hennessey	1900 BC/CA	159	This case essentially restates Rule 22-2(13).

Case/Statute	Juris.	P	Key Points
Haughian v Jiwa	2011 BC/SC	135	1. Ms Haughian's XFD transcript is ***not admissible*** for the truth of its contents. However, it is admissible for the narrow purpose of determining whether the issues are capable of being resolved by summary trial. 2. Parts of the witness' affidavit are inadmissible because they are ***personal assumptions***, ***commentary***, and ***argument*** rather than fact. 3. The statement the witness provided to ICBC and attached as an exhibit is not admissible because the defendant would have had to exhaust his full memory before being given an opportunity to refresh it at trial.
Director of Civil Forfeiture v Doe (No. 2)	2010 BC/SC	128	The affidavits in support of the application to set aside the default judgment contained not only hearsay, but worthless hearsay, because the sources of information and belief were not identified.

Affidavit Examples

JF provided the following 3 examples of affidavits in class.

EXAMPLE #1

My son does not want to play hockey.

This is a statement of opinion and hence inadmissible. If your son told you (or he told your wife, and she told you) that he doesn't want to play hockey, then this is a statement based on information and belief and the source of the information and belief is not given. If you inferred that he doesn't want to play because he acts all pouty every time you take him to the rink, then again this is a statement of opinion and not fact.

EXAMPLE #2

I was told by the engineer, and verily believe, that the cost of repairing the drain pipes will likely exceed $25,000.

This seems like more of a practice note from JF. She said that **affidavits frequently fail to adequately describe** the source of information and belief (i.e. in this case, the affidavit would have failed to provide the name and contact information of "the engineer"). This identifying information is crucial, since another party may very well want to contact the engineer. If the engineer is adequately described, however, then this affidavit is admissible under Rule 22-2(13)(a) if used to seek an interlocutory order.

EXAMPLE #3

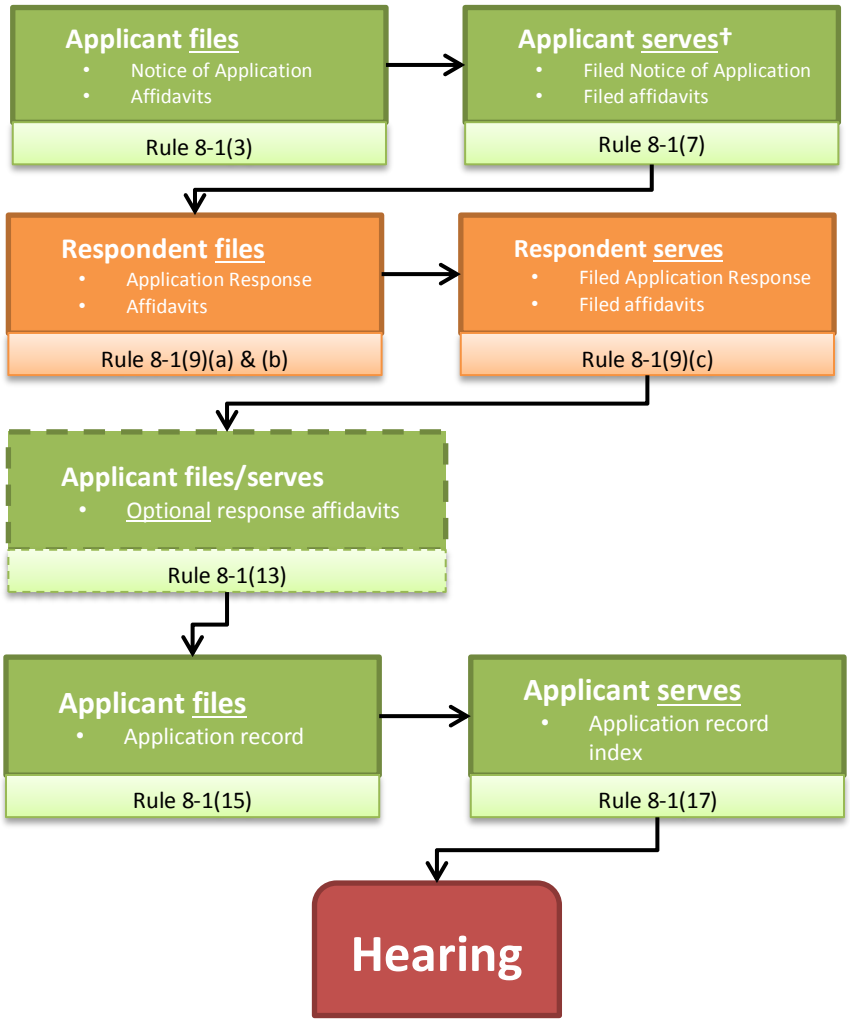
The defendant should not be permitted to use my assets against my will and without my permission. This will just encourage him to do whatever he wants.

This is argument and hence inadmissible.

APPLICATIONS

The application process is governed by Part 8 of the Rules. In class, we only focussed on the basic procedure in Rule 8-1.

Application Flowchart



- At least 8 business days before hearing
  - Rule 8-1(8)(a)
- At least 12 business days before hearing
  - Summary Trial (p 85)
  - Rule 8-1(8)(b)

- Within 5 business days after service
  - Rule 8-1(9)
- Within 8 business days after service
  - Summary Trial (p 85)
  - Rule 8-1(9)

No later than 4pm on the business day that is one business day before the date set for the hearing: Rule 8-1(13).

No later than 4pm on the business day that is one business day before the date set for the hearing: Rule 8-1(15) & (17)

†: See Service Requirements for Notice of Application, below

Applications involve at most a 3-step process. Once any (optional) response affidavits are filed and served by the moving party, neither party is permitted to serve any other affidavits: Rule 8-1(14).

Who Sets the Hearing Date?

For applications estimated to take 2 hours or less, the applicant generally picks the date of the hearing: Rule 8-1(5–6). However, the applicant should show professional courtesy toward the application respondents by arranging the scheduling with the respondents. The registrar schedules applications estimated to take more than two hours.

Case/Statute	Juris.	P	Key Points
Rule 8-1(5)	/	209	Subject to subrule (6), the hearing of an application must be set for 9:45 am on a date on which the court hears applications (or at a date or time fixed by the court or registrar).
Rule 8-1(6)	/	209	If the applicant estimates that the application will take ***more than 2 hours***, the date and time of hearing must be fixed by a registrar.
Professional Conduct Handbook	1:4(1)/	257	A lawyer's conduct toward other lawyers should be characterized by ***courtesy*** and ***good faith***.

Application Materials

Apart from the affidavits which all parties must file in support of their application materials, there are three main documents:

1. The ***notice of application***, filed by the applicant. This document may not exceed 10 pages in length.
2. The ***application response***, filed by anyone† who wishes to respond to the notice of application. This document may not exceed 10 pages in length.
3. The ***application record***, filed by the applicant.

†: See Service Requirements for Notice of Application, below, to understand why the word "anyone" is used.

For an application estimated to take two hours or less, the notice of application and application response, are the only documents which the moving party and the application respondent(s), respectively, are permitted to hand up to the court. See Rule 8-1(16).

The main ***issue*** which we looked at in class with respect to application materials relates to the quality of the written materials provided to the court. The notice of application and application response ***must*** contain more than cursory listing of Rules which ***might*** apply: ***Zecher v Josh***.

Case/Statute	Juris.	P	Key Points
Rule 8-1(4)	/	209	Notice of application may not exceed 10 pages (other than any draft order attached to it).
Rule 8-1(10)	/	210	Application response must not exceed 10 pages.
Rule 8-1(15)(c)(iii)	/	211	The application record may contain a list of authorities. See *Zecher v Josh*.
Zecher v Josh	2011 BC/SC	167	Part 3 of the ***notice of application*** is intended to contain more than a cursory listing of the Rules which *might* support the application. • Common law authorities can and should be cited along with a brief legal analysis. • A comprehensive legal analysis can easily be included in a 10-page notice of application. Moreover Rule 8-1(15)(c)(iii) permits the parties to include a ***list of authorities*** with the ***application record***.
Rule 8-1(16)	/	211	Unless the application is estimated to take ***more than 2 hours***, no party to the application may file or submit a written argument ***other than*** what is included in that party's notice of application or application response.

Service Requirements for Notice of Application

Rule 8-1(7) stipulates that the notice of application must be served:

1. on each of the parties of record; and
2. on every other person who ***may be affected*** by the order sought.

The "every other person who ***may be affected***" language means that the notice may need to be served on a much broader class of people than just the parties to the proceeding. This is a potentially tricky exam issue, so be alert for it if any question involves service of a notice of application.

ORDERS

The result of the court process, if taken to its conclusion, is an order from the court. The formal aspects of orders are governed by Rule 13-1.

In British Columbia, while the courts provide the substance of their orders, they do not actually write the text (the "form") of their orders. Orders are drawn up by the parties—typically, by counsel for the party in whose favour the order was obtained—and, except where the court otherwise orders, must be approved by all parties of record or their lawyers. It goes without saying that counsel is obligated to ***draft fairly***, according to what the judge or master actually said. Approval is as to the ***form*** of the order, rather than its substance, since the substance is supposed to have been provided by the court.

The main ***issue*** we looked at with respect to orders is the obligation of the parties to ensure that the orders they draw up and approve are unambiguous and enforceable: ***Halvorson v British Columbia (Medical Services Commission)***.

The ***second important thing*** to remember is that orders generally ***take effect*** from the date they are pronounced, not the date that they are filed: Rule 13-1(8). This is important for appeals, for example. If you have 14 days to appeal the decision of a master under Rule 23-6(9), this means you must appeal within 14 days from the date that the order was pronounced, which may be much less than 14 days from the time the form of the order was finally approved.

Case/Statute	Juris.	P	Key Points
Rule 13-1(1)	/	228	General process for drawing up and approving an order.
Halvorson v British Columbia (Medical Services Commission)	2010 BC/CA	133	Court orders must be clear on their faces and not require extrinsic sources to interpret them.
Rule 13-1(8)	/	229	The ***effective date*** of an order is the date it was pronounced, unless the court orders otherwise.
Rule 13-1(17)	/	230	• The court may at any time ○ ***correct*** a clerical mistake in an order; ○ ***correct*** an error arising from an accidental slip or omission; or ○ amend an order to provide for any matter that should have been but was not adjudicated on. • JF mentions that as well as Rule 13-1(17), **the court has an inherent jurisdiction to correct its orders**. (But does this apply only to superior court judges and not masters?)

APPEALS

For the purpose of this course, we are interested in the following types of appeals:

1. appeals of an order or decision of a master, which may be either:
    a. interlocutory; or
    b. final; and
2. appeals of an order of a judge of the Supreme Court.

Appealing the Order of a Master

A person affected by the order or decision of a master can appeal it by filing a ***notice of appeal*** within 14 days of the order or decision complained of: Rule 23-6(8–9). The appeal is made "to the court" (i.e. the Supreme Court), but since we know from the limitations on the Jurisdiction of Masters that masters may not hear appeals or applications in the nature of appeals, in practice this means that the appeal must be heard by a judge of the Supreme Court.

All appeals authorized to be heard by "the court" or a judge of the Supreme Court—which includes appeals from the order or decision of a master under Rule 23-6(8–9)[5]—are governed by Rule 18-3. While there is a lot of practical and necessary stuff in this rule, for the purposes of exams, all you have to be able to do is say "Rule 18-3". None of the rule's content will make it onto an exam.

NOTE: Since masters can make certain final orders, both interlocutory and final orders of masters can be appealed.

Issue: Standard of Review on an Appeal of the Order of a Master

The main ***issue*** with respect to an appeal from the order of a master which concerns this course is: what is the standard of review on an appeal from the order of a master?

Current Standard of Review

The standard of review is set out in ***Abermin Corp v Granges Exploration*** and the answer depends on whether the decision is in respect of a ***purely interlocutory*** matter, or a ***final order*** or ***question vital to a final issue*** in the case.

1. Purely interlocutory matters. Where the appeal is from a master's order on a ***purely interlocutory*** matter, the appeal may be allowed only if the master was ***clearly wrong***.
2. Final orders and questions vital to the final issue in the case. Where the appeal is from a
   a. ***final order*** made by a master; or
   b. a ruling of a master which raises ***questions vital to the final issue***†

   the correct form of appeal is a ***rehearing*** and the judge appealed to may substitute his view for the master's. Unless an order for the production of fresh evidence is made‡, the rehearing will proceed on the basis of the material that was before the master.

†: One of the major ***criticisms*** of this standard of review is that it is frequently very difficult to differentiate between a matter which is "purely interlocutory" and a matter which, while interlocutory in nature, raises questions vital to the final issue. See the heading below on Future Changes to the Standard of Review. JF's definition of an ***interlocutory*** order is: **an order which maintains the *status quo* and does not change substantive rights**.

‡: Any ***fresh evidence*** order of course requires an application and argument.

Future Changes to the Standard of Review

The *Ralph's Auto Supply* case seems to have been included in the readings for no other purpose than as potential fodder for an essay question on whether the standard of review should be changed. Interestingly, the plaintiffs in *Ralph's* (who lost their bid in front of Madam Justice Fenlon to have the standard of review made more deferential by mandating the ***clearly wrong*** standard across the board) were denied leave to appeal to the Court of Appeal by Madam Justice Kirkpatrick, in chambers, in an application of the Test for Leave to Appeal an Interlocutory Order to the Court of Appeal (below): 2011 BCCA 390. This is why, as JF noted in class, **there is no mention of the standard of review issue in the reasons for judgment of the actual appeal**: 2011 BCCA 523.

Relevant Rules and Cases

Case/Statute	Juris.	P	Key Points
Rule 18-3(1)	/	234	If an appeal or application in the nature of an appeal is authorized by an enactment to be made to the court or to a judge of the court, the appeal is governed by Rule 18-3 to the extent that this rule is not inconsistent with any other procedure provided in that enactment.

[5] Another example of an appeal authorized to be heard by the Supreme Court is given by *Small Claims Act*, RSBC 1996, c 430, s 5(1).

Case/Statute	Juris.	P	Key Points
Rule 23-6(8)	/	245	A person affected by an order or decision of a master, registrar or special referee may appeal the order or the decision to the court.
Rule 13-1(8)	/	229	The ***effective date*** of an order is the date it was pronounced, unless the court orders otherwise.
Rule 23-6(9)	/	245	The appeal must be made by filing a notice of appeal in Form 121 ***within 14 days*** after the order or decision complained of. See also Orders (above).
Abermin Corp v Granges Exploration	1990 BC/CA	119	Current standard of review for appeals from the decision of a master in BC.
Ralph's Auto Supply (BC) Ltd v Ken Ransford Holding	2011 BC/SC	152	Affirms *Abermin*'s standard of review on the narrow ground of *stare decisis*, but offers reasons why Fenlon J believes that *Abermin* should be overruled and a consistent and deferential standard of review applied to all orders of masters.

Appealing the Order of a Judge

Unlike with masters, we only considered appeals from ***interlocutory*** orders made by judges. We did not study appeals from final orders made by judges in this course.

Only Orders May Be Appealed

> *A reviewing court may refer to the reasons for judgment in order to ascertain whether the decision from which the appeal is brought has been arrived at by a reviewable error but the appellate review process relates to attacks on the order that has been made, not the reasons for judgment. If an appeal is successful, it is the order that is set aside, not the reasons or a portion thereof that is "overturned". . .*
>
> —Rowles JA, *Laye v College of Psychologists (British Columbia)* (1998), 105 BCAC 214 (CA).

An appeal lies to the Court of Appeal from an ***order*** of the Supreme Court or an ***order*** of a judge of the Supreme Court: ***Court of Appeal Act*** s 6(1)(a). This apparently broad right of appeal is limited in two important ways:

1. A ruling on evidence made by a trial judge during the trial process is not an order and therefore the Court of Appeal has no jurisdiction to hear the appeal: ***Rahmatian v HFH Video Biz***.
2. Certain enumerated interlocutory orders are limited appeal orders under the ***Court of Appeal Act*** and ***Court of Appeal Rules***. These orders may only be appealed with leave. See the heading Limited Appeal Orders, below.

Limited Appeal Orders

Under section 7 of the ***Court of Appeal Act*** and Rule 2.1 of the ***Court of Appeal Rules***, the following orders (and some others not listed below) are declared to be limited appeal orders which can only be granted with leave of a justice of the Court of Appeal:

- an order granting or refusing relief for which provision is made under any of the following Parts or rules of the *Supreme Court Civil Rules*:
  - Part 5 *[Case Planning]*;
  - Part 7 *[Procedures for Ascertaining Facts]*, other than Rule 7-7 (6) *[application for order on admissions]*;
  - Rule 9-7 (11), (12), (17) or (18) *[adjournment or dismissal, preliminary orders, orders and right to vary or set aside order]*;
  - Part 10 *[Property and Injunctions]*;
  - Part 11 *[Experts]*;
  - Rule 12-2 *[trial management conference]*;
- an order granting or refusing an adjournment or an extension or a shortening of ***time***;
- an order granting or refusing ***costs***, or granting or refusing ***security for costs***, if the only matter being appealed is that grant or refusal.

If you encounter an interlocutory order made by a judge, you must therefore address two ***issues***:

1. Is it a limited appeal order?
2. If so, does it meet the criteria for leave to appeal?

The ***test*** for leave is given under the heading below.

Test for Leave to Appeal an Interlocutory Order to the Court of Appeal

The ***test*** for granting leave to appeal a limited appeal order is **whether it is in the interests of justice that the appeal be heard** (JF), having regard to the following ***factors***, **among others**:

1. whether the point on appeal is of significance to the practice;
2. whether the point raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious‡ or, on the other hand, whether it is frivolous; and
4. whether the appeal will unduly hinder the progress of the action.

Relevant Cases, Statutes, and Rules

Case/Statute	Juris.	P	Key Points
Court of Appeal Act s 6(1)(a)	RSBC 1996	247	An appeal lies to the Court of Appeal from an ***order*** of the Supreme Court or an ***order*** of a judge of the Supreme Court
Rahmatian v HFH Video Biz	1991 BC/CA	151	The disposition of a motion for nonsuit made during the course of a trial is ***not an order***. It is more properly described as a ***ruling*** which is part of the trial process and is not appealable until the trial has completed.
Court of Appeal Act s 7(1)	RSBC 1996	247	Limited appeal orders are enumerated in the *Court of Appeal Rules*.
Court of Appeal Act s 7(2)	RSBC 1996	247	Despite section 6(1) of the *Court of Appeal Act*, there is no appeal from a limited appeal order without leave.
Court of Appeal Rules Rule 2.1	BC Reg	246	Enumerates limited appeal orders.
Power Consolidated (China) Pulp v BC Resources Investment Corp	1988 BC/CA	150	Test for Leave to Appeal an Interlocutory Order to the Court of Appeal (above)

Other Issues Relating to Appeals

Recall that a superior court judge has inherent jurisdiction to set aside his own order where that order is a ***nullity***: *Bache Halsey Stuart Shields Inc v Charles*.

Calculating Time

Issues Involved in the Calculation of Time

The "time" question is always really a variation on:

> What is the latest date upon which I can take some action before some consequence arises?

The answer to this question is determined by applying the rules of date determination to some statutory (or court-ordered) time span. In applying the rules, the following questions must be asked:

1. What is the date of the anchoring event?
2. What is the raw size of the time span?
   (a) How many days are involved?
   (b) What kind of days are involved?
3. How are the endpoints of the span to be dealt with?

The headings below briefly explain how to answer these questions in real life.

Date of Anchoring Event

All time spans are anchored relative to some anchoring event. For example, it might be the date of service, or the date set for the hearing of an application. When ***service*** is the anchoring event, it becomes crucial to determine ***what date service is deemed to have occurred on***, and this requires the Rules themselves plus the *Interpretation Act* to determine the date of deemed service.

Case/Statute	Juris.	P	Key Points
Interpretation Act s 29	RSBC 1996	251	Defines the term holiday. Most importantly for the purposes of an exam, holiday includes ***Sunday***.
Rule 4-2(3)	/	186	A document served by ordinary service ***delivery*** (leaving it at the person's address for service) under Rule 4-2(2)(a) is deemed to be served either: (a) If left at or before 4pm on a day that is not a Saturday or a holiday, on that day. (b) Otherwise, on the next day that is neither a Saturday nor a holiday.
Rule 4-2(4)	/	186	A document served by ordinary service via ***ordinary mail*** under Rule 4-2(2)(b) is deemed to be served one week later on the same day as the day of the mailing unless the deemed day of service is a Saturday or a holiday, in which case the document is deemed to be served on the next day that is not a Saturday or a holiday.
Rule 4-2(6)	/	186	A document served by ordinary service ***fax*** or ***email*** under Rule 4-2(2)(c) or (d) is deemed to be served: (a) If transmitted before 4pm on a day that is not a Saturday or a holiday, on that day. (b) Otherwise, on the next day that is neither a Saturday nor a holiday.
Rule 4-3(7)	/	188	A document served by ***personal service*** is deemed to be served: (a) If served at or before 4pm on a day that is not a Saturday or a holiday, on that day. (b) Otherwise, on the next day that is neither a Saturday nor a holiday.

Raw Size of the Time Span

Number of Days in the Time Span

The rules always provide some minimum or maximum time span, for example, "within ***49*** days after . . . service" or "at least ***8*** business days before the date set for the hearing of the application". The basic ***number*** of days (49, or 8, or whatever it is in the specific case) is the *starting point* for the analysis.

Note: In civil procedure, we seem to be mainly concerned with time spans quantified in days. The rules in the *Interpretation Act* also contemplate time spans quantified in weeks, months, and years, but I have oriented this section toward days only for simplicity's sake.

Quality of Day in the Time Span

In addition to the basic ***number*** of days, there is a subtle difference in the quality of the "days". Time spans throughout the rules are typically specified in "***days***". However, time spans under Rule 8-1 (and only Rule 8-1) may be specified in business days, which are defined in Rule 8-1(1) to mean days on which the court registries are open for business. Finally, Rule 22-4(1) says that if a time period is quantified in "***days***"† and is specified to be less than 7 days, then holidays are not counted.

†: The rule does not mention "***business days***" and there is no indication that it intends to, since the definition of a business day will already exclude most holidays from counting in any event.

Case/Statute	Juris.	P	Key Points
Rule 8-1(1)	/	208	Defines the term business day, which is only applicable within Rule 8-1. A business day is a day on which the court registries are open for business. This excludes Saturday, Sunday, and statutory holidays at a minimum.

Case/Statute	Juris.	P	Key Points
Rule 22-4(1)	/	242	If a period of ***less than 7 days*** is stipulated by the Rules, holidays are not counted.
Interpretation Act s 29	RSBC 1996	251	Defines the term holiday. Most importantly for the purposes of an exam, holiday includes ***Sunday***.

Endpoints

Once you know the size and quality of the days in the time span, and the date of the anchoring event, you might think that date determination is just a matter of counting out the qualifying days on the calendar. If did think this, you would be wrong! There is one further consideration which deals with whether the endpoints of the span can be included in the count. The answer to this question depends on whether the span is an ordinary span, or specified in ***clear days***.

Clear Days

Section 25(4) of the *Interpretation Act* (see p 251) says that if a time period is specified to be:

- in "clear days";
- "not less than" a certain number of days; or
- "at least" a certain number of days,

then the first and last days of the time span must be excluded for the purpose of calculating the size of the time span. Of the three variants, only "not less than" seems to appear in the Rules studied in this course.

Ordinary Days

Section 25(5) of the *Interpretation Act* says that if none of the phrases indicating clear days are present, then the first day of the time span, but not the last day, must excluded for the purpose of calculating the size of the span.

Time Calculation Examples

This section shows how to apply the time calculation algorithm to two example problems.

Example #1

Problem

You filed a notice of civil claim on December 1, 2012 and personally served it on the US defendant in Nevada on December 8, 2012. It is now December 20th and the defendant still has not filed a response to civil claim. You want to know the first date when you can apply for default judgment.

Solution

The anchoring date is the date of service. Because December 8 falls on a Saturday, however, the deemed date of service is the first date that is not a Saturday or a holiday: Rule 4-3(7). Therefore, service is seemed to have occurred on Monday December 10, which is the anchor for the start of the time span.

Because the defendant was served in the US, he must file and serve his response "within 35 days": Rule 3-3(3)(a)(ii). The span is thus 35 days long, the quality of day involved is an ordinary day, not a business day, and because Rule 22-4(1) does not apply, holidays count toward the 35 days.

Finally, because the span is described as "within 35 days", the endpoints determination is done in the ordinary way, not according to the rules for clear days: *Interpretation Act* s 25(5). Thus, the first day of the span (in this case, the anchoring event, December 10) is excluded for the purposes of counting 35 days, but the last day of the span is

included in the count. The calendars below show that the last day on which the defendant can validly file and serve his response to civil claim is January 14, 2013.

December 2012						
Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10 Excluded	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25 Christmas	26	27	28	29
30	31					

January 2013						
Su	Mo	Tu	We	Th	Fr	Sa
		1 New Year	2	3	4	5
6	7	8	9	10	11	12
13	14 Deadline	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Now Rule 3-8(1) says that the plaintiff may only proceed in default against the plaintiff after the period for filing and serving the response to civil claim has expired. This means that the earliest date on which you may file the materials required by Rule 3-8(2) is January 15, 2013.

EXAMPLE #2

PROBLEM

The trial of your action is set to begin on January 28, 2013. You just had a brilliant idea, however, and now you think you can save your client money and win the case by holding a Summary Trial (p 85). It is now November 26, 2012 and you have two questions to resolve:

(a) Do you have time to hold a summary trial at all?
(b) If so, what is the earliest date you would have to serve your opponent with the notice of application?

SOLUTION

The anchoring event is the date of the trial, which is set for January 28.

A summary trial application must be "heard at least 42 days before the scheduled trial date": Rule 9-7(3), and presumably "heard" means the hearing has to have finished, not just started. The size of the span is 42 ordinary days, not business days, and since the span is 7 days or more, holidays are counted: Rule 22-4(1).

The use of the qualifier "***at least***" means that the endpoints must be treated according to the rules for ***clear days***: *Interpretation Act* s 25(4). Thus both the first and last days of the span must be excluded for the purpose of counting 42 days. The calendars below show that the hearing would have to be completed on December 15, 2012. However, since the courts don't hear applications on Saturdays, it would really have to be completed on Friday December 14 at the latest.

December 2012						
Su	Mo	Tu	We	Th	Fr	Sa
25	26 Today	27	28	29	30	1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16 Excluded	17	18	19	20	21	22
23	24	25 Christmas	26	27	28	29
30	31					

January 2013						
Su	Mo	Tu	We	Th	Fr	Sa
30	31	1 New Year	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28 Excluded	29	30	31		

Assuming you are certain you have a trivial application which can be heard in one court day (DO NOT DO THIS IN REAL LIFE!) and you schedule it for December 14, I leave as an exercise for the reader whether it is physically possible to meet the service requirements under Rule 8-1(8)(b), keeping in mind that the period for service in that paragraph is stipulated in ***clear*** business days.

Chart of Common Time Requirements

	Action	Rule	P	Qty	Quality	Endpoint
Originating Pleadings	Respond to notice of civil claim	3-3(3)(a)	178	(i) Canada/21 (ii) USA/35 (iii) Elsewhere/49		
	File counterclaim	3-4(1) 3-3(3)(a)	178 178	Same as for responding to notice of civil claim		
	Serve filed counterclaim on party of record	3-4(4)(a) 3-3(3)(a)	179 178	Same as for responding to notice of civil claim		
	Serve counterclaim on new person†	3-4(4)(b)	179	60 from date counterclaim filed		
	Respond to counterclaim	3-4(6) 3-3(3)(a)	179 178	Same as for responding to notice of civil claim		
	File third party notice w/o leave	3-5(4)(b)	180	42 from notice of civil claim or counterclaim		
	Serve third party notice on the third party‡	3-5(7)(a)(i)	180	60 days after filing		
	Respond to third party notice	3-5(11) 3-3(3)(a)	181 178	Same as for responding to notice of civil claim		
Particulars	Serve further particulars	3-7(20)(b)	183	10 days after demand made in writing		
Amending Pleadings	Amend w/o leave	6-1(1)(a)	193	Before earlier of date of service of notice of trial and date of first CPC		
	Serve amended pleading on parties of record	6-1(4)(a)	194	7 days after filing		
	Serve filed amended responding pleading on parties of record	6-1(5)(b)	194	14 days after being served with amended pleading		
CPC	Serve filed notice of first CPC to be held in action	5-1(3)(a)	191	35 days before date set for the CPC		Clear

	Action	Rule	P	Qty	Quality	Endpoint
	Serve filed notice of any subsequent CPC	5-1(3)(b)	191	7 days before date set for the CPC		Clear
	Plaintiff serves filed case plan	5-1(5)(a)	191	14 days, but anchor event depends on who served notice of CPC		
	Other parties of record serve filed case plan	5-1(5)(b)	191	14 days after receipt of plaintiff's case plan		
Documents	Serve list of documents	7-1(1)	196	35 days after end of pleading period		
	Respond to demand for documents	7-1(12)	198	35 days after receipt of demand		
XFD	Serve appointment and tender witness fees	7-2(13)	200	7 days		Clear
Interrogatories	Answer	7-3(4)	202	21 days		
Witness List	File and serve witness list	7-4(1)	203	Earlier of TMC and date that is 28 days before the scheduled trial		
Pre-Trial Examination of Witness	Serve subpoena on all parties of record	7-5(7)	204	7 days before date appointed for examination		Clear
Admission	Respond to notice to admit	7-7(2)	205	14 days		
Deposition	Serve subpoena on all parties of record	7-8(13)	208	7 days before date appointed for examination		Clear
Application	Serve filed application materials for normal application	8-1(8)(a)	209	8 business days after service	Business	Clear
	Serve filed responding materials for normal application	8-1(9)	209	5☼ business days after service	Business	
	Serve filed responding affidavits	8-1(13)	210	No later than 4pm on the business day that is 1 full business day before the date set for the hearing.	Business	
	Provide application record to registry	8-1(15)	210	No later than 4pm on the business day that is 1 full business day before the date set for the hearing.	Business	
Summary Trial	Serve filed application materials for summary trial	8-1(8)(b)	209	12 days before date set for hearing summary trial	Business	Clear
	Serve filed responding materials for summary trial	8-1(9)	209	8 days before date set for hearing summary trial	Business	
	Summary trial hearing	9-7(3)	217	42 days before scheduled trial date		Clear

	Action	Rule	P	Qty	Quality	Endpoint
Experts	Serve expert report (by party or parties who intend to tender it at trial)	11-6(3)	223	84 days before scheduled trial date		Clear
	Serve responding expert report	11-6(4)	223	42 days before scheduled trial date		Clear
	Make expert's file available if requested more than 14 days before trial	11-6(8)(b)(ii)	224	14 days before scheduled trial date		Clear
	Serve notice objecting to expert report	11-6(10)	224	~~21 days before scheduled trial date~~ by date of TMC♦		
	Demand expert attend for cross-examination	11-7(2)(a) 11-7(3)	224 225	21 days after service of the report		
Trial	Trial management conference	12-2(1)	226	28 days before scheduled trial date		Clear
	Serve filed trial brief	12-2(3)	226	7 days before TMC		Clear
	File trial record (must be served "promptly" afterward)	12-3(3)	227	At least 14, but not more than 28, days before scheduled trial date		Clear (14) / Ordinary (28)
	File trial certificate	12-4(2)	227	At least 14, but not more than 28, days before scheduled trial date		Clear (14) / Ordinary (28)
Fast Track	Complete XFD	15-1(12)	233	14 days before scheduled trial date		Clear
Petition	Serve filed response to petition plus affidavits	16-1(4)(c)	234	(i) Canada/21 (ii) USA/35 (iii) Elsewhere/49		
Appeals	File notice of appeal	23-6(9) 13-1(8)	245 229	14 days after the order or decision complained of		
	Hearing of appeal	23-6(10)	245	3 days between service of the notice of appeal and the hearing		Clear

†: Notice of civil claim must also be served on the defendant by way of counterclaim: Rule 3-4(4)(b)(ii).

‡: Promptly after filing, the a copy must also be served on all parties of record: Rule 3-5(7)(b).

♦: If the third party is not already a party of record, you must also serve a copy of all filed pleadings previously served by any part to the action: Rule 3-5(7)(a)(ii) within the same 60-day period.

☼: While Rule 22-4(1) *might* technically apply to service of responding materials under Rule 8-1(9), bear in mind that the use of business days already achieves more or less the same effect as the exclusion of holidays.

♦: Technically, it must be served on the earlier of the date of the TMC and the date that is 21 days before the scheduled trial date. But since the TMC must take place at least 28 days before the scheduled trial date unless the court orders otherwise, in most cases notice will have to be served by the time of the TMC.

7. Summary Proceedings

Rules 9-3 to 9-7 present various alternatives for concluding proceedings in a summary way—that is to say, without the need for a conventional trial. BG and JF refer to these five rules collectively as "**summary proceedings**". It is important to understand the distinction between each of the rules, since at times some of them seem to blend together. Toward this end, a Comparison Chart has been added at the end of this chapter.

This chapter deals with the summary proceedings rules in the following order, which is an attempt at a compromise between narrative convenience and the likely importance of the topic on an exam, in descending order:

1. Rule 9-5: Striking Pleadings
2. Rule 9-6: Summary Judgment
3. Rule 9-7: Summary Trial
4. Rule 9-4: Proceedings on a Point of Law
5. Rule 9-3: Special Case

Striking Pleadings

At any time during the proceedings, a party may apply under Rule 9-5(1) to have some or all of another party's pleadings amended or struck out on any of the four grounds enumerated in paragraphs (a) to (d):

(a) that the pleading discloses no reasonable claim or defence;
(b) that it is unnecessary, scandalous, frivolous, or vexatious;
(c) that it may prejudice, embarrass or delay the fair trial or hearing of the proceeding; or
(d) that it is otherwise an abuse of the process of the court.

The ***only issue*** under Rule 9-5 is the ***sufficiency of the pleadings*** as a matter of law. A successful application to have another party's pleadings struck out is not a decision on the merits, and nothing (apart from time limits and limitation periods) prevents the party whose pleadings were struck from trying again.

The standard for having an opposing party's pleadings struck is an exacting one. *Per* ***Hunt v Carey Canada Inc***, it must be ***plain and obvious*** that the document meets the criteria of a particular paragraph before it will be struck. Moreover, the striking of pleadings is **not a "gotcha game"** (JF) and the court must consider the possibility that an ***amendment*** could cure the defect in the pleadings.

Disclosing No Reasonable Claim or Defence

Aside from the ***plain and obvious*** test, an additional barrier confronts an applicant applying under Rule 9-5(1)(a). No evidence is admissible on the application and the court is required to assume that the facts alleged in the impugned pleading are true. Nonetheless, there is an exception to this rule: it is appropriate for the court to analyze the pleadings to determine whether they are incapable of truth or based on speculation. Pleadings may be struck in these cases even if the facts, if true, would disclose a cause of action.

JF provides the following examples of what could qualify under paragraph (a):

1. **a claim not known in law**†; and
2. **material facts required to plead a cause of action not provided and could not be provided on amendment**.

†: But watch out for "novel" claims!

Case/Statute	Juris.	P	Key Points
Rule 9-5(1)(a)	/	215	Court may order the whole or any part of pleading amended or struck out if it discloses no reasonable claim or defence, as the case may be.
Rule 9-5(2)	/	216	In an application under Rule 9-5(1)(a), no evidence is admissible.
Hunt v Carey Canada Inc	1990 CA/SC	136	Neither: • the length and complexity of the issues; • the novelty of the issues; nor • the potential of the defendant to present a strong defence are valid reasons for striking pleadings. It must be ***plain and obvious*** that the pleadings disclose ***no reasonable claim***, where a reasonable claim is defined as one with some possibility of success.
Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong	2011 BC/CA	139	When there is an attack on a pleading as showing no reasonable claim or defence, the court is well advised to first consider whether the pleading can be preserved by ***amendment***.
National Leasing Group v Top West Ventures	2001 BC/SC	148	• Counterclaim written in "idiosyncratic" grammar and referring to "the fictitious language/scribble/scribble-procedures" struck out because it did not disclose a cause of action. • The deficiencies mentioned by Master Bolton were: ○ failure to set out the nature of the alleged transaction; ○ failure to set out the parties; and ○ failure to indicate the date of the alleged transaction.
Jerry Rose Jr v The University of British Columbia	2008 BC/SC	140	• Despite the requirement of assuming the facts pleaded to be true for the purposes of an application to strike under Rule 9-5(1)(a), the court may ***look behind*** allegations of fact to determine whether they are based on speculation or incapable of proof. • Two symptoms of wild speculation are: ○ generalized allegations made against all defendants without distinction; and ○ failure to state adequate particulars about when, where, or how the allegations occurred.

Unnecessary, Scandalous, Frivolous, Vexatious, Prejudicial, and So On

Paragraphs (b) and (c) of Rule 9-5(1) are a blizzard of adjectives which supposedly present additional grounds for striking pleadings. They seem like an amorphous cloud of vagueness to me—***unnecessary, scandalous, frivolous or vexatious*** pleadings, or those that may ***prejudice, embarrass or delay*** a fair trial—but the courts are apparently able to make sense of the mess.

The authority we are given is ***Citizens for Foreign Aid v Canadian Jewish Congress***. At paragraph 47 of the judgment, Romilly J cites a number of authorities which attempt to define the adjectives. Hilarious circularity ensues: irrelevant means confusing, scandalous means really really irrelevant, but a scandalous pleading will not be struck unless it is irrelevant, implying that scandalous doesn't mean irrelevant. In any event, here are the rules that I was able to glean from *Citizens*, of which the necessity of ***irrelevancy*** seems to be the most important:

- A pleading is ***irrelevant*** and likely to ***embarrass*** a fair trial where it is difficult to understand what is pleaded.
- A ***scandalous*** or ***embarrassing*** pleading will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues.
- A pleading is ***frivolous*** not because it lacks an evidentiary basis but because of the doctrine of estoppel.
- A pleading is ***unnecessary*** or ***vexatious*** if it does not go to establishing the plaintiff's cause of action or establish any claim known in law.
- An offensive imputation against the character of a party is ***scandalous***.
- An allegation which is ***scandalous***:

- will not be struck unless it is also ***irrelevant***;
- will not be struck even if written maliciously or with *mala fides*, if it is ***relevant***.

Case/Statute	Juris.	P	Key Points
Rule 9-5(1)(b)	/	215	An unnecessary, scandalous, frivolous or vexatious pleading may be struck in whole or in part.
Rule 9-5(1)(c)	/	215	A pleading which may prejudice, embarrass or delay the fair trial or hearing of a proceeding may be struck in whole or in part.
Citizens for Foreign Aid v Canadian Jewish Congress	1999 BC/SC	126	Irrelevancy is a requisite for scandalousness, unnecessity, and embarrassment.
Professional Conduct Handbook	8:1(a)/	258	Even if the court can't strike your pleadings as a matter of law, you don't want to be the lawyer drafting pleadings which are close to the line.

Abuse of Process

Paragraph (d) adds the catch-all rule that a pleading may be struck if it is otherwise an abuse of the process of the court. *Citizens* offers the following guideline:

> *[52] The ambit of abuse of process is very broad. Abuse of process may be found where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose [citation omitted].*
>
> —Romilly J

To which JF adds the following examples:

1. **applications to strike on the basis of *res judicata*, issue estoppel, or collateral attack**;
2. **existence of another action that deals with the same issue**; and
3. **pursuit of a civil claim where there is a statutory remedy**.

Case/Statute	Juris.	P	Key Points
Rule 9-5(1)(d)	/	215	A pleading which is, otherwise than under paragraphs (a–c) an abuse of process of the court, may be struck in whole or in part.
Citizens for Foreign Aid v Canadian Jewish Congress	1999 BC/SC	126	∄ abuse of process ∵ paragraph 10 is not vexatious, without merit, or brought with the sole motive to harass the defendants and interfere with their ability to defend.

SUMMARY JUDGMENT

> *The underlying purpose of the summary judgment procedure has been described as preventing claims (or defences) ". . . that have **no chance of success** from proceeding to trial" because "[t]rying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system: Canada (AG) v Lameman, 2008 SCC 14 at para 10.*
>
> —Savage J, ***Haghdust v British Columbia Lottery Corporation***

A plaintiff may apply for final judgment (or a defendant may apply to have a claim finally dismissed) under Rule 9-6. The heading over the rule is "Summary Judgment", but it might be better entitled "Summary Judgment or Dismissal".

Test for Summary Judgment (or Dismissal)

The ***basic test*** is that the claim or defence against which Rule 9-6 is being invoked must be ***bound to fail***.[6] Rule 9-6(5) enumerates three cases where this may occur:

(a) where there is ***no genuine issue for trial*** with respect to a claim or defence;
(b) where there is ***no genuine issue for trial except as to the amount*** to which the claiming party is entitled; and
(c) where the only genuine issue is a ***question of law***.

No Genuine Issue for Trial

When deciding if there is a genuine issue for trial, it is not the function of the court to try disputed questions of fact. The only question is whether the facts raise a *bona fide* triable issue.

See Also: Artful Pleaders: The Problem with Rule 9-6, below

Question of Law

The ability to grant summary judgment or dismissal where the only genuine issue is ***question of law*** did not exist under the Old Rules and was added to the New Rules as Rule 9-6(5)(c). The case of ***Haghdust v British Columbia Lottery Corporation*** states the considerations which are specific to this subrule. To wit, the courts should approach settling all or part of a claim summarily under Rule 9-6(5)(c) where the only genuine issue is a ***question of law*** with caution and apply it only where:

a. there is no dispute about the material facts;
b. the issue of law is not mixed up with the facts; and
c. the issue of law is well settled by authoritative jurisprudence,

keeping in mind that Rule 9-7 is better suited for deciding novel points of law because on summary trial, the court has a more complete factual record framing the question of law.

Evidence Requirements under Rule 9-6

Except where subrule (3)(b) requires an answering party to provide affidavit evidence in response to a claiming party's application for summary judgment, the text of Rule 9-6 does not require evidence in support of an application. Nevertheless, ***affidavit evidence is always required***, as the following makes clear:

> *[13] . . . It is inconceivable to me, however, that a plaintiff could overcome a filed defence and obtain summary judgment under the new rule in the absence of sworn evidence to prove the claim. A claim for a liquidated sum under a contract, for example, surely would require sworn evidence under the rule to prove the contract, breach of the contract and the amount owing.*
>
> *[14] It is also inconceivable to me that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim is without merit. In either case, if the court is faced with oath against oath, it is most unlikely that it could grant judgment to the plaintiff or dismiss the claim, as the case may be. . .*
>
> —Low JA, ***Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong***

[6] Because lawyers like to double-shot their adjectival cannons, this is sometimes formulated as a requirement that it must be ***plain and obvious*** (or "beyond doubt", or "manifestly clear" &c) that the action cannot succeed.

How is Summary Judgment Different than Striking Pleadings?

> *[9] Rules 9-5 and 9-6 are quite different. The former is an attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. It raises a matter of law only. The latter is an assertion that the claim or defence is factually without merit. It raises an issue of fact only or, at most, an issue of mixed fact and law, unless under subrule (5)(c) the court determines that "the only genuine issue is an issue of law", in which case it "may determine the question [of law] and pronounce judgment accordingly."*
>
> —Low JA, ***Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong***

Res Judicata: A Difference of Effect

The major difference between Rules 9-5 and 9-6 is in the effect of a ruling in favour of the applicant. Rule 9-5 is only concerned with the ***sufficiency of pleadings*** and does not result in a final determination of the issues. On the other hand, an order under Rule 9-6 is a ***final order*** which conclusively determines the issues between the parties. If, for example, the defendant wins summary dismissal of the plaintiff's claim under Rule 9-6, he will be entitled to raise the defence of *res judicata* if the plaintiff tries to claim against him on the same subject matter again. The defendant will thus succeed rather easily in having the plaintiffs pleadings struck as an Abuse of Process (see above).

Presumably because summary judgment in favour of a plaintiff or summary dismissal of the plaintiff's claim is a binding decision on the issues between the parties, the parties are required to support their positions with sworn ***evidence***, as discussed above. It would be unjust, not to mention ridiculous, if a party could hide behind *res judicata* without ever having to prove the facts alleged in his pleadings. Thus the difference in result between Rules 9-5 and 9-6 seems to dictate the difference in evidentiary requirements.

Illustration of the Difference

Despite the differences, a party will often be able to take advantage of Rules 9-5 and 9-6 simultaneously. The following examples are intended to illustrate some of the similarities and differences.

Example #1

This is a somewhat contrived example I made up which I think shows a scenario where it is impossible to strike pleadings but very much possible to obtain an order for summary judgment. Suppose that the plaintiff gets injured in one of those freak ziplining accidents and sues the company which owns the zipline in negligence.

The defence pleaded is that the plaintiff signed a waiver, having received exemplary notice, which waiver unambiguously surrenders her right to sue in negligence. The defendant applies to strike the plaintiff's pleadings on the basis that considering the pleadings alone, the waiver defence is determinative. The application fails because the plaintiff counter-applies to amend her notice of civil claim to deny signing the waiver.

The defendant then applies for summary dismissal of the claim, bringing an affidavit sworn by the zipline operator, who deposes that he personally notified the plaintiff of the waiver's effect on her legal rights and personally watched her sign the waiver. Attached as an exhibit to the operator's affidavit is the original waiver apparently signed and dated by the plaintiff. For whatever reason, the plaintiff brings no evidence on the application for summary dismissal, and the result is complete dismissal of the plaintiff's claim.

Notice that the defendant could not, as a matter of law, have succeeded in having the plaintiff's pleadings struck, but that he nevertheless obtained summary dismissal of the claim.

EXAMPLE #2

This second example was provided by JF and illustrates how the addition of Rule 9-6(5)(c), which had no equivalent under the Old Rules, changes the nature of the summary judgment regime.

At some point in the past, JF (or her firm) defended the Royal Bank of Canada on a tort claim. The plaintiff was a man who ran a gold bullion trading business jointly with his son. The business had an account at RBC. At some point, the account became overdrawn by around $300,000 and RBC began requesting that the plaintiffs cover the overdraught. At around this time, the son quite tragically committed suicide and his father sued RBC alleging:

1. negligent infliction of nervous shock; and
2. intentional infliction of nervous shock.

$\exists$ a large body of cases stating that a suicide is a *novus actus interveniens* sufficient to break the chain of causation in negligence. Thus the plaintiff's pleadings raised a pure issue of law as to whether the claim in negligence could succeed and, moreover, this was an issue "well settled by authoritative jurisprudence" (*Haghdust*). However, because Rule 9-6(5)(c) did not exist under the Old Rules, the only option available to the defence was to have the claim in negligence struck under the precursor to Rule 9-5(1)(a). This the defence succeeded in doing.

Under the New Rules, $\exists$ Rule 9-6(5)(c) $\Rightarrow$ RBC could have applied for summary dismissal of the plaintiff's claim, with the resulting bonus that any attempt by the defendant to re-litigate the negligence issue would be barred by *res judicata*.

EXAMPLE #3

As a practical matter, one reason to prefer Rule 9-5 in certain cases might be the saving of expense, since there is no necessity of paying a lawyer to draft affidavits under Rule 9-5(1)(a).

Artful Pleaders: The Problem with Rule 9-6

> *[38] The problem with Rule 18 [now Rule 9-6] is that artful pleaders are usually able to set up an arguable claim or defence and any affidavit that raises a contested question of fact or law is enough to defeat a motion for judgment. Rule 18 was often ineffective in avoiding unjust delay or in avoiding unnecessary expense in the determination of many cases.*
>
> *[39] As a consequence, R. 18A [now Rule 9-7] was added to the Rules of Court in 1983 in an attempt to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by any of the other proceedings authorized by R. 18A(5) [now Rule 9-7(8)] unless it would be unjust to decide the issues in such a way.*
>
> —McEachern CJBC, ***Inspiration Management v McDermid St Lawrence Ltd***

The Rule 9-7 process, typically referred to as the summary trial, is referred to in the next section of this chapter.

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 9-6(2)	/	216	A claiming party (i.e. someone who filed an originating pleading) may apply for summary judgment on ***all or part*** of the claim, but only after the person against whom the claim is made has served a responding pleading on the claiming party. In conjunction with subrule (4), this means that Rule 9-6 is only available as between parties who have completed an exchange of pleadings.
Rule 9-6(4)	/	216	An answering party (i.e. someone who served a responding pleading on a claiming party) may apply for summary dismissal of ***all or part*** of the claim, but only after serving the responding pleading on the claiming party.

Case/Statute	Juris.	P	Key Points
Rule 9-6(5)	/	216	On hearing an application under subrules (2) or (4), the court may: (a) where there is no genuine issue for trial, give judgment or dismiss the claim; (b) where the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or accounting to determine the amount; (c) where the only genuine issue is a question of law, may decide the question and pronounce accordingly; (d) make any other order it can justify under the object of the Rules.
Haghdust v British Columbia Lottery Corporation	2011 BC/SC	132	• Because at least some of the plaintiff's responses are arguable, the plaintiff is ***not bound to fail***. • Moreover, the issues are ***novel*** and are not well-settled by authoritative jurisprudence, which makes Rule 9-6(5)(c) inapplicable in any event.
Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong	2011 BC/CA	139	Both applications for summary judgment by a plaintiff and for summary dismissal by a defendant must be supported by ***evidence***.

SUMMARY TRIAL

Introduced in 1983, the Rule 18A (now Rule 9-7) summary trial was the brainchild of former Chief Justice of British Columbia Allan McEachern. The introduction of the summary trial process placed British Columbia in the vanguard of the movement which seeks to devise novel procedures to address issues of the types raised under the headings:

- Speech of the Chief Justice (p 7); and
- Artful Pleaders: The Problem with Rule 9-6 (p 84).

Over 50% of the trials in the BC Supreme Court are now summary trials.

A summary trial is a particular type of chambers application which serves the same purposes as a conventional trial. In particular, the parties lead evidence, the chambers judge makes findings of fact, and the result is a final disposition of the case (or at least one or more issues). However, since the summary trial takes places in chambers, the general rule is that no live witnesses are heard nor is *viva voce* evidence given. Thus, subject to exceptions noted below, the "trial" is conducted on the basis of the documentary record. In many cases, this has the potential to radically reduce the time to try the matter, the costs of doings so and, equally importantly, the amount of time the parties must wait before their dispute can be heard in court.

Before getting into specific issues, the following JF-isms are memorable and useful:

- recall from the section on Converting a Petition Proceeding into an Action (p 61) that **the BC courts take a "very robust view" of what can be resolved summarily**;
- a summary trial **is a trial** (i.e. usually at the conclusion of the summary trial, one of the parties is going to win the entire action on the merits and one is going to lose); and
- a summary trial is a **paper trial**.

As far as this course is concerned, there are only three ***issues*** we need to be able to address:

1. What is the time window during which a summary trial can be heard?
2. What evidence can be adduced on a summary trial application?
3. Is a matter suitable for determination at a summary trial?

Timing of a Summary Trial

Case/Statute	Juris.	P	Key Points
Rule 9-7(2)	/	217	A party may make a summary trial application once the appropriate responding pleading has been filed.
Rule 9-7(3)	/	217	A summary trial application must be heard at least 42 days before the scheduled trial date.
Rule 8-1(8)(b)	/	209	The applicant must serve the required documents on the application respondent at least 12 business days before date set to hear the summary trial.
Rule 8-1(9)	/	209	The application respondent must serve the required documents on the applicant within 8 business days after service of the applicant's documents.

See Also: Chart of Common Time Requirements (p 76)

Note on Evidence

Permissible Evidence

Although a summary trial application is a chambers application, Rule 9-7(5) expands the variety of evidence which may be received without leave of the court beyond mere affidavit evidence. The following types of evidence are available to the parties as of right:

(a) Affidavits;
(b) an answer, or part of an answer, to Interrogatories;
(c) any part† of the evidence taken on an Examination for Discovery;
(d) an Admissions under Rule 7-7; and
(e) an Expert Report‡ if:
  (i) the report conforms to Rule 11-6(1); or
  (ii) the court orders that the report is admissible even though it does not conform to Rule 11-6(1).

In addition to the types of evidence available as of right under Rule 9-7(5), additional types of evidence are available with leave of the court: Rule 22-1(4).

†: However Rule 12-5(46) applies: Rule 9-7(6). See also *Haughian v Jiwa*.
‡: Rule 11-6(2) applies: Rule 9-7(7).

Hearsay

Affidavits containing ***information and belief*** are admissible for the purpose of determining the suitability issue, but not for deciding any substantive issues on summary trial: ***Charest v Poch***. This is a straightforward application of Rule 22-2(12–13).

Co-Operation of Witnesses

In a conventional trial, the parties can subpoena witnesses and, using the apparatus of the state, force them to testify in court. Yet there is no mechanism by which witnesses can be required to provide affidavit evidence. While of course an uncooperative person may be forced to submit to a Pre-Trial Examination of a Witness ordered by the court under Rule 7-5, nothing obtained in such an examination is admissible as evidence at trial under Rule 9-7(5), which closely tracks the rules of evidence.

Thus one difference between summary and conventional trials is that witnesses may ***refuse to provide affidavits***, and thus essentially "refuse to testify" at the summary trial. Thus the following quote from the *Western Delta Lands* case:

> *[47] Accordingly, if the evidence of Ferguson and Howay is necessary for the resolution of certain issues, it may not be possible to resolve those issues on a Rule 18A [9-7] application.*
>
> —Allan J, ***Western Delta Lands v 3557537 Canada Inc***

I have accordingly included this as a factor to consider in deciding the "unjustness" aspect of the suitability issue (see below).

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 9-7(5)	/	217	Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender evidence by any or all of: (a) affidavit; (b) an answer, or part of an answer, to interrogatories; (c) any part of the evidence taken on an examination for discovery; (d) an admission under Rule 7-7; (e) a report setting out the opinion of an expert, if: (i) the report conforms with Rule 11-6(1), or (ii) the court orders that the report is admissible even though it does not conform to Rule 11-6(1).
Rule 9-7(6)	/	217	Rule 12-5 (46), (49), (50), (51), (56) to (58) applies to subrule (5).
Rule 12-5(46)	/	228	If otherwise admissible, a party may tender the XFD evidence of a party adverse in interest, but such evidence is admissible only against the adverse party. This rule qualifies Rule 9-7(5)(c).
Haughian v Jiwa	2011 BC/SC	135	Ms Haughian's XFD transcript is ***not admissible*** for the truth of its contents. However, it is admissible for the narrow issue of suitability (see below for more).
Rule 11-1(1)(a)	/	220	Part 11 (Experts) of the Rules does not apply to summary trials except as provided for under Rule 9-7 itself. See Rule 9-7(5)(e) and 9-7(7). **NOTE** that subparagraph (b), on case planning conferences, does not apparently apply to expert reports on summary trial.
Rule 11-6(1)	/	222	Requirements for expert reports. This is brought in through Rule 9-7(5)(e).
Rule 9-7(7)	/	217	Rule 11-6(2) applies to summary trial applications.
Rule 11-6(2)	/	223	The assertion of qualifications of an expert is evidence of them.
Rule 9-7(12)	/	218	The title of this rule is horrible. It is entitled "Preliminary orders", but clearly applies "on or before the hearing of a summary trial application". This rule entitles the court to make various rulings on evidence including **(b)** that the deponent of an affidavit or an expert whose report is relied on submit to ***cross-examination***.
Rule 22-1(4)	/	240	On a chambers application, evidence must be given by affidavit except that the court has discretion to decide to hear other types of evidence, such as ***cross-examination on affidavits***. This rule must be read subject to Rule 9-7(5).
Rule 22-2(13)(b)	/	242	An affidavit may contain hearsay if made in respect of an application which does not seek a ***final order***. • But the point of a summary trial is to obtain a ***final order***, so clearly ***hearsay is not admissible*** on the substantive issues. • On the other hand, considering the ***suitability issue*** (see below) separately, whether a matter can be the subject of a summary trial at all doesn't directly implicate a final order, and it therefore makes sense that hearsay would be admissible to determine suitability.
Charest v Poch	2011 BC/SC	125	Affidavits containing ***information and belief*** are not admissible to decide the substantive issues on summary trial, but they are admissible on the question of suitability.
Western Delta Lands v 3557537 Canada Inc	2000 BC/SC	165	If a witness refuses to give evidence on an issue for which his evidence is necessary, it may not be possible to resolve the issue by summary trial.

Suitability: The Major Issue of Summary Trials

Not all matters which could be decided at a conventional trial with live witnesses are suitable for determination at a summary trial. The major issue we looked at in class is how to decide which issues are suitable and which are not.

Test for Suitability on Summary Trial

The test for suitability is given by Rule 9-7(15)(a). The court ***may*** grant judgment in favour of any party, either on an issue or generally, unless it is:

(i) ***unable to find the facts*** necessary to decide the issues, after considering all of the evidence before it; or
(ii) of the opinion that ***it would be unjust*** to decide the issues on the application.

Rule 9-7(15)(a) is worded exactly the same as Old Rule 18A(11)(a), which also contained the theoretically permissive ***may***. However, it appears that this ***may*** is really a ***must*** since McEachern CJBC wrote the following in *Inspiration Management*, a case decided under Old Rule 18A (at ¶ 52): "if the chambers judge can find the facts, then he ***must*** give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so."

Finding the Facts: Conflicts of Evidence

One potential reason for an inability to ***find the facts*** necessary to decide the issues is conflicting affidavit evidence. The rule on conflicting affidavits is that the chambers judge should not decide an issue of fact or law ***solely*** on conflicting affidavits: *Inspiration Management*. However, it may be that other admissible evidence will make it possible to resolve the conflict and find the facts necessary for judgment to be given. For example, the court could:

- make use of documentary evidence as was done in ***Charest v Poch***;
- order ***cross-examination on affidavits*** as was suggested in ***Inspiration Management v McDermid St Lawrence Ltd***; or
- make use of any other admissible evidence permitted under Rule 9-7(5).

Another potential contributor to an inability to find the facts might be a necessary witness who refuses to provide affidavit evidence.

Factors Bearing on Whether it Would Be Unjust to Give Judgment on Summary Trial

In deciding whether it will be ***unjust*** to give judgment, the chambers judge is entitled to consider, among other factors:

- the open-ended list enumerated at ¶ 48 of ***Inspiration Management v McDermid St Lawrence Ltd***:
  - the amount involved;
  - the complexity of the matter;
  - the ***urgency*** of the matter†;
  - any ***prejudice*** likely to arise by reason of ***delay***†;
  - the cost of taking the case forward to a conventional trial in relation to the amount involved;
  - the course of proceedings‡;
  - any other matters which arise;
- whether the applicant is litigating in slices: ***Charest v Poch***;
- whether a necessary witness is refusing to provide affidavits☼;
- whether a litigant is self-represented♦.

†: On the issues of ***urgency***, and prejudice caused by delay, see ***Western Delta Lands v 3557537 Canada Inc***.
‡: For example, a summary trial would be premature if one party has not yet had its examinations for discovery.
☼: This issue was alluded to by JF **in class** and by the court in *Western Delta*. See Co-Operation of Witnesses (above).

♦: JF says that **self-represented litigants have more trouble at summary trials than during conventional trials**.

Litigating in Slices

A summary trial on a subset of the issues may not be appropriate where other matters will have to proceed to a conventional trial in any event. Piecemeal decision making is rarely an efficient way of resolving disputes and raises, in particular, the potential problems of:

1. inconsistent findings of fact if the trial judge disagrees with a fact found by the chambers judge; and
2. the sum of the cost of the summary trial and the conventional trial outweighing what a conventional trial of all the issues, at once, would have cost.

One the other hand, resolving an important issue rapidly by way of summary trial can have benefits. For example, a conclusive determination of a single matter might lead to a settlement between the parties on other matters. Thus there is no hard and fast rule against "litigation in slices" and indeed this is routinely done, for example in the common case of resolving the liability issue in a car crash and then holding a conventional trial only on the issue of damages.

When Can the Suitability Issue Arise?

According to Rule 9-5(11)(b)(i), the suitability question can be heard either before or at the same time as the summary trial application itself. According to ***Western Delta Lands v 3557537 Canada Inc***, the threshold that the moving party must meet at a preliminary application to convince the court that the issues are not suitable for summary trial is higher than the threshold that the summary trial application respondent must meet during the actual summary trial hearing.

In *Western Delta*, Allan J held that a ***preliminary application*** to have a summary trial application dismissed on suitability grounds is ***likely to fail*** unless:

1. the litigation is extensive and the summary trial hearing itself will take considerable time;
2. the unsuitability of the issues for summary determination is relatively obvious;
3. it is clear that a summary trial involves a substantial risk of wasting time or effort or producing unnecessary complexity; or
4. the issues are not determinative of the litigation and are interwoven with the issues to be determined at conventional trial.

Consent on Suitability May Not Be Enough

On some summary trials, the application respondent may not contest the suitability issue and may in fact consent to deciding the issues summarily. Despite this consent, however, it isn't necessarily the case that the matter is actually fit for summary trial. In some cases, the court will hear the whole application and, when attempting to formulate reasons for judgment, realize that case was not suitable for a summary trial. It is crucial that the counsel turn their minds to the suitability question since a summary trial can cost in the realm of $50,000–$75,000 and it is a disaster for the client to have that money wasted without even obtaining a final decision.

Relevant Cases and Rules

Case/Statute	Juris.	P	Key Points
Rule 9-7(15)(a)	/	219	Test for Suitability on Summary Trial (in tandem with *Inspiration Management*).

Case/Statute	Juris.	P	Key Points
Inspiration Management v McDermid St Lawrence Ltd	1989 BC/CA	138	The chambers judge used the wrong test. However, even if she had use the right test, she could not have found the necessary facts because of the conflict in the evidence of McGowan and Wheeler on the central issue. Thus the chambers judge ought to have ordered ***cross-examination on the affidavits***.
Charest v Poch	2011 BC/SC	125	• The defendants' issue is not inappropriate for summary disposition because deciding the matter summarily will enhance the administration of justice. • The court can assess ***credibility*** because, despite the conflict in the evidence, there is additional documentary evidence on the basis of which the facts can be found. • Hearsay in affidavits may only be used to decide the issue of suitability.
Rule 9-7(11)(b)(i)	/	218	A suitability application can be heard before or at the same time as the hearing of the summary trial.
Western Delta Lands v 3557537 Canada Inc	2000 BC/SC	165	Keeping in mind that the moving party has another chance to argue unsuitability at the summary trial itself, a ***preliminary application*** to have a summary trial application dismissed on suitability grounds is ***likely to fail*** unless one of four conditions are met. See When Can the Suitability Issue Arise? (above).
Haughian v Jiwa	2011 BC/SC	135	A party's own XFD testimony is admissible on the suitability issue, but not admissible toward the substantive issues.

How is Summary Trial Different than Summary Judgment?

The summary trial rule is very different than the summary judgment rule. Under Rule 9-6, a genuine issue for trial scuttles the whole application. Under Rule 9-7, we try those issues!

PROCEEDINGS ON A POINT OF LAW

> *The essential purpose of R. 34(1) [Rule 9-4] is to provide a way to determine, without deciding the issues of fact raised by the pleadings, a question of law which goes to the root of the action.*
> —Esson JA, *BC Teacher's Federation v BC (AG)*, [1987] 1 WWR 527 (BC CA) at p 532
> cited by Saunders J in ***Harfield v Dominion of Canada General Insurance Co***

At any time before the trial, the court can hear and dispose of a pure question of law brought either by consent of the parties or order of the court: Rule 9-4. The point of law must ***arise from the pleadings***.

Where the parties ***consent***, it appears that the question of law need only meet the following requirements:

1. the point of law must be raised and clearly defined by the pleadings;
2. the facts relating to the point of law must not be in dispute and the point of law must be capable of being heard without hearing any evidence; and
3. assuming the facts alleged in the pleadings of one or more of the parties are true, the point of law must determine whether such alleged facts support a claim or defence in law.

However, when one party applies to have a point of law set down for hearing but another party ***contests*** the application, as occurred in *Harfield*, the court must decide whether to order that the point of law be set down for hearing. The following additional considerations seem to apply when the court is deciding whether to issue such an order:

4. whether the question will be decisive of the litigation or a substantial issue raised in it;
5. whether deciding the question will immeasurably shorten the trial, or result in a substantial saving of costs; and

6. whether the point of law is a serious question of general importance, in which case it is preferable that it be decided at trial where the full factual context will be available.

Case/Statute	Juris.	P	Key Points
Rule 9-4(1)	/	215	A point of law ***arising from the pleadings*** may be set down for hearing and disposed of at any time before trial, either by consent of the parties or order of the court (where "order", as we know, implies that a party must apply for it).
Rule 9-4(2)	/	215	If the decision on the point of law substantially disposes of the action or any claim, defence, set-off, or counterclaim, the court may make appropriate order.
Harfield v Dominion of Canada General Insurance Co	1993 BC/SC	135	The court can decide the point of law, which is ***determinative of a substantial issue*** in the action and raises the potential of significant savings of time and cost, since a determination in favour of Safeco will eliminate the need to prove whether Randy Grabowsky was insane.

SPECIAL CASE

The special case, or stated case, available under Rule 9-3, is the most puzzling device in this chapter because it is arguably not a "**summary proceeding**" within the JF/BG definition. This is crystal clear from Rule 9-3(5), which states that on answering a special case, the court may grant specific relief or order judgment to be entered ***with the consent of the parties***. In other words, ***without*** their consent, the court's opinion on the stated question is not binding on the parties.

The purpose of the stated case rule appears to be to allow the parties to get an opinion from the court which will allow them to settle their dispute between themselves. For example, suppose A and B formed a contract entirely by e-mail. They are in complete agreement as to the existence of the contract, and as to the e-mail messages which resulted in the contract formation. However, they can't agree as to whether a particular term was incorporated or not. A thinks the term is incorporated but B thinks it is not. B refuses to perform the alleged obligation and A sues him for damages. In negotiations, A and B agree that if in the opinion of the court, the term is incorporated, B will start performing going forward and A will drop the suit. A and B could then state a case, attach the e-mails, get the court's opinion, and resolve their differences without the need for a trial.

The main differences between Rule 9-3 and Rule 9-4 appear to be that:

1. the court in a special case can make findings of fact whereas under Rule 9-4 only questions of law may be answered;
2. the questions in the stated case need only "arise in the proceedings" whereas a point of law under Rule 9-4 must be raised by the pleadings;
3. the stated case need not determine a substantial issue in the action.

Case/Statute	Juris.	P	Key Points
Rule 9-3(1)	/	215	The parties may concur in stating a question of law, fact, or mixed fact and law.
Rule 9-3(2)	/	215	• The court may order that a question or issue arising in a proceeding (whether raised by the pleadings or ***otherwise***) be stated as a special case. • As always, the word "order" implies that a party can apply for the order. • However, this doesn't relieve the parties of the requirement to agree on the facts to be stated. This is what caused the problems in *William*. • Moreover, presumably this also doesn't make the court's opinion binding without consent of the parties.

Case/Statute	Juris.	P	Key Points
William v British Columbia	2004 BC/SC	166	A ***court-ordered*** stated case is not appropriate for the following reasons: 1. no question of law would dispose of the central issue; 2. the rule provides no mechanism for resolving disputed facts other than proceeding trial; and 3. a case of this importance should not move forward on the basis of assumed facts.
Rule 9-3(3)(b)	/	215	A special case must state such facts and refer to such documents as the court may require to decide the questions stated.
Jabs Construction Ltd v Callahan	1991 BC/SC	140	• Where determining a hypothetical point of law **may have a conclusive effect** on litigation, the court may make the determination, even if it will not necessarily dispose of the legal problems the parties have. • The test is whether deciding the issue will or may serve a useful purpose.
Rule 9-3(5)	/	215	With the ***consent*** of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

COMPARISON CHART

Name	Rule	Type of Question	E	When Available	Result	Master?
Striking Pleadings	9-5	Law	×	Any time, period	Procedural order	If no decision on question of law relating to issues: PD-34 ¶ 6(d)
Summary Judgment	9-6	Any	✓	After exchange of pleadings between affected parties	Substantive judgment or dismissal on all or part of a claim	If no triable issue: PD-34 ¶ 6(c)
Summary Trial	9-7	Any	✓	From filing of responding pleading to 42 clear days before trial	Substantive judgment or dismissal of all suitable issues	No
Point of Law	9-4	Law	×	Any time before trial	Binding substantive decision on a point of law arising from the pleadings	No
Special Case	9-3	Any	O	Any time, by consent or order of court	Non-binding opinion	Likely not

× No evidence is allowed

✓ Evidence is required

O Whether evidence is required—documents referred under Rule 9-3(3)(b)—probably depends on the case stated and whether the court is asked to provide an opinion on a question of fact.

8. Interim Relief

Pre-Trial Injunctions

From time to time, a plaintiff may be in such urgent need of an order from the court requiring the defendant to do or stop doing something that the plaintiff simply cannot wait for the trial. In these cases, he may apply for a ***pre-trial injunction***. Permanent injunctions are available only as final relief and are not part of the subject matter of this course.

Preliminary Matters

Interim vs Interlocutory

BG says that the general rubric of **pre-trial injunctions** has two sub-types with very specific definitions:

1. interim injunctions; and
2. interlocutory injunctions.

According to BG, **the meanings of these two terms have shifted over the years**, but the **currently accepted definitions** are as follows. An ***interim injunction*** is a pre-trial injunction usually granted as a short-term measure in response to an *ex parte* application. Because the courts are reluctant† to interfere with the rights of a party who has not had an opportunity to be heard, the terms of an interim injunction order will stipulate first that it must be promptly served on the party who is subject to the order, and second that it expires in short order unless renewed on application to the court. This gives the party who did not receive notice of the initial application an opportunity to contest the injunction at the first available opportunity.

An ***interlocutory injunction*** is quite simply a pre-trial injunction which expires at the conclusion of the trial, subject to continuation by a final order.

†: In fact, says BG, **increasingly reluctant** as the years go by.

Prohibitive vs Mandatory

A ***prohibitive injunction*** is just what it sounds like: You are ordered not to do X. Ditto a ***mandatory injunction***: You must do X. The important things to remember is that our courts of law are reluctant to order people to do things that they don't want to do and thus the threshold for granting a mandatory injunction is much higher than for a prohibitive injunction. Coerced inaction is the rule, coerced action the exception.

A Mareva Injunction (below) is an example of a prohibitive order, while an Anton Piller Order (below) contains a mandatory element.

Ethics of Injunctions

Certain types of injunction applications may need to be made ***without notice*** to the party sought to be enjoined. For example, in both the *Mareva* and *Anton Piller* scenarios which are discussed below, a defendant who receives notice of the impending application might accelerate the dissipation of his assets, or the destruction of the evidence, as the case may be.

As should be firmly ingrained in your memory by now, *ex parte* applications involve a ***heightened duty of professional ethics*** from counsel, both as ***officers of the court***, and under Chapter 8, paragraph 21 of the Law Society's ***Professional Conduct Handbook***. Deliberate failure to bring material adverse facts to the court's attention on an *ex parte* application could result in professional discipline for a lawyer†.

Ex parte applications are a risk for the party involved as well as counsel. If a party misleads the court, whether deliberately or not, the injunction is at the very least vulnerable to being set aside or varied. Costs or more severe consequences could also follow.

†: And possibly costs consequences on the lawyer as well. See ***Myers v Elman***.

Injunctions Are Not within the Jurisdiction of Masters

The court's inherent jurisdiction to impose injunctions is codified in section 39 of the *Law and Equity Act*. However, except for certain interim family law orders, masters have no jurisdiction to grant injunctions, whether pre-trial or final. This is made explicit in paragraph 2(g) of Chief Justice Bauman's Practice Direction ***PD-34 — Master's Jurisdiction***.

Relevant Rules, Statutory as Well as Ethical

Injunctions are governed on purely procedural matters by Rule 10-4 of the Supreme Court Civil Rules.

Case/Statute	Juris.	P	Key Points
Rule 10-4(2)	/	219	An application for a pre-trial injunction may be made before the start of a proceeding. This means, for example, that: • if a matter is so urgent that you don't even have time to draft and file a notice of civil claim, you may still apply to court for an injunction; • you might also use this rule when the element of surprise is crucial, as may occur when seeking a *Mareva* injunction or *Anton Piller* order. The injunction "***may***" (and probably will) be granted on ***terms*** providing for the start of the proceeding.
Rule 10-4(3)	/	219	If an application for a pre-trial injunction is made ***without notice***, the court may grant an ***interim injunction***.
Professional Conduct Handbook 8:21	/	260	In a ***without notice*** application, counsel must inform the court of all ***material*** facts, even if they are ***adverse*** to his client.
Rule 10-4(4)	/	219	An injunction must be imposed by ***order*** of the court. This makes it appealable. Crucially, this is subject to the fact that it is a limited appeal order under the *Court of Appeal Rules*.
Court of Appeal Rules Rule 2.1(a)(iv)	BC Reg	247	An order granted or refused under Part 10 of the Supreme Court Civil Rules is a limited appeal order and therefore requires leave under s 7(1–2) of the ***Court of Appeal Act***. See also Appealing the Order of a Judge (p 71).
Rule 10-4(5)	/	219	Unless the court orders otherwise (i.e. the applicant must establish entitlement to such an order), an order for a pre-trial or interim injunction just include the applicant's Undertaking as to Damages (below).
PD-34 — Master's Jurisdiction ¶ 2(g)	/	245	Masters ***do not have jurisdiction*** to grant injunctive relief except for making certain interim family law orders specifically enumerated in ¶ 5 of the Practice Direction. See also Jurisdiction of Masters (p 62).

Undertaking as to Damages

In granting a pre-trial injunction, the court is ***pre-judging*** the rights of the parties. There are two obvious and related problems with pre-trial injunctions:

1. the court is in a much worse position to decide on the parties' rights before a trial than it would be at the end of a trial, when it would have heard all of the evidence and arguments on the law; and

2. prematurely enjoining one of the parties could result in that party suffering injury which it does not deserve as a matter of law.

For these reasons, unless the applicant specifically establishes that an undertaking should not be imposed, a pre-trial injunction order must contain the applicant's ***undertaking*** to abide by any order the court makes as to damages payable to the party enjoined: Rule 10-4(5). If at the end of the trial, the injunction is found to have been wrongly imposed, the court must then conduct a ***damages assessment*** and order the applicant to pay any damages caused to the enjoinee by the wrongfully imposed injunction.

> *[T]he rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are* ***special circumstances*** *to the contrary.*
> —Cotton LJ, *Griffith v Blake* (1884), 27 Ch D 474,
> cited by Spence J in ***Vieweger Construction v Rush & Tompkins Construction***

The *Vieweger* case makes clear that the kinds of ***special circumstances*** excusing the applicant from paying the damages it has undertaken to pay are very limited. The two examples of special circumstances offered by Spence J in *Vieweger* are:

1. when applicant for the injunction is a public body acting in the public interest to maintain the *status quo* pending final adjudication of rights; and
2. when the defendant has been guilty of such misconduct that, despite winning on the merits, the court is not inclined to exercise its discretion in the defendant's favour.

Absent these circumstances, or similar ones, an applicant whose wrongly-obtained injunction causes results in injury to the enjoined party will be required to pay damages.

> *[I]t is neither the practice nor appropriate to require an undertaking as to damages where the Crown seeks to enforce by injunction what is prima facie the law of the land.*
> —McLachlin JA, ***British Columbia (AG) v Wale***

Test for a "Standard" Pre-Trial Injunction

> *Having set out the usual procedure to be followed in determining whether to grant an interlocutory injunction, it is important to emphasize that the judge must not allow himself to become the* ***prisoner of a formula****. The fundamental question in each case is whether the granting of an injunction is* ***just and equitable*** *in all the circumstances of the case.*
> —McLachlin JA, ***British Columbia (AG) v Wale***

The ***test*** for a garden-variety pre-trial injunction is set out in *British Columbia (AG) v Wale*. The overriding question is whether it is ***just and equitable*** in all the circumstances to grant the injunction, but the following criteria must be met.

1. there is a ***fair question to be tried*** as to
   a. the existence of the right which the applicant alleges; and
   b. a breach thereof, actual or reasonably apprehended; and
2. the ***balance of convenience*** favours granting the injunction.

Fair Question to Be Tried

The threshold for a ***fair question to be tried*** is apparently quite low. In particular, the applicant does not have to bring enough evidence on his application for a pre-trial injunction to support a final order. This latter evidentiary

burden, referred to as a "*prima facie* case", was rejected as too high by Lambert JA in ***Canadian Broadcasting Corp v CKPG Television***:

> *I presume that a "prima facie case" must mean a case where, if a decision were to be made as if the evidence on the application was all the evidence there was ever going to be, that decision would be in favour of the applicant. . . That test is different from the "fair question" test and imposes a burden on the applicant that is not required by the authorities. . .*

The ***strength*** of the applicant's case is not to be considered under the fair question prong, but rather under the balance of convenience: *CBC v CKPG*.

Balance of Convenience

The following non-exhaustive list of factors to consider in assessing the balance of convenience emerges from the *Wale*, and especially the *CBC*, cases:

1. whether the applicant, or the party sought to be enjoined, will suffer ***irreparable harm***;
   *(as a particular category of irreparable harm, whether contested **property** is sought to be preserved)*
2. the ***likelihood that the defendant will pay*** any damages finally awarded;
3. which of the parties has acted to affect the ***status quo***;
4. the ***strength*** of the applicant's case, which should be considered under the second prong of the test quite apart from whether there is a fair question to be tried; and of course
5. any other factors affecting the balance of justice and convenience.

Irreparable Harm

The *Wale* case set out the following considerations regarding irreparable harm:

- Irreparable harm means harm which an award of ***damages*** at the conclusion of trial ***will not adequately compensate***.
- Clear proof of irreparable harm is not required. Doubt as to the adequacy of damages may suffice to support an injunction.
- Where both parties might suffer irreparable harm—the applicant if the injunction is refused and the respondent if the injunction is ordered—the fact that one party bases his claim on existing rights, while the other's claim would upset the *status quo*, may tip the balance of convenience.
- The question of preservation of ***property*** often involves irreparable harm, since if the property which is the subject matter of the litigation is altered pending trial, damages may not offer complete compensation.

BG says that **because a judge deciding an injunction application is supposed to weigh all of the factors, in theory there is no need to establish irreparable harm. In practice, however, an injunction is unlikely to be ordered without some form of irreparable harm**.

Status Quo

> *Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.*
>
> —Lord Diplock, *American Cyanamid Co v Ethicon Ltd*, [1975] UKHL 1 at p 5
> referred to with apparent approval by McLachlin JA in ***British Columbia (AG) v Wale***

In *CBC v CKPG*, Lambert JA seems to argue, and BG agrees, that what exactly constitutes the ***status quo* can be arguable or difficult to determine**: "the status quo at the time of the application in a picketing case may be mass picketing". Be that as it may, it seems to me that this will be a frivolous argument in most cases. If something has

been the same for twenty years and one of the parties succeeds in changing things for twenty days before an injunction is obtained, it is pretty clear which of the two states of affairs the *status quo* denotes.

In any event, in *CBC v CKPG* Lambert JA identified three aspects involved in the consideration of the *status quo*:

1. which party took the step which first brought about the alteration in their relationship which led to an alleged actionable breach of the rights of one of the parties;
2. which party took the action which is said to be an actionable breach of the rights of the other party; and
3. the nature of the conduct which is said to be wrongful.

On Ignoring *RJR-MacDonald*

The test for a pre-trial injunction in BC is the two-prong *Wale* test. The fact that the Supreme Court of Canada used a three-pronged test in *RJR-MacDonald v Canada (AG)*, [1994] 1 SCR 311 (a judgment concurred in by McLachlin J) is apparently a source of confusion for some. The only "difference" in the tests is that the *RJR-MacDonald* makes irreparable harm a separate prong, whereas the *Wale* version rolls it into the balance of convenience. The BC courts have been at pains to emphasize that this is a distinction without a difference. BG suggests that **the best practice is to use *RJR-MacDonald* when you have a strong case on irreparable harm, and *Wale* when you do not**.

Relevant Cases

Case/Statute	Juris.	P	Key Points
British Columbia (AG) v Wale	1986 BC/CA	122	• Test for a pre-trial injunction: (1) whether there is a ***fair question to be tried***; and (2) whether the ***balance of convenience*** favours granting the injunction, with the ultimate decision depending on what is ***just and equitable*** in the circumstances. • Injunction upheld. The chambers judge did not err in principle in her exercise of her discretion. She implicitly considered irreparable harm by treating the Attorney General's claim as proprietary.
Canadian Broadcasting Corp v CKPG Television	1992 BC/CA	124	The *prima facie* case standard imposes too high an evidentiary burden. The first requirement of the pre-trial injunction test is always a ***fair question to be tried***.

Extraordinary Pre-Trial Injunctions

Aside from run-of-the-mill pre-trial injunctions, we learned about two extraordinary forms of pre-trial injunctions (BG calls them "**special injunctions**"):

1. the Mareva Injunction (below); and
2. the Anton Piller Order (p 99).

Because these orders are extremely invasive and coercive of the respondent (and because by their nature they must often be applied for *ex parte*), an application for such an order must meet a higher bar than must an application for more commonplace forms of injunctive relief.

Mareva Injunction

A *Mareva* injunction is an order intended to prevent a party from removing assets from the reach of the court, either by transferring them out of the jurisdiction, or by dissipating or destroying them entirely. Since *Mareva* orders can be quite draconian in their effect, different considerations apply to the granting of *Mareva* orders than to less intrusive injunctions.

The General Principle is No Execution before Judgment: *Lister & Co v Stubbs*

The word ***execution***, in its judicial sense, means the enforcement of a judgment of a court of law. Execution may include orders seizing or impounding a judgment debtor's assets or otherwise interfering with his rights. It is a basic

principle of the common law that execution cannot be obtained prior to judgment, and judgment cannot be recovered before trial:

> *I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.*
>
> —Cotton LJ, *Lister & Co v Stubbs*, [1886–90] All ER 797 at p 799
> cited with approval by Estey J in ***Aetna Financial v Feigelman***

The *Mareva* Exception and the Potential for Abuse

The Supreme Court of Canada recognized an exception to the *Lister* rule in the *Aetna Financial* case for the preservation of assets which are "the very subject matter of the dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute". However, the Court cautioned that the *Mareva* exception can lead to serious abuse and that ***litigious blackmail*** is not to be permitted:

> *[43] There is still, as in the days of Lister, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. . . . This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of a defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for one of many reasons, cannot afford to await the ultimate vindication after trial. . .*
>
> —Estey J, ***Aetna Financial v Feigelman***

Federalism and *Mareva* Injunctions

The name *Mareva* comes from the case of *Mareva Compania Naviera SA v Karageorgis*, [1975] 3 All ER 282 (CA), one of the early cases in which Lord Denning MR, helped to enshrine the *Mareva* exception in English law. The English cases tend to involve shipowners who, unable to locate the charterers of their ship, seek a *Mareva* injunction to prevent the charterers from transferring money from an English bank account to an account outside of England until a debt owed under the charterparty is paid off. Such a transfer would in many cases put the money outside of the jurisdiction of the English courts.

In the *Aetna* case, Estey J pointed out that a transfer of assets from one Canadian province to another is not an analogous situation. In our federal system, just because a resident of province A is a not a resident of province B hardly makes him a foreigner in the ordinary sense of the word. He is still subject to execution on a judgment rendered in province B in every part of Canada. Obtaining a *Mareva* injunction based on removal, or impending removal, of assets from one province into another will in most cases likely be quite difficult.

Test for *Mareva* Injunctions

The ***test*** for a *Mareva* injunction is whether it is ***fair and just*** that the applicant should have the right to monitor the movement or expenditure of the respondent's assets during the course of the proceedings: ***Silver Standard Resources v Joint Stock Co Geolog***. This appears to entail the following requirements:

1. the applicant must have a **strong *prima facie* case**, not just a fair question to be tried ***Aetna Financial v Feigelman***, ***Reynolds v Harmanis***; and
2. subject to the "relaxed approach" suggested in *Silver Standard* and the overall requirement to be ***fair and equitable***, the applicant must usually persuade the court that:
    a. the respondent ***is removing*** his assets from the jurisdiction to avoid the possibility of a judgment;

b. there is a ***real risk*** that the respondent is ***about to remove*** his assets from the jurisdiction to avoid the possibility of a judgment; or
c. the respondent is otherwise ***dissipating or disposing*** of his assets ***otherwise than in the ordinary course of business*** or living so as to render the possibility of tracing them remote.

Aetna Financial v Feigelman at ¶ 29, citing with apparent approval the Ontario Court of Appeal in *Chitel v Rothbart* (1982), 39 OR (2d) 513).

Some factors to consider in assessing the overall "justice and convenience" include:

- The effect of the injunction on innocent third parties (*Reynolds, Silver Standard*). If the respondent's assets are tied up, third parties who are expecting payment may be made to suffer serious harm.
- The respondent's ability to defend itself in the litigation.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Aetna Financial v Feigelman	1985 CA/SC	120	The removal of assets in the ***ordinary course of business*** by a resident defendant to another part of the ***federal*** system will not by itself trigger an exceptional remedy such as a ***Mareva injunction***.
Reynolds v Harmanis	1995 BC/SC	152	• Plaintiff failed to demonstrate a strong *prima facie* case. • A second ground for rejecting the application is that the court probably cannot grant an order whose effect is entirely extraterritorial: **either the assets sought to be tied up must be within the jurisdiction, or the respondent to the application must be here, but at least one or the other is required** (BG).
Silver Standard Resources v Joint Stock Co Geolog	1999 BC/CA	155	• ∄ a hard and fast rule that a ***Mareva injunction*** may never be made unless there is a fraudulent intent. • Judges must not be "prisoners of a formula" and should take a ***relaxed*** approach which faces the real issue: balance of justice and convenience. • In most cases it will be neither just nor convenient to tie up a defendant's assets simply to give plaintiff security for a judgment he might never obtain. • Chambers judge considered all of the factors and did not err in principle.

Anton Piller Order

The purpose of an *Anton Piller* order is to preserve evidence pending trial. Such orders are most frequently issued in cases involving fraud, or illicit use of intellectual property, as in *Anton Piller KG v Manufacturing Processes*. Since the objective is to prevent the "respondent" from destroying evidence, and since the knowledge of an impending lawsuit would likely prompt a dishonest "respondent" to speed up the 'ol evidence destruction schedule, such orders normally have to be made *ex parte*.

An *Anton Piller* order frequently has two parts:

1. an injunction restraining the "respondent" from doing what the applicant for the order objects to; and
2. an order that the "respondent" grant the applicant permission to enter his premises and inspect, or take possession of, certain evidence.

The second component of the order is a ***mandatory injunction*** of a very particular kind. While it might at first blush seem to grant the applicant a private search warrant, there is an important difference between a search warrant and an *Anton Piller* order. The holder of a search warrant is entitled to forcibly enter and inspect. The holder of an *Anton Piller* order is not. If the "respondent", in defiance of the order, refuses to grant permission to enter, the applicant must respect this refusal.

Despite the right of the "respondent" to deny entry to his premises or access to the evidence, an *Anton Piller* order is far from toothless. There are two reasons for this:

1. defiance of an order is a contempt of court, and the "respondent" who refuses to comply is in peril of contempt proceedings; and
2. the court may draw adverse inferences at trial if the "respondent" refused to allow the applicant to enter and inspect.

TEST FOR *ANTON PILLER* ORDER

Subject to the *caveat* that the overarching test is no doubt still the *Wale* test and whether it is ***just and equitable*** in the circumstances to grant the order, an *Anton Piller* order may be granted *ex parte* where:

1. the applicant has an ***extremely strong prima facie case***;
2. there is ***very serious potential damage*** (or actual damage) to the applicant;
3. there is ***clear evidence*** that
    a. the "respondent" has in his ***possession*** incriminating documents or things; and
    b. there is a real possibility that the "respondent" ***may destroy*** such material if he receives notice of the application.

SAFEGUARDS

Any *Anton Piller* order granted in Canadian courts will, in addition to the two substantive elements described at the outset of this section, include the following safeguards:

- the order will be drafted in the narrowest possible terms and identify to the greatest extent possible the material to be preserved;
- the applicant must be attended, in Canada, by an ***independent*** solicitor who:
    - acts as an ***officer of the court*** (on the payroll of the applicant);
    - among other responsibilities, can preserve material over which the applicant claims a right to inspect, but the "respondent" claims ***privilege***;
- the order must contain an Undertaking as to Damages (p 94);
- the applicant must allow the "respondent" an opportunity to consider the order and consult his own solicitor;
- if the "respondent" wants to discharge the order as having been improperly obtained, he must be allowed to do so; and
- if the "respondent" refuses entry, the plaintiffs must accept this refusal and bring it to the attention of the court.

PRE-JUDGMENT GARNISHING ORDERS

Recall that the general rule from *Lister & Co v Stubbs* is that the plaintiff has no recourse against the defendant until he recovers judgment. The ***Court Order Enforcement Act*** enacts a statutory exception to this rule in the form of pre-judgment garnishing orders.[7]

[7] Post-judgment garnishing orders are also available under the Act, but these are more a matter of creditors' remedies than of civil procedure.

A garnishing order allows the plaintiff to obtain security against the possibility of a judgment by "***attaching***" a debt, obligation, or liability owing from a third person, called the ***garnishee***, to the defendant. The garnishee is compelled to pay the amount owing to the defendant into court. If the plaintiff wins, the attached amount is then paid to the plaintiff; if the defendant wins, to the defendant.

A pre-judgment garnishing order may only be issued for a ***liquidated amount***, which typically means a debt. If the plaintiff seeks an amount to be assessed, he is out of luck. The most common garnishee is a ***bank*** because under our enlightened legal system, a deposit account is considered to be a debt rather than a contract of bailment.

An Extraordinary Remedy

> *It must not be forgotten that the attachment of debts before judgment is an extraordinary process, unique in our law, whereby a defendant is deprived of the use of his property before any judgment is rendered against him. There must therefore be a meticulous observance of the requirements of the [Court Order Enforcement Act] and of sec. 3 thereof. . .*
>
> —Wilson J, ***Knowles v Peter***

Because pre-judgment garnishing orders are an extraordinary remedy, they are an exception to the usual rule of civil procedure that a technical defect is merely an irregularity. A technical defect will cause an application for a pre-judgment garnishing order to be denied, or an existing such order to be set aside: ***Knowles v Peter***.

Requirements for a Pre-Judgment Garnishing Order

An application for a pre-judgment garnishing order must be supported by an affidavit swearing the following facts as required by section 3(2), paragraphs (d–f) of the ***Court Order Enforcement Act***:

- paragraph (d):
  - an action is pending;
  - when it was commenced;
  - the nature of the cause of action; and
  - the amount that is justly due and owing, after making all discounts;
- paragraph (e):
  - the garnishee is indebted to the defendant;
- paragraph (f):
  - the place of residence of the garnishee.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Court Order Enforcement Act s 3(2)	RSBC 1996	249	• On application ***without notice*** to any person (i.e. neither the defendant nor to the garnishee need be notified) . . . • . . . a judge or registrar may order that all debts due from the garnishee to the defendant are attached up to the amount necessary to answer the judgment . . . to be recovered from the defendant.
Professional Conduct Handbook	8:21 /	260	In a ***without notice*** application, counsel must inform the court of all ***material*** facts, even if they are ***adverse*** to his client.
Court Order Enforcement Act s 3(2)(d-f)	RSBC 1996	249	Requirements for a Pre-Judgment Garnishing Order (see above)
Court Order Enforcement Act s 3(2)(d)(iii)	RSBC 1996	249	The affidavit in support of the application, made by the applicant, his solicitor, or some other person aware of the facts, must state the ***nature of the cause of action***.

Case/Statute	Juris.	P	Key Points
Knowles v Peter	1954 BC/SC	144	The cause of action must be stated with sufficient particularity to (1) allow the judge to decide, intelligently, whether it is allowed by the *Court Order Enforcement Act*; and (2) support an indictment for perjury if the statement turns out to be false.
Court Order Enforcement Act s 3(4)	RSBC 1996	250	Garnishment of ***wages*** pre-judgment is ***not allowed***.
Court Order Enforcement Act s 9(1)	RSBC 1996	250	A pre-judgment garnishing order is operative once served on the garnishee.
Court Order Enforcement Act s 9(2)	RSBC 1996	250	The defendant must also be served "at once" with the garnishing order.
Court Order Enforcement Act s 11(a–b)	RSBC 1996	250	A garnishee may either (a) pay the debt allegedly owing to the defendant into court; or (b) dispute the debt.
Court Order Enforcement Act s 11(c)	RSBC 1996	251	If the garnishee fails to either pay or dispute, the court may order the garnishee to pay the amount into court, plus the costs of the process.

9. Expert Evidence

Overview

In various places, the ***Supreme Court Civil Rules*** blur the lines between procedural and substantive law. One place this is particularly apparent is Part 11, which deals with expert opinion evidence in civil trials. Codifications and modifications of the common law of expert opinion evidence are scattered throughout Par 11 and the reader should be aware that, while everything below is part of the course material, some of it is more appropriately described as evidence law, not civil procedure.

Expert evidence, or expert opinion evidence, is an exception to the general rule that evidence must be given by someone who personally saw or heard something relevant to the issues before the court.[8] At common law, expert opinion evidence is presumptively inadmissible. The onus is on the party tendering the evidence to establish its admissibility on principled grounds.

The civil expert opinion evidence regime in British Columbia is fascinating because it is driven by documents, not the *viva voce* testimony of live witnesses. Indeed, the "default setting" for the system is no testimony at all. The expert writes a ***report***, which goes into the record as his direct evidence and the expert doesn't even appear at the trial. The expert may only be cross-examined if a party who is entitled to cross-examine the expert demands his attendance for this purpose. The expert may give direct evidence if his attendance was demanded for cross-examination, or if a direct examination is necessary to clarify terminology used in the report or make the report more understandable.

Note: Part 11 does not apply to summary trials except as specified in Rule 9-7. The applicable rules are listed in the Relevant Cases and Rules in the Note on Evidence part of the section on Summary Trial (p 87).

Ethics and Expert Witnesses

Please see the Table of Ethical Obligations (p 10). There are no other specific obligations beyond these.

The Rule against Advocacy

Rule 11-2(1) codifies two crucial common law obligations of expert witnesses:

1. an expert's duty is to assist the court; and
2. an expert witness is not to be an advocate for any party.

Case/Statute	Juris.	P	Key Points
Rule 11-2(1)	/	220	Duty of experts is to assist the court and not to be advocates for any party.
Vancouver Community College v Phillips, Barratt	1988 BC/SC	162	• Atkins' report and testimony amount to nothing more nor less than ***arguments*** advanced on VCC's behalf through the mouth of an expert. • The substantial revisions of the ***substance*** of the report, on at least 10 occasions, based on advice from counsel, were entirely inappropriate.

[8] Thus opinion evidence given by someone who saw or heard something relevant and formed an expert opinion about it—as, for example, a doctor who realized someone who fell into a lake suffered hypothermia—may be plain old evidence, not "expert opinion evidence". Part 11 doesn't seem to apply here: Rule 11-1(2).

Case/Statute	Juris.	P	Key Points
Turpin v Manufacturers Life Insurance Co	2011 BC/SC	161	If the author of an expert report regards a factor as a major premise leading to the conclusion, then it should be so stated. The author should not use ***unexplained emphasis***, by way of ***bold*** or ***italic*** typeface or otherwise, in the body of the report.
Surrey Credit Union v Wilson	1990 BC/SC	157	• Where assistance from counsel goes to the ***form*** of the report, as opposed to the ***substance*** of the opinion, no objection can be raised. • *If* counsel had properly prepared Dr Rosen (or suggested appropriate revisions), *then* much objectionable material *might have* been avoided.
Rule 11-2(2)	/	220	An expert must ***certify*** every report he makes as follows: (a) I am aware of the duty to assist the court and not be an advocate; (b) I made the report in conformity with that duty; and (c) if I am called to testify, I will testify in conformity with that duty.

TYPES OF EXPERTS

The Rules specifically provide for four different "types" of expert witness:

1. the party's own expert: Rule 11-4;
2. joint experts, jointly appointed by adverse parties: Rule 11-3;
3. common experts, appointed by parties not adverse in interest: Rule 11-3(11);
4. experts appointed by the court under Rule 11-5.

Party's Own Expert

By far the most common case is where a party appoints his own expert.

Case/Statute	Juris.	P	Key Points
Rule 11-4	/	221	Subject to Rule 11-1(2), which states that if a CPC has been held, no party may tender expert evidence unless provided for in the case plan order which is in effect, a party may appoint its own expert.
Rule 11-3(9)	/	221	Although the default case is that adverse parties combining to appoint a joint expert may not appoint any other experts on that issue, with leave of the court a party appointing a joint expert may appoint its own expert on that issue.

See Also: Cross-Examination of Experts (p 109)

Joint and Common Experts

A ***joint expert*** is an expert jointly appointed by two or more parties who are ***adverse in interest***. Several considerations which are specific to joint experts are set out under Rule 11-3. A ***common expert***, on the other hand, is an expert appointed by two or more parties who are not adverse in interest. Other than the fact that several parties co-operate to appoint him, it seems to me that a common expert is really just a special case of one party appointing his own expert.

Case/Statute	Juris.	P	Key Points
Rule 11-3(1)	/	220	Two or more adverse parties may appoint a joint expert if they can agree on the details listed in paragraphs (a)–(g).
Rule 11-3(3)	/	220	If the parties cannot agree, the court may by order settle the terms of the expert's appointment on application by a party either under Part 8, at a CPC, or at an application to amend a case plan order.
Rule 11-3(7)	/	221	Unless the court otherwise orders (i.e. unless it is convinced on application by one of the parties), the joint expert is the only expert who, in relation to the parties who appointed him and the issue he is appointed for, may give expert opinion evidence.

Case/Statute	Juris.	P	Key Points
Rule 11-3(10)	/	221	All parties of record, including those who appointed the joint expert, may cross-examine him. See also Cross-Examination of Experts (p 109).
Rule 11-3(11)	/	221	Rule 11-3 does not apply to parties with concordant interests, who want to appoint a common expert.

Court-Appointed Expert

Under Rule 11-5, the court may appoint its own expert witness ***on the court's own initiative***. As with all experts, such a witness is duty-bound to follow The Rule against Advocacy.

Case/Statute	Juris.	P	Key Points
Rule 11-5(1)	/	221	The court may appoint an expert at any point in the action on its own initiative.
Rule 11-5(2)(a)	/	221	In making an appointment, the court may ask the parties to suggest candidates.
Rule 11-5(2)(b)	/	221	The court may require the parties to advise if they have any connection to a potential expert.
Rule 11-5(7)	/	222	The court, in consultation with the parties, settles the questions to be submitted to the court's expert and gives the expert any directions it thinks appropriate.
Rule 11-5(10)	/	222	The court can order a party or the parties to pay the expert's fees.
Rule 11-5(6)	/	222	All parties are entitled to ***cross-examine*** a court-appointed expert unless the court orders otherwise. See also Cross-Examination of Experts (p 109).

EXPERT REPORT

Admissibility: *R v Mohan* &c

Since the expert's report is supposed to provide the expert's direct evidence under the regime described by Part 11, the substantive admissibility of the report, or parts of it, is a commonly litigated issue.

Recall that at common law, expert evidence is presumptively inadmissible. The party tendering the evidence must establish, on a balance of probabilities, that the evidence meets the four-part test from *R v Mohan*[9]:

(a) logical relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule;
(d) a properly qualified expert.

In this course, we looked at aspects of only two *Mohan* factors: (d) the properly qualified expert; and (b) necessity. In addition, we looked at two other rules: (1) experts may not give opinions on the ultimate issue; and (2) experts may not find facts.

QUALIFIED EXPERT

Case/Statute	Juris.	P	Key Points
Rule 11-6(1)(a)	/	222	An expert report must state the expert's area of expertise.
Rule 11-6(1)(b)	/	222	The report must state the expert's qualifications, employment experience, and education in his area of expertise.
Rule 11-6(1)(d)	/	222	The report must set out the nature of the opinion being sought.
Rule 11-6(2)	/	223	The assertion of qualifications of an expert is ***evidence*** of them. Note that the rule says evidence, not proof. Note also the point made in *Turpin*: evidence of qualifications is not the same as evidence that the expert is a qualified expert in the legal sense.

[9] [1994] 2 SCR 9.

Case/Statute	Juris.	P	Key Points
Turpin v Manufacturers Life Insurance Co	2011 BC/SC	161	• The onus is on the party putting forward the expert evidence to establish that the expert is qualified. • The words ***internal medicine*** do not assist the court, as a layman, in deciding whether a proposed witness is a qualified expert. • It's not enough that the expert be qualified in the abstract: she must be qualified on the very topic upon which she will state her opinions.
Surrey Credit Union v Wilson	1990 BC/SC	157	A well-respected member of a profession is qualified to give evidence on the ***standards*** of that profession—and whether specific assumed facts constitute a departure from those standards—but not as to the ***legal effect*** of the standards.

Necessity in Assisting the Trier of Fact

The opinion of a qualified expert must be ***necessary*** to ***assist*** the trier of fact: *R v Mohan*. This is because generalist triers of fact may need assistance in drawing inferences on issues which are beyond their knowledge. Thus any "expert" opinion on an issue that the trier of fact is already fully-equipped to decide is inadmissible under the *Mohan* test for the simple reason that it is not necessary.

Case/Statute	Juris.	P	Key Points
Yewdale v ICBC	1995 BC/SC	166	Statements of ***self-evident fact***, and statements of facts of which the court is well aware, are ***of no assistance*** and are inadmissible.

Ultimate Issue

The trier of fact is supposed to be the ultimate decider of the facts in issue. The closer, therefore, that a fact comes to being an ***ultimate issue***—a fact which, if proved or disproved, brings with it legal consequences—the less appropriate it is for an expert to offer an opinion on it. If the expert's opinion is on the ultimate issue itself, it is certainly inadmissible.

Consider *Turpin v Manufacturers Life Insurance Co*. This was a straightforward breach of contract action. The plaintiffs incurred mondo medical costs while travelling abroad. When they claimed under their travel insurance policy, their insurer denied the claim, so they sued. The only issue for the court was whether the policy covered the medical expenses claimed. Since this turned entirely on whether the medical treatment was necessitated because of a pre-existing condition as defined in the policy, this latter question was the ***ultimate issue*** for the court and an expert opinion on this very question was inadmissible.

Experts May Not Find Facts

No witness, whether expert or ordinary, can take away the trier of fact's duty to find the facts of the case. Expert opinions are to be rendered based upon ***assumed*** facts so that if the underlying facts found are not those assumed by the expert, the weight given to the expert's opinion can be adjusted accordingly.

Case/Statute	Juris.	P	Key Points
Yewdale v ICBC	1995 BC/SC	166	Mr Camp's report is inadmissible in part because it draws inferences of fact.
Rule 11-6(1)(f)(i)	/	222	An expert report must include a description of the factual assumptions on which the opinion is based. . .
Rule 11-6(1)(f)(ii)	/	222	. . . plus a description of any research conducted by the expert that led him to form his opinion. . .
Rule 11-6(1)(f)(iii)	/	222	. . . plus a list of every document relied on by the expert in forming his opinion.
Turpin v Manufacturers Life Insurance Co	2011 BC/SC	161	One of the defects in the report is that it fails to list the documents the author wrote that she "reviewed", contrary to Rule 11-6(f)(iii).

Case/Statute	Juris.	P	Key Points
Rule 11-6(8)(a)	/	223	• If the report of a party's own expert is served under Rules 11-3(9) or 11-4, the party who served the report must, upon being asked by a party of record, promptly serve on the requesting party a written statement of facts on which the expert's opinion is based. • Given the requirement that Rule 11-6(1)(f) places on the report itself, presumably there is a difference in detail between subrules (1) and (8)?

Objections to Admissibility

Under the report as direct evidence regime, a party cannot object to an expert report unless he raises the objection in advance of the trial in conformity with Rule 11-6, subrules (10) and (11).

Case/Statute	Juris.	P	Key Points
Rule 11-6(10)	/	224	A party wanting to object to the admissibility of an expert report must serve notice on all parties of record of any (every) objection that the objecting party plans to raise at trial ***on the earlier of*** the date of the trial management conference or 21 days before trial.
Rule 11-6(11)	/	224	If a party could have given ***reasonable notice*** of an objection to admissibility under subrule (10) but did not, the party may not raise the objection at trial ***unless*** the court otherwise orders (i.e. except on application and with a convincing reason).

Expert's File

When a lawyer solicits the opinion of an expert witness who is not a party to assist in litigation, either ongoing or reasonably contemplated, the documents produced by the lawer and expert in obtaining that opinion are protected by Solicitor's Brief Privilege (p 41). However, as with all privilege, this privilege may be ***waived***. Thus in a decision[10] taken earlier in the same proceedings as ***Vancouver Community College v Phillips, Barratt***, Finch J held that when an expert witness is called to testify—or when his report is placed in evidence—the party tendering the expert evidence waives privilege over, and the witness may be required to produce to cross-examining counsel, all documents in his possession which are, or may be, relevant to the expert's ***credibility***† or to the ***substance*** of his evidence. This disclosure of the expert's file is how the court became aware of the improprer revisions of Mr Atkins' report in the *VCC* case.

In ***Delgamuukw v British Columbia (No. 2)***, McEachern CJBC applied the "credibility† or substance" test to a number of documents possessed by three of the plaintiffs' experts. The following table attempts to summarize what was, and was not, found to be disclosable, although there's a good deal of bleed between "substance" and "credibility", so the use of distinct columns is somewhat artificial.

substance of the evidence	credibility† of the expert	not disclosable

• exposure of the expert to the possible influence of an expert in a different discipline
• changes suggested by counsel
• critiques of the report provided to the expert before he revised
• anything that could be read as suggesting what should, or should not, be in the report (and probably live testimony)
• draft versions of the report
	• fees and compensation
	• terms of engagement
		• anything innocuous
		• identities of other recipients of information sent to the expert
		• favourable comments about the quality or usefulness of a report by
		  ○ counsel; or
		  ○ anyone else
		• trial strategy
		• trial housekeeping
		• the fact that the report was given to a consultant

[10] *Vancouver Community College v Phillips, Barratt* (1987), 20 BCLR (2d) 289.

†: Credibility must be given a limited construction, because just about anything *could* relate to credibility, and the purpose of the expert's file rule is not to open the door to fishing expeditions: *Delgamuukw (No. 2)*.

The obligation to disclose the expert's file has been codified in subrule (8) of Rule 11-6. It applies to reports of a party's own expert, whether given under Rule 11-4 or Rule 11-3(9).

Case/Statute	Juris.	P	Key Points
Rule 11-6(8)(a)	/	223	Promptly after being asked for any of the following by a party of record: (i) any written statement of facts on which the expert's opinion is based; (ii) independent observations may by the expert in relation to the report; (iii) any data compiled by the expert in relation to the report; (iv) the results of any test or inspection conducted by the expert if the expert relied on it in coming to his opinion, a party tendering the report of its own expert must ***serve*** that information on the requesting party.
Rule 11-6(8)(b)	/	224	A party tendering the report of its own expert must ***make available*** to a party of record who requests it the contents of the expert's file for inspection and copying: (i) if requested ***within 14 days before*** the trial date, "promptly"; or (ii) at least ***14 days before*** the scheduled trial date otherwise.
Delgamuukw v British Columbia (No. 2)	1988 BC/SC	127	• The expert's file, which must be disclosed if the report is put in evidence or the expert testifies, consists of all documents in the expert's ***possession*** which are, or may be, relevant to his ***credibility*** or the ***substance*** of his evidence. • In addition to documents in the witness' ***possession***, counsel must produce on demand any similar documents which the witness has seen. • Oral communications must be disclosed on the same principles.

Service Requirements

Case/Statute	Juris.	P	Key Points
Rule 11-6(3)	/	223	With the exception of the report of a court-appointed expert, all expert reports must be served on ***every*** party of record at least ***84 days before*** the trial date.
Rule 11-6(4)	/	223	A responding report (i.e. the report of an expert whose evidence is intended to respond to another expert's evidence) must be served on ***every*** party of record at least ***42 days before*** the trial date.
Rule 11-6(5–6)	/	223	Supplementary reports must be (a) prepared as soon as practicable; and (b) served promptly. See also Subsequent Changes of Fact or Opinion (below).

See Also: Chart of Common Time Requirements (p 76)

Subsequent Changes of Fact or Opinion

Case/Statute	Juris.	P	Key Points
Rule 11-6(5)	/	223	If a ***joint expert's*** opinion changes in a ***material way*** after his report has been served, he must prepare a ***supplementary report***.
Rule 11-6(6)	/	223	If a ***party's own expert's*** opinion changes in a ***material way*** after his report has been served, he must prepare a ***supplementary report***.
Rule 11-6(7)	/	223	Formal requirements for the content of a supplementary report.
Rule 11-7(6)(a)	/	225	The court may allow an expert witness to ***give evidence at trial*** on terms and conditions, even if the requirements of Part 11 were not satisfied, if ***new facts have come to light*** that could not reasonably have been learned in time to be included in a report or supplementary report. See also Direct Examination of Experts (below).

Expert Opinion Evidence at Trial

There are two issues relating to how expert opinion evidence is given at trial:

1. whether the expert can give ***direct evidence*** *viva voce*, and what evidence he can give; and
2. who, if anyone, is permitted to ***cross-examine*** the expert witness.

Direct Examination of Experts

Case/Statute	Juris.	P	Key Points
Rule 11-7(2)(b)	/	224	If, of the parties entitled to cross-examine a particular expert, ***no one demands his attendance*** at trial for cross-examination, the witness need not give *viva voce* evidence and ***the expert's report may stand as his evidence*** at trial. This applies to all kinds of experts: joint, court-appointed, or party's own.
Rule 11-7(5)(a)	/	225	A party must not call ***its own expert*** to give direct evidence (unless the court orders otherwise) except in two kinds of scenarios: (i) a party entitled to do so has demanded the expert's attendance for cross-examination; or (ii) where the party calling the expert believes direct examination is necessary to clarify terminology or otherwise make the report more understandable. Subrule (5) does not apparently apply to joint experts. It is also ambiguous. Subparagraph (ii) says that the direct examination must be limited to the matters listed in subparagraph (ii). But what if a party demands the expert's attendance for cross-examination? Is a free-wheeling direct examination now permitted? It seems unlikely, but the text of the rule suggests it is.
Rule 11-7(6)	/	225	The court may allow an expert witness to ***give evidence at trial*** on terms and conditions, even if the requirements of Part 11 were not satisfied, in any of three (disjunctive) scenarios: (a) new facts have come to light that could not reasonably have been learned in time to be included in a report or supplementary report; (b) the non-compliance is unlikely to cause prejudice; or (c) the interests of justice require it. Note that despite the subrule's heading, this is not the same as "dispensing with the requirements of Part 11". That more broad power would have to be justified under Rule 22-7(1).

Cross-Examination of Experts

Case/Statute	Juris.	P	Key Points
Rule 11-3(10)	/	221	∀ party of record, including appointing parties, may cross-examine ***joint experts***.
Rule 11-5(6)	/	222	∀ party of record may cross-examine ***court-appointed experts***, unless court says no.
Rule 11-7(2)(a)	/	224	If a party entitled to cross-examine the expert demands his attendance at trial ***within 21 days after*** service of the expert's report, the report may not be tendered or accepted as evidence at trial unless the expert submits to cross-examination.
Rule 11-7(2)(b)	/	224	If no party entitled to do so demands an expert's attendance at trial for cross-examination, the expert need not come to the trial.
Rule 11-7(3)(a)	/	225	This rule essentially regurgitates Rules 11-3(10) and 11-5(6): any party of record is entitled to demand the attendance of a ***joint*** or ***court-appointed*** expert for cross-examination by the demanding, or any other, party.
Rule 11-7(3)(b)	/	225	Only an ***adverse party*** may demand the attendance of a ***party's own expert*** for cross-examination.
Rule 11-7(5)(b)	/	225	A party who appoints ***his own expert*** under Rule 11-4 or 11-3(9) may not cross-examine the expert at trial.

10. Trial Procedures, Offers to Settle & Costs

Trial Procedures

The actual conduct of a trial, which is governed by the law of evidence, the art of advocacy, and to some extent Rule 12-5, is not the subject of this course. We need only know a few procedural matters about the run-up to trial, and about the fast-track litigation rule.

Run-Up to Trial

Setting the Trial Date

Any party (i.e. not just a plaintiff) can reserve a trial date by consulting with the registry and then filing a ***notice of trial***. A party can theoretically set the trial date unilaterally, but as a matter of courtesy—and practicality—the party setting the trial date must consult with the other parties. The party filing the notice of trial is also responsible for filing and serving the ***trial record***. All parties of record, regardless of whether they are the one who filed the notice of file, must prepare a ***trial brief***, attend the mandatory ***trial management conference***, and file a ***trial certificate***.

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 12-1(2)	/	225	• Any party may set a proceeding down for trial by filing a ***notice of trial***. • Note that that party who does this also becomes responsible for filing the ***trial record*** under Rule 12-3.
Rule 12-1(6)	/	226	The plaintiff, or another party if ordered by the court, must serve a copy of the filed notice of trial on all the parties of record.
Rule 12-2(1)	/	226	A trial management conference must be held at least 28 days before the trial date. See also Chart of Common Time Requirements (p 76). The TMC gives the court a tool to ensure that the litigants are prepared to make efficient use of court time at the upcoming trial.
Rule 12-2(3)	/	226	Each party of record must file a trial brief at least 7 days before the TMC. See also Chart of Common Time Requirements (p 76).
Rule 12-2(4–5)	/	226	∀ party of record must attend the TMC, unless: • he is excused by the court ("the court otherwise orders"); or • he falls under the exception in subrule (5), namely that either the party himself or someone empowered to decide how the party will conduct the litigation is readily available for consultation by phone or in person. On BG's reading, **subrule (4) requires a court order to take advantage of subrule (5)**. Another plausible interpretation is that if the party abides by the subrule (5) conditions, leave of the court is not necessary.
Rule 12-3(3)	/	227	As well as filing a trial brief, the party who filed the ***notice of trial*** must: (a) file a ***trial record*** at least 14 days but not more than 28 days before the scheduled trial date (see Chart of Common Time Requirements); and (b) serve a copy of the filed trial record on all other parties of record.
Rule 12-3(1)	/	227	The ***trial record*** must contain, among other things: (a) the Pleadings; (b) any Particulars served under a demand for particulars, plus the demand itself; and (c) any case plan order.

Case/Statute	Juris.	P	Key Points
Rule 12-4(2)	/	227	∀ party of record (not just the one that filed the notice of trial) must file a ***trial certificate*** at least 14 days but not more than 28 days before the scheduled trial date. Note that the "not more than 28 days" requirement ensures that the TMC has been held. See also Chart of Common Time Requirements (p 76).
Rule 12-4(3)	/	227	The ***trial certificate*** must contain: (a) a statement that the party filing the certificate will be ready to go on the scheduled trial state; (b) a statement that the party filing the certificate has completed ∀ XFD that the party intends to conduct; (c) the party's current estimate of the length of the trial; and (d) a statement that the TMC has been conducted.

Fast Track Litigation

Rule 15-1 creates a modified trial regime for matters which involve small sums of money and (or?) which are expected to be resolved by relatively short trials. Qualifying proceedings are called ***fast track*** actions.

How is a Fast Track Action Different than a Regular Action?

No doubt inspired by the "proportionality" goal codified in Rule 1-3(2), a fast track proceeding governed by Rule 15-1 is subject to the following procedural limits:

- with a few notable exceptions, no party can bring any application without consent of the other parties until a case planning conference or trial management conference has first been held;
- examination for discovery rights are heavily curtailed; and
- the default costs regime is a fixed daily rate which tops out if the trial takes 3 days (i.e. no more costs can be recovered for a 4-day trial or a 55-day trial than can be recovered for a 3-day trial).

The *quid pro quo* for submitting to these limits is supposed to be that the parties are ***entitled*** to a trial date within 4 months, which in this age of multi-year wait times is a minor miracle. However, BG confides (albeit on information and belief rather than personal knowledge) that **the registry is often unable to schedule a trial date within 4 months even for valid fast track actions**.

Which Actions Qualify as Fast Track Actions?

An action is a fast track if it meets any of the disjunctive criteria set out in Rule 15-1(1)—that is:

(a) the relief claimed by the plaintiff is $100,000 or less;
(b) the trial is estimated to be 3 days or less;
(c) all parties consent; or
(d) the court orders, on its own initiative or on application by a party, that the action is a fast track action.

Relevant Rules

Case/Statute	Juris.	P	Key Points
Rule 15-1(1)	/	232	Criteria for a fast track action.
Rule 15-1(7–9)	/	233	Until there is a CPC or TMC in the action, no applications are allowed except for the following five allowed purposes: (a) to exempt the action from fast track rules; (b) to obtain the courts permission to bring an application; (c) to strike pleadings, obtain summary judgment, or for summary trial; (d) to add, remove or substitute a party; or (e) by consent.

Case/Statute	Juris.	P	Key Points
Rule 15-1(11)	/	233	All examinations of any party of record by all adverse parties must not, in the aggregate, exceed 2 hours unless the party being examined consents. See also Time Limit on Examination for Discovery (p 48).
Rule 15-1(12)	/	233	∀ XFD in a fast track action must be completed at least 14 days before the scheduled trial date. See also Chart of Common Time Requirements (p 76).
Rule 15-1(13)	/	233	The parties to a fast track action are entitled to a trial date within 4 months.
Rule 15-1(15)	/	233	The costs schedule for fast track actions is fixed according to this rule unless one of two things happens: (1) the court orders otherwise; or (2) the parties consent.

Costs

Costs are governed by Rule 14-1. A costs award is an order that a particular party must pay some of another party's legal fees. The "default setting" of our system of civil litigation is party-and-party costs in the cause, which means that at the conclusion of the litigation, the losing party must pay to the winning party an amount which, while significant, will likely not approach the true amount of the winner's legal fees.

Costs Awards are Discretionary

Judges are guided in their awards of costs by the common law and the *Supreme Court Civil Rules*. However, at the end of the day, a court's decision on costs is highly discretionary, and will not be interfered with on appeal unless it resulted from an error in principle or is otherwise clearly wrong: ***Giles v Westminster Savings and Credit Union***

Purposes of Costs

In ***Giles v Westminster Savings and Credit Union***, Mr Justice Frankel identifies the following purposes of costs:

1. deterring frivolous actions or defences;
2. winnowing out doubtful cases or defences;
3. encouraging conduct which reduces the duration and expense of litigation;
4. discouraging conduct which increases the duration and expense of litigation; and
5. encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases.

Most of these "purposes" are really saying the same thing in different ways. In theory at least, costs are supposed to reduce the ability of both plaintiffs and defendants to corrupt our civil litigation system into a tool for abusing other litigants, and conserve the courtrooms for claims in which it is not obvious who should win on the merits.

Potential Problems with Costs

These days, the phrase ***access to justice***—by which I think people mean access to the courts—is on everyone's lips, so keep in mind that, as BG says, **the greater the potential costs award against a plaintiff, the greater the risk to the plaintiff of pursuing his legal rights**. Some people are worried that plaintiffs will be deterred from suing out of fear of having costs assessed against them.

But then, isn't that the point? And if an undeterred real, flesh-and-blood plaintiff is ordered to pay costs, it is probably because he didn't have the legal right he claimed to begin with. Moreover, every defendant not only risks having to pay costs, but having to pay a judgment as well, and defendants have no choice whether to incur these risks or not. Plaintiffs, at least, have the ***luxury of choosing*** whether they want to run the risk of a costs order or not. If we compromise our costs system, we may belatedly discover that living in a US-style trial lawyer's paradise was not the better of the available options.

One potential downside of the costs system that is not frequently talked about is the perverse incentive barristers have to inflate their bills of costs. A barrister presenting a bill of costs only has to convince a registrar that he should be paid what the bill stipulates. Despite diligence and professionalism on the part of the registrar, the fact remains that first, it is not her money, but the losing party's, that will pay the bill; and second, despite having much experience to draw on, she cannot have perfect knowledge of how the lawyer conducted the case, because she wasn't there. Meanwhile, the lawyer whose bills of costs always have just a few more steps than everybody else's will probably, over time, have more steps approved by the registrar. So every barrister has an incentive to be the one whose bill contains a few more steps.

Types of Costs

The following table splits the costs lexicon into categories. The sub-headings below expand on some of the terms.

quantum of the award	party to whom costs payable	time at which costs payable
• party-and-party costs • double costs • special costs • lump sum costs • fast track action costs	• costs in the cause • costs to party X in any event of the cause • costs paid by a lawyer, not a party • no costs	• costs in the cause • costs payable forthwith

Quantum of the Award

Party-and-Party Costs

The default quantum of a costs award is ***party-and-party costs*** according to Appendix B of the Rules: Rule 14-1(1). Party-and-party costs are based on a tariff system. The party entitled to costs prepares a bill of costs which identifies the steps taken in the litigation and claims "units" for each of those steps. The total number of "units" that the bill of costs identifies is converted into a dollar amount according to one of three scales:

- Scale A, for less difficult matters;
- Scale B, for matters of ordinary difficulty; and
- Scale C, for matters of more than ordinary difficulty.

Regardless of which scale is used, the total costs award when assessed on a party-and-party basis is usually substantially less than the amount charged by the winning party's lawyer.

Double Costs

The term ***double costs*** appears only once in the Rules[11] to the best of my knowledge, and it is never defined. It appears to mean costs awarded on a party-and-party basis and multiplied by two. Although it is basically a punitive measure, a certain amount of the "punishment" would seem to be contingent on the difficulty of the matter, since double costs at Scale A is really more or less the same as regular costs at Scale B, while double costs at Scale C comes to quite a hefty amount.

Special Costs

> *[17] . . . [T]he single standard for the awarding of special costs is that the conduct in question be properly categorized as "reprehensible". . . [T]he word reprehensible has a wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.*
>
> —Lambert JA, ***Garcia v Crestbrook Forest Industries***

[11] Rule 9-1(5)(b)

The term ***special costs*** is the new name for what used to be called ***solicitor-and-client*** costs. Special costs, which are awarded to punish ***reprehensible conduct***, are much closer to a full indemnity for legal fees than are party-and-party costs.

In the *Garcia* case, the Court of Appeal held that Crestbrook's conduct after judgment was given against it at trial, including its decision to launch an appeal with very little prospect of success, was ***reprehensible conduct*** entitling the plaintiff and respondent on the appeal to ***special costs*** of the appeal.

Lambert JA stressed that bringing an appeal with little merit is not reprehensible in and of itself. However, in conjunction with other factors such as:

- improper allegations of fraud;
- improper motive for bringing the proceedings; or
- improper conduct of the proceedings themselves

an unmeritorious appeal could become reprehensible conduct. While the court chose not to infer an improper motive on the facts of *Garcia*, it found that Crestbrook's improper conduct, combined with the decision to appeal, amounted to reprehensible conduct.

Lump Sump

Lump sum costs are exactly what they sound like. Instead of assessing costs on a party-and-party basis or awarding special costs, the court just awards a ***lump sum***, like $1,000. We didn't learn under what scenarios this kind of costs award would be made.

Fast Track Action

Unless the court orders otherwise or the parties consent, the party entitled to costs in a fast track action gets the ***lump sum*** amount which is codified in Rule 15-1(15).

Party to Whom Costs are Payable

The basic rule is that costs are payable ***in the cause***, or is sometimes said, costs are to ***follow the event***: Rule 14-1(9). This is both a rule as to the beneficiary of the costs award and to the time at which the costs are payable. It means that costs will be awarded to party who ultimately prevails in the litigation, once it has been finally disposed of. This goes for the costs of any step in the proceedings as well for the trial. For example, the default rule is that the costs of an application are payable in the cause and will be assessed at the end of the trial.

In some cases, the court might depart from this rule. For example, if an application for a further and better list of documents is made necessary by the intransigence of a party, the court hearing the application in chambers may order that the costs of that particular application are payable to the applicant ***in any event of the cause***. If the winning party's conduct of the proceedings has been improper, the court might also order that the winning party be ***deprived of his costs*** The professional failures of a party's lawyer can also lead to the ***lawyer***, rather than the party, being made liable for costs: Rule 14-1(33). *Cf* ***Myers v Elman***, Offers to Settle (below) are subject to their own costs regime.

Time When Costs Payable

The court is also entitled to order that specific costs be paid before the end of the action. For example, the court may order that a certain costs award is ***payable forthwith***.

Relevant Rules and Cases

Case/Statute	Juris.	P	Key Points
Rule 14-1(1)	/	230	Default rule is party-and-party costs, unless one of paragraphs (a)–(f) apply.
Rule 14-1(9)	/	231	Default rule is costs to follow the event.
Rule 14-1(12)	/	231	Default rule for applications is that the party who is awarded costs at the conclusion of the matter also gets his costs of the application, but only if he won the application. Otherwise, no one gets costs on that application.
Rule 14-1(33)	/	232	If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following several things, including: • ordering the lawyer to indemnify his client for costs the client is liable to pay to another party; or • making the lawyer personally liable for costs the client is liable to pay to another party.
Giles v Westminster Savings and Credit Union	2010 BC/CA	131	Costs orders are discretionary. Court of Appeal will not vary the order unless: 1. the judge who awarded costs erred in principle; or 2. the award is plainly wrong.
Garcia v Crestbrook Forest Industries	1994 BC/CA	130	• Bringing an appeal with little merit is not in itself ***reprehensible***. More is required, such as improper allegations of fraud, improper motive for bringing the proceedings, or improper conduct of the proceedings. • Here, a number of factors combined into ***reprehensible*** conduct, though no single one would necessarily have sufficed in itself. ***Special costs*** awarded.
Rule 9-1	/	213	Costs regime associated with formal Offers to Settle (below).
Rule 15-1(15)	/	233	Costs schedule for Fast Track Litigation (p 111).
Rule 7-7(4)	/	206	An unreasonable refusal to admit in response to a ***notice to admit*** may have costs consequences.
Court of Appeal Rules Rule 2.1(f)	BC Reg	246	An order granting or refusing costs is a limited appeal order if the only matter being appealed is the grant or refusal of costs. See Limited Appeal Orders (p 71).

OFFERS TO SETTLE

Recent revisions of the Rules have attempted to use costs as a tool to push parties to settle their disputes before trial. For some time, parties have been entitled to make formal offers to settle which they reserve the right to bring to the attention of the court for consideration, with respect to costs, at the conclusion of all other issues in the action. The system evolved to the point that the Old Rules were considered to be a ***complete code*** for awarding costs in cases where the winning party had earlier rejected a formal offer to settle from the losing party. Under the "**rigid**" (BG) Old Rules, the courts no longer had any significant discretion over costs awards in these kinds of cases.

The drafters of the New Rules, as wise as they are anonymous, responded to this situation by tearing out the musty old rules root and branch and replacing them with a maze of mays. The result is Rule 9-1. BG describes this rule as **discretion layered on top of discretion layered on top of discretion**. Yes, that's three layers of discretion. Don't believe me? Check out subrules (4)–(6):

(4) The court ***may*** consider an offer to settle in exercising its discretion as to costs.
(5) In proceedings in which an offer to settle has been made, the court ***may*** do a bunch of different things.
(6) In doing any of the bunch of different things, the court ***may*** consider a number of factors, the last of which is "anything it feels like" (I paraphrase).

Case/Statute	Juris.	P	Key Points
Rule 9-1(1)(c)	/	214	Definition of an offer to settle under the New Rules.
Rule 9-1(2)	/	214	The fact that a formal offer to settle was made must not be disclosed to the trier of fact until all issues other than costs have been determined.
Rule 9-1(3)	/	214	An offer to settle is not an admission.

Case/Statute	Juris.	P	Key Points
Rule 9-1(4)	/	214	The court ***may*** consider an offer to settle when deciding on costs.
Rule 9-1(5)	/	214	In a proceeding in which an offer to settle has been made, the court may do one or more (or none!) of the following: (a) deprive a party of costs it would otherwise be entitled to had the offer not been made; (b) award double costs; (c) award the party the costs it would otherwise be entitled to had the offer not been made; (d) award costs to a defendant where the plaintiff failed to beat the defendant's offer at trial and all of the above can be done for some or all steps taken after the offer to settle was delivered.
Rule 9-1(6)	/	214	In making an order under subrule (5), the court may consider: (a) whether the offer to settle ought reasonably to have been accepted; (b) the difference between the terms of settlement and the final judgment; (c) the relative financial circumstances of the parties; (d) any other factor.
Ward v Klaus	2012 BC/SC	163	• Whether plaintiff ***ought reasonably to have accepted*** defendant's offers must: ○ be undertaken without regard to the ultimate outcome; ○ be done from the plaintiff's ***subjective*** point of view. • The fact that defendants' offers beat final award under Rule 9-1(6)(b) is a factor, but not ***determinative***.
Rule 20-2(17)	/	238	Leave is required to approve settlement for person under a ***legal disability***.
PD-34 — Master's Jurisdiction ¶ 2(d)	/	245	Masters do not have jurisdiction to grant court approval of a settlement where one of the parties is under a ***legal disability***.

SECURITY FOR COSTS

Recall that deterring frivolous actions is one of the Purposes of Costs. But costs awards will not have much of a deterrent effect on claimant† if they know they don't have the money to pay costs even if their claim is dismissed. The shadow of a costs award is no deterrent to frivolous lawsuits by what the legalese refers to as the ***impecunious*** plaintiff†. Consequently, on application by a party defending a claim, the court may be persuaded to order the plaintiff† to post ***security for costs*** by paying the amount of a possible costs award into court pending final disposition of the action.

The current *Supreme Court Civil Rules* are unique among the rules of court in Canadian common law jurisdictions in that they contain no rule which confers upon the court the power to order security for costs. The court justifies making such orders, in respect of claimants† who are real, breathing, ***natural persons***, on the basis of its ***inherent jurisdiction***: ***Han v Cho***. The court also has inherent jurisdiction to order security for costs in respect of claimants who are ***corporations***: ***Integrated Contracors v Leduc Developments***. As well, section 236 of the BC *Business Corporations Act* provides a statutory basis for ordering plaintiffs† who are BC corporations to post security for costs.

†: Hopefully placing an obelisk next to every occurrence of the words ***plaintiff*** and ***claimant*** makes clear that litigants may only be forced to post security for costs in respect of claims they have brought, never defences they have raised. This is a straightforward application of the *Lister* principle.

In this course, we looked at three issues with respect to security for costs:

1. when may a ***corporate*** claimant be required to post security for costs?
2. when may a ***natural*** person be required to post security for costs?

3. when may a defendant be required to post security for costs in respect of a ***counterclaim***?

Corporate Claimants

The ***test*** for whether a ***corporate claimant*** should have to post security for costs is set out in *Integrated Contractors*:

1. Has the applicant for security for costs established a *prima facie* case that the corporate claimant would be unable to pay applicant's costs if the corporate claimant's claim fails?
2. Has the corporate claimant rebutted the *prima facie* case by showing:
    a. that it has ***enough assets*** available to satisfy the award; or
    b. that the applicant has ***no arguable defence*** to its claim?

The above test is not the whole story. ***Integrated Contracors v Leduc Developments*** says that other ***factors*** may bear on the court's decision whether to order the claimant to post security for costs, including, but not limited to:

- Would ordering security for costs unfairly ***stifle*** a valid claim?
- Is the application brought against a defendant advancing a ***counterclaim*** which is sufficiently ***intertwined*** with his defence that most of the applicant's costs will be incurred regardless of the counterclaim?
- Is the respondent under financial hardship brought about by the very actions of the applicant which are at issue in the respondent's claim?

There is nothing about the above factors which suggests they are limited to the case of corporate claimants, so presumably they may also be considered on applications in respect of ***natural persons***.

Natural Persons

> *[14] The longstanding basic rule that has applied with respect to an order for security for costs against an individual is that a natural person can sue without giving security for costs in any but excepted cases. This rule flows from the principle that poverty is not a bar to access to the courts. . .*
>
> —Dillon J, ***Han v Cho***

In ***Han v Cho***, Madam Justice Dillon reviewed several lines of authority before concluding that the test for ordering security for costs for corporate claimants does not apply to ***natural persons***. Dillon J did not set out a test for when a natural person would be ordered to post security for costs, but she did state the following principles:

- The court has broad discretion whether to order security for costs.
- The onus is on the applicant to establish that he will be unable to recover costs.
- The following are not sufficient, by themselves, to justify security for costs:
    - the fact that the plaintiff is impecunious;
    - the fact that the plaintiff lives outside the jurisdiction (or even in a non-reciprocating jurisdiction);
    - the fact that the plaintiff has no assets within the jurisdiction.
- Security for costs cannot be ordered unless there are ***special circumstances***. These might include:
    - where the plaintiff is impecunious and also has a weak claim;
    - where the plaintiff has failed to pay costs before; or
    - where the plaintiff has refused to follow a court order for payment of maintenance.

Counterclaims

In *Integrated Contractors*, the claimant whose claim attracted the application for security for costs was the corporate defendant, and its claim was a ***counterclaim***. The court mentioned that one factor which could negate a *prima facie* case for security for costs is the fact that the counterclaim is so ***intertwined*** with the defendant's defence of the plaintiff's original claim that most of the plaintiff's costs of defending the counterclaim would be spent anyway prosecuting the original claim.

My guess is this would also be a factor with ***natural persons***. For example, suppose Bloggs sues Snooks in breach of contract. Snooks counterclaims against Bloggs for breach of the very same contract. Snooks has very few assets and has refused to pay a costs order in the past. If the counterclaim doesn't change the evidence the court will hear or the fact that the basic issues for the court are, "Who did what?" and "How much damages does the contract say he should pay for doing that?" then it seems possible that the intertwined nature of the counterclaim would override the combination of Snooks' impecuniosity and earlier refusal to pay costs, if indeed these added up to ***special circumstances***.

One other minor detail to keep in mind is the difference between a Counterclaim (p 21) and Set-Off (p 22). Under no circumstances will the latter expose a defendant to an obligation to post security for costs.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Han v Cho	2008 BC/SC	134	Plaintiffs have a ***strong case*** against defendants in ***fraud***. ∄ evidence plaintiffs are impecunious or unlikely to pay costs. Despite the fact that plaintiffs live in a non-reciprocating jurisdiction and have no assets in BC, they do not have to post security for costs.
Integrated Contracors v Leduc Developments	2009 BC/SC	139	• L&M is denied security for costs because it has ***no arguable defence***. • IC is denied security for costs because this would ***stifle*** Leduc's ability to defend IC's claim against it (the fact that Leduc's counterclaim is ***intertwined*** with IC's claim is a factor here).
Business Corporations Act s 236	RSBC 1996	236	If it appears that a ***corporate plaintiff*** will be unable to pay the costs of the defendant if the defendant prevails, the court ***may*** order it to post security for costs.
Court of Appeal Rules Rule 2.1(f)	BC Reg	246	An order granting or refusing security for costs is a limited appeal order if the only matter being appealed is the grant or refusal. See Limited Appeal Orders (p 71).

11. Case Chart

Abermin Corp v Granges Exploration

1990 BC/CA

Rule 23-6(8)

Issue What is the ***standard of review*** on an appeal from the master?

Ratio

1. Purely interlocutory matters. Where the appeal is from a master's order on a ***purely interlocutory*** matter, the appeal may be allowed only if the master was ***clearly wrong***.
2. Final orders and questions vital to the final issue in the case. Where the appeal is from a
    a. final order made by a master; or
    b. a ruling of a master which raises questions vital to the final issue

    the correct form of appeal is a ***rehearing*** and the judge appealed to may substitute his view for the master's. Unless an order for the production of fresh evidence is made, the rehearing will proceed on the basis of the material that was before the master.

See Also *Ralph's Auto Supply (BC) Ltd v Ken Ransford Holding*; Appealing the Order of a Master (p 69)

Adams v Thompson, Berwick, Pratt & Partners

1987 BC/CA

Rule 3-5(1) 3-5(4)

Facts The plaintiffs sought to develop certain property. They retained the defendant engineering firm (Thompson &c) to carry out the plans. They also retained a law firm to provide advice relating to the project. Problems with the sewage disposal fields and setback requirements delayed the project and the market thereafter tanked, causing the plaintiffs to abandon the project. They sued the engineers alleging that negligent design led to their loss.

Issue Can the engineers third-party the solicitors on the ground that when the problems first arose, the solicitors ought to have advised the plaintiffs to develop 10 of their lots separately so they could sell them before the market crashed?

Analysis What the engineers are really alleging is that the plaintiffs failed to mitigate. Thus it is unnecessary to consider whether there was an agency relationship between the solicitors and the plaintiffs.

Held Third party notice set aside.

Ratio *Adams* "first branch" (as cited by Newbury JA in *Laidar Holdings*)

> *[A] third party claim will not lie against another person with respect to an **obligation belonging to the plaintiff** which the defendant can raise directly against the plaintiff by way of **defence**. Where the only negligence alleged against the third party is **attributable to the plaintiff**, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff.*

Adams "second branch" (as cited by Newbury JA in *Laidar Holdings*):

> *On the other hand, where the **pleadings** and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand.*

See Also *Laidar Holdings Ltd v Lindt and Sprungli (Canada) Inc*; *McNaughton v Baker*; Unnecessary Third Party Proceedings: Adams (p 30)

Aetna Financial v Feigelman

1985 CA/SC

Rule Rule 10-4

Facts Aetna is a *CBCA* corporation with offices in Winnipeg and Toronto and head office in Montreal. When a Manitoba company called Pre-Vue defaulted on debentures held by Aetna, Aetna appointed a receiver. Aetna collected some money via the receivership proceedings, which it was about to ***transfer out of Manitoba***, to either Toronto or Montreal. Before this could be done, Pre-Vue sued, alleging that Aetna appointed the receiver before Pre-Vue was given the time to which it was entitled under the debentures to cure the default.

Issue Is Pre-Vue entitled to a pre-trial ***Mareva injunction*** to enjoin Aetna from moving the money out of Manitoba?

Analysis

> *The movement of the assets . . . was announced in public pronouncements of the two stockholders of [Aetna] and by [Aetna] itself. The [applicants] were expressly made aware of the impending transfer. There is no finding . . . of any improper motive behind this transfer of assets. The transfer, indeed, was carried out in the ordinary course of business and reflected the history of the conduct of [Aetna's] business in Manitoba. . . . There is no finding of any intention by the appellant to default on its obligations, either generally or to the respondent, if . . . such an obligation is later found to exist. [Aetna] has not been found to be insolvent . . . Finally, there is the federal fact . . .*

Held Aetna wins. Pre-Vue cannot get a Mareva injunction.

Ratio The removal of assets in the ***ordinary course of business*** by a resident defendant to another part of the ***federal*** system will not by itself trigger an exceptional remedy such as a ***Mareva injunction***.

See Also Mareva Injunction (p 97), *Reynolds v Harmanis*, *Silver Standard Resources v Joint Stock Co Geolog*

Allarco Broadcasting v Duke

1981 BC/SC

Rule 7-2(17) 7-2(18)(a)

Facts Plaintiffs brought an oppression case against directors (Duke &c) of a company called Western. Plaintiffs pleaded that a Guarantors' Agreement entered into by the defendants contravened a unanimous Shareholders' Agreement. Plaintiffs quoted the impugned clauses of the Guarantor's Agreement in full in their statement of claim. On XFD of one of the plaintiffs, Mr Bell-Irving, by defendants' counsel, Bell-Irving's solicitor objected to two kinds of questions:

A. Questions asking Mr Bell-Irving what parts of the Guarantor's Agreement "concerned" him.
B. Questions soliciting an opinion on a hypothetical legal question.

Issue Are the objections to these XFD questions valid?

Analysis

- Generally, a cross-examiner is entitled to take the most ***circuitous routes*** if it is necessary to do so. He need not make a ***frontal assault***.
- Either the impugned clauses of the agreement, which are clearly set out in the ***pleadings***, were oppression or they were not. Mr Bell-Irving's subjective views on this (see "A" in the facts, above) are irrelevant and thus do not "relate to a matter in question".

Held Plaintiffs win. Objections A & B are valid.

Ratio

1. What is a "matter in question" and therefore what "relates to" it within the meaning of Rule 7-2(18)(a) is governed by the ***pleadings***.
2. No witness on XFD (not even a lawyer) is required to give or verify a ***legal opinion*** about a matter in question.
3. However, a ***professional man*** can be asked for an opinion on discovery about a matter of fact ***within his knowledge*** on matters directly connected with the issues.

See Also *Kendall v Sun Life Assurance Co of Canada*, Scope of Examination for Discovery (p 48)

Anton Piller KG v Manufacturing Processes

1975 Eng/CA

Rule 10-4

Facts Anton Piller is a German manufacturing company. It is part of that big new computer industry everyone is talking about these days. Manufacturing Processes is a UK company which acts as a dealer, selling Anton Piller's machines to customers in England. As part of AP's arrangements with MP, AP provides MP with various IP, including confidential documents showing how the machines are designed and operate.

AP found out through two "defecting" former employees of MP that MP is secretly giving away AP's confidential information to AP's competitors.

Issue Should AP be granted an order with the following constituent parts?

1. An injunction restraining MP from infringing AP's IP; and
2. an order requiring MP to permit AP to enter its premises and inspect various documentary evidence.

Analysis

- No court may authorize a private search warrant. But the order sought is not a search warrant—it only authorizes entry and inspection by permission of the respondent, and then orders the respondent to give that permission!
- Respondent may refuse permission, on pain of a contempt order or adverse inferences at trial.

Held The order sought by AP is granted, with the addition of appropriate Safeguards.

Ratio An order of this type can be made by a judge *ex parte* where:

1. the applicant has an ***extremely* strong prima facie case**
2. there is ***very serious potential damage*** (or actual damage) to the applicant;
3. there is ***clear evidence*** that
    a. the "respondent" has in his ***possession*** incriminating documents or things; and
    b. there is a real possibility that the "respondent" ***may destroy*** such material before any application *inter partes* can be made.

See Also Anton Piller Order (p 99)

Bache Halsey Stuart Shields Inc v Charles

1982 BC/SC

Rule 8-1(7) 22-1(7)(a) 22-7(1)

Facts Plaintiff applied to have Dobell's defence struck out. The application materials served on Dobell made no mention of seeking default judgment. In due course, Dobell failed to appear at the hearing of the application and the court struck his defence. During the same hearing, plaintiff then moved for default judgment, which was granted by the court. Now Dobell applies to have the default judgment set aside as void.

Issue Can the Supreme Court set aside its own default judgment order as void?

Analysis

- Inasmuch as the rules require notice to Dobell of any order of the court that may be asked against him, the failure to give notice would be an irregularity: Rule 22-7(1).
- However, because this was a judgment given without notice to the defendant, it is contrary to the rules of ***natural justice***. Dobell was deprived of his ***right to be heard***.
- Dobell ought not to have been left to guess at the relief which would be sought.

Held The default judgment order is set aside.

Ratio 1. An order based on an irregularity which causes a failure of ***natural justice*** is a ***nullity***.

2. The court may set aside its own order, without the necessity of an appeal, if that order is a ***nullity***.

See Also What Powers Does the Court Have in Chambers? (p 61)

BC Ferry Corporation v T&N Plc

1993 BC/SC

Rule *Negligence Act* s 4

Facts When the plaintiff sued the T&N, T&N brought a third party notice against Yarrows. The plaintiff then entered into a settlement agreement with Yarrows under the following terms:

1. plaintiff would not seek from T&N any part of its losses which the court would attribute to Yarrows' fault; and
2. plaintiff would advise the court at the first reasonable opportunity that it expressly waived its right to recover from T&N any portion of its losses which the court might attribute to Yarrows.

Issue Can Yarrows get T&N's third party notice struck out on the basis of the settlement agreement?

Analysis
- T&N only has a claim against Yarrows for contribution and indemnity under *Negligence Act* s 4.
- But T&N's claim against Yarrows is only for the part of the plaintiff's claim that the defendant did not cause yet was compelled to pay by virtue of joint and several liability.
- So if plaintiff does not seek that portion from the defendant, defendant has no claim against Yarrows.

Held Yarrows wins. T&N's third party notice against Yarrows is struck out.

Ratio When plaintiff only seeks that part of its loss from a defendant which the defendant actually caused, the defendant has no claim for contribution and indemnity against another party which also caused part of plaintiff's loss.

See Also *Tucker v Asleson*, BC Ferries Agreements (p 34)

British Columbia (AG) v Wale

1986 BC/CA

Rule 10-4

Facts Certain Indian bands passed bylaws, as they were apparently entitled to do under the *Indian Act*, RSC 1970, c I-6. These bylaws purported to govern fishing on the Skeena, Kispiox, and Bulkley Rivers in a manner altogether inconsistent with regulations made under *Fisheries Act*, RSC 1970, c F-14 and applicable provincial regulations. The provincial Attorney General sued to enjoin the bands from breaching any federal or provincial laws or regulations. The AG also sought, and obtained, a ***pre-trial injunction*** along the same lines.

In her reasons for granting the ***pre-trial injunction***, the chambers judge did not explicitly mention ***irreparable harm***. She did, however, treat the province's claim as essentially a ***proprietary*** one, based on the contention that the province owned the waters over which the bands asserted jurisdiction in their bylaws.

There was evidence that the bands' desire to fish contrary to the regulations might hurt salmon stocks; that Indian fish sales were failing to meet standards imposed by law for other fish commercially sold; and that absent an injunction, federal and provincial law had been and would continue to be flouted. On the other side, the injunction would deprive the Indians of commercial fishing revenues which were difficult to measure at time of trial.

Issue Is the trial judge's failure to mention ***irreparable harm*** in granting the injunction a reversible error?

Analysis
- In most cases, an injunction should not be granted unless there will be irreparable harm.
    - Irreparable harm will be suffered where ***damages are inadequate*** to compensate the plaintiff.
    - Clear proof of irreparable harm is not required. ***Doubt*** as to adequacy of damages is ***sufficient***.
    - The question of preservation of ***property*** has repeatedly been treated as one of irreparable harm.
- Irreparable harm is part of the ***balance of convenience*** analysis, not a separate prong of the test.

- The chambers judge clearly had irreparable harm in mind in treating the AG's claim as proprietary.
- The remainder of her reasons indicate the factors she was balancing: the AG's interest in maintaining a public waterway and fishery against the Indians' interest in using it according to their bylaws.

Held Injunction upheld. The chambers judge did not err in principle in her exercise of her discretion.

See Also ***Canadian Broadcasting Corp v CKPG Television***, Test for a "Standard" Pre-Trial Injunction (p 95)

Broom v The Royal Centre

2005 BC/SC

Rule 6-1(1)(a)

Facts Plaintiff sustained an injury when she tripped over an allegedly badly laid carpet in the Royal Centre. Plaintiff wanted to join the company responsible for maintaining the carpet as a defendant but could not determine the identity of the company, ***SMS Modern Cleaning Services***, because it had undergone various name changes and corporate reorganizations. SMS was carrying on business under the name of another company, ***Focus***, and using Focus' employees. Plaintiff thus used the name ***John Doe 1*** to stand in for the unknown defendant (i.e. SMS) and described it in the ***pleadings*** as a person "contracted by the owners at all material times to clean the premises in question".

Because Focus and its employees were well aware of the accident, and because of their relationship to SMS a.k.a. John Doe 1, it is very unlikely that SMS was not aware that the plaintiff was trying to bring a lawsuit against it.

Issue Is plaintiff entitled to amend the pleadings to substitute SMS for John Doe 1 without leave of the court?

Analysis

- SMS would know it was the John Doe being sued under the test for ***misnomer***.
- SMS did not suffer any ***prejudice*** as it should have been aware that plaintiff was trying to sue it.
- SMS substantially ***contributed*** to necessity of resorting to a misnomer by carrying on business under the name of Focus and using Focus' employees, &c.
    - When the conduct of the misnamed person caused or ***contributed*** to the situation, the case for treating it as a misnomer is particularly compelling.

Held Plaintiff wins. She is entitled to substitute SMS for John Doe 1 as of right under Rule 6-1(1)(a) because this is a case of ***misnomer*** and not a substitution under Rule 6-2(7)(b).

Ratio An amendment will be allowed where the opposite party has not been misled or substantially injured by the incorrect name and the incorrect name is a misnomer according to the following test:

> *How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself, "Of course, it must mean me, but they had got my name wrong". Then there is a case of mere misnomer.*

See Also Misnomer (p 23), Amendments to Pleadings (p 23)

Camp Development v South Coast British Columbia Transportation Authority

2011 BC/SC

Rule 3-7(22-23)

Facts Plaintiff brought a claim for compensation for expropriation of property used to construct the Golden Ears bridge. Defendant demanded a long list of precise money values relating to the damages claimed.

Issue Which ***particulars***, if any, sought by the defendant should plaintiff be ordered to provide?

Analysis

- Particulars are different from discovery because particulars are not to be used to obtain information about *how* an issue will be proven. Particulars are used to inform the other side of *what* needs to be proven.
- The court also listed a number of Purposes of Particulars which can be found on p 20, rather than in this brief.

- A plaintiff who has the ability to base his claim on ***precise calculation*** must give the defendant access to the facts which make such calculation possible.

Held The court went through each particular requested by the defendant and granted those that were:

1. amenable to calculation/quantification;
2. not subject to assessment/opinion; and
3. not already within the knowledge of the defendant.

Ratio Test for ordering particulars: are particulars **necessary to delineate the issues between the parties**?

Campbell v McDougall

2011 BC/SC

Rule 7-8(3)(d)

Facts When Dr Maloon agreed to be retained as an ***expert*** witness for the defence, he was aware that the trial was set for February 2012. At the time, he was awaiting approval of a 6-month sabbatical for which he had earlier applied. When the sabbatical was subsequently approved, Dr Maloon made plans to go to "southern Africa" between October 1, 2011 and March 31, 2012.

Plaintiff wants Dr Maloon to testify by videoconference from his location in "southern Africa" and has provided evidence that ∃ videoconferencing networks "in southern Africa in general and Cape Town in particular". Dr Maloon wants to be ***deposed*** in advance because his schedule is too uncertain to commit to a videoconference and he will not have access to his charts and records while overseas.

Issue Can Dr Maloon be deposed so his video testimony can be put in evidence at the trial?

Analysis

- These Rule 7-8(3) factors favour deposition: (a) convenience of Dr Maloon; (b) ~~possibility~~ certainty that Dr Maloon will be absent; and (c) ~~possibility~~ certainty that Dr Maloon will be beyond the jurisdiction of the court.
- However, under factor (d), the "interests of justice and ensuring a fair trial" favour requiring Dr Maloon to attend by videoconference.
    - If the evidence is given by videoconference, the court can control the conduct of cross-examination.
    - If the evidence is given by videoconference, the court can rule on objections at the time they are made. In a deposition, the objection is just recorded and the witness continues to give evidence.
    - In a deposition, the plaintiff will not have the opportunity to cross-examine Dr Maloon on issues arising at trial or arising from the evidence of plaintiff's own experts.
- The fact that Dr Maloon was well aware of the consequences of his sabbatical weighs in favour of having him testify by videoconference.

Held Plaintiff wins. Dr Maloon must testify by videoconference rather than being deposed.

Note JF: **The court is almost always going to say that videoconference is preferable to deposition**.

Ratio The ***onus*** is on the party resisting the use of videoconferencing at trial to demonstrate that receiving testimony in that manner would be contrary to the principles of fundamental justice.

Canadian Broadcasting Corp v CKPG Television

1992 BC/CA

Rule 10-4

Facts CBC sued CKPG for breach of a contract and sought a ***pre-trial injunction*** enjoining CKPG from continuing to do the actions which constituted the alleged breach. The chambers judge who heard the injunction application concluded that because the action could not expect to be tried until the contract had already expired, and because the pre-trial injunction would be the major part of the remedy that CBC could expect to receive if it were wholly successful in the

action, the first prong of the *Wale* test should be elevated from a "fair question to be tried" to a "*prima facie* case".

Issue In the circumstances, should CBC have to establish a *prima facie* case in order to obtain the injunction?

Analysis Factors such as the strength of the applicant's case fall to be considered under the ***balance of convenience***.

Held The trial judge erred. CBC does not have to establish a *prima facie* case.

Ratio The *prima facie* case standard imposes too high an evidentiary burden on the applicant. The first prong of the pre-trial injunction test is always a ***fair question to be tried***.

Note
1. CBC did not actually succeed on the appeal, as the chambers judge did not err in principle in deciding that the balance of convenience did not favour granting the injunction.
2. Presumably, the fact considered by the chambers judge that the contract would expire before the case was tried could validly be considered under the balance of convenience, although nothing in Lambert JA's reasons explicitly says so.
3. Lambert JA discussed the Status Quo (p 96), and factors affecting the Balance of Convenience (p 96).

See Also ***British Columbia (AG) v Wale***, Test for a "Standard" Pre-Trial Injunction (p 95)

Charest v Poch

2011 BC/SC

Rule 9-7 9-7(11)(b)

Facts Plaintiffs claim to be beneficial owners of certain lands owned by the defendants. This is an application by defendants to have plaintiffs' claim dismissed by Rule 9-7 summary trial. The issue defendants want decided is whether plaintiffs' pleadings disclose an arguable cause of action which can be supported on the facts of the case.

The pleadings have been closed for over a year. Plaintiffs recently changed solicitors. The new solicitor received notice of the summary trial application some 3½ weeks before the hearing, and only a day after taking over the file. He did not draft the plaintiffs' pleadings.

Some of the affidavits conflict on important points, so a credibility assessment is required. Some of the affidavits contain hearsay. There is also additional documentary evidence.

Issue
1. May the plaintiffs ***amend*** their pleadings to plead a new cause of action?
2. Are the defendants inappropriately ***litigating in slices*** because the issue they picked will dispose of the matter only if decided in their favour?
3. Can the court assess ***credibility*** on a summary trial application?
4. What use may be made of the ***hearsay*** in the affidavits?

Analysis It would be unfair to the defendants to permit plaintiffs to argue the application on the basis of a new cause of action. Even though time was short for plaintiffs' new solicitor, it was still possible for him to apply to amend the pleadings prior to this hearing, and he did not do so. Defendants cannot be made to do without a good tactical position because of the difficult position in which new counsel for plaintiffs was placed.

Held
1. Plaintiffs may not amend their pleadings.
2. The defendants' issue is not inappropriate because deciding the matter summarily will enhance the administration of justice.
3. The court can assess ***credibility*** because, despite the conflict in the evidence, there is additional documentary evidence on the basis of which the facts can be found.
4. Hearsay in affidavits may only be used on summary trial to decide the issue of suitability.

See Also Suitability: The Major Issue of Summary Trials (p 87), ***Inspiration Management v McDermid St Lawrence Ltd***, ***Western Delta Lands v 3557537 Canada Inc***

Citizens for Foreign Aid v Canadian Jewish Congress

1999 BC/SC

Rule 9-5(1)(a) 9-5(1)(b–c) 9-5(1)(d)

Facts CFA is suing CJC and CJC's authorized spokesman and agent, Michael Elterman, in defamation for calling CFA a "hate group". Paragraph 10 of CFA's statement of claim alleges:

> ***[10]*** *The foregoing comments are woven together by the Canadian Jewish Congress and Michael Elterman in their conspiratorial world view to create power for themselves in combatting a mythical enemy.*

Issue Should paragraph 10 be struck out under Old Rule 19(24), the precursor to Rule 9-5(1)?

Analysis **Rule 9-5(1)(a): no reasonable claim**:
Paragraph 10 appears to be alleging a conspiracy between CJC and its agent, Elterman. Since Elterman was acting in the scope of his agency and was therefore CJC's alter ego, and because CJC cannot conspire with itself, the facts alleged fail to establish a common plan and paragraph 10 should be struck as disclosing no reasonable claim.

Rule 9-5(1)(b–c): unnecessary, scandalous, frivolous, vexatious, or may prejudice, embarrass or delay fair trial:
See the heading Unnecessary, Scandalous, Frivolous, Vexatious, Prejudicial, and So On (p 80) for the guidelines which apply. The court held that paragraph 10 is unnecessary, embarrassing, and scandalous, in that ***irrelevant*** imputations against the character of the defendants are raised directly and by innuendo.

Rule 9-5(1)(d): abuse of process:
See the heading Abuse of Process (p 81) for the guidelines which apply. In this case ∄ abuse of process ∵ paragraph 10 is not vexatious, without merit, or brought with the sole motive to harass the defendants and interfere with their ability to defend.

Held Paragraph 10 is struck as **(1)** disclosing no reasonable claim; and **(2)** unnecessary, embarrassing and scandalous. It is not, however, an abuse of process. So it has that going for it at least.

Ratio Irrelevancy is a requisite for scandalousness, unnecessity, and embarrassment.

See Also Striking Pleadings (p 79), ***Hunt v Carey Canada Inc***

Delgamuukw v British Columbia (No. 1)

1988 BC/SC

Rule 7-5(2) 7-5(3)(c)

Facts Heather Harris is a genealogist who extensively investigated the genealogy of the Gitksan. Ms Harris has been ***retained*** by plaintiffs, who intend to rely on her opinion at trial. Ms Harris is in a unique position because she has some Gitksan ancestry and the Gitksan co-operated in her study. Defendants are not able to retrace her steps because the Gitksan are for all intents and purposes the plaintiffs in this action.

Defendants delivered 110 questions to Ms Harris. She furnished only part answers, and only to 29 questions.

Issue Are defendants entitled to a ~~pre-trial~~† examination of Ms Harris under oath?

Analysis
- Although Ms Harris is an expert ***retained*** by plaintiffs, defendants are unable to obtain facts or opinions on the same subject by any other means. Thus the requirement of now Rule 7-5(2) is satisfied.
- Ms Harris' answers are not a sufficiently ***responsive statement*** because they assist only partly in the search for information. Thus the requirement of now Rule 7-5(3)(c) is also satisfied.

Held Defendants win. Ms Harris must submit to cross-examination under oath and must disclose on examination the underlying facts on which her report is based.

Note †: The words "pre-trial" only appear in the title of Rule 7-5. They are nowhere in the actual text of the rule. Titles

are for convenience only and do not guide interpretation: Rule 1-1(3). In this case, the trial was ongoing at the time of the defendants' application and the court ordered the examination.

See Also *Professional Conduct Handbook* 8:14 (p 259), *Sinclair v March*

Delgamuukw v British Columbia (No. 2)

1988 BC/SC

Rule Rule 11-6(8)(b) Rule 7-1(20)

Facts The defendants demanded that three of the plaintiffs' experts disclose the contents of their files. Since the plaintiffs asserted privilege over many areas of the documents, and the defendants contested this privilege, the court examined the documents, just as it might do if requested under Rule 7-1(20).

Ratio

- The ***onus*** favours upholding properly advanced claim of privilege.
- If counsel wishes to assert a claim of ***continuing privilege***, he must furnish:
  - a reasonable description of the document or an edited copy; and
  - a specific claim to privilege which in rare cases might have to be supported by affidavit.

  If cross-examining counsel does not accept the claim of privilege, the only solution is to have the judge inspect the document under Old Rule 26(12)—now Rule 7-1(20).
- The expert's file, which must be disclosed if the expert's report is to be put in evidence or the expert is to testify, consists of all documents in the expert's ***possession*** which are, or may be, relevant to his ***credibility*** or the ***substance*** of his evidence.
  - Credibility must be construed ***narrowly*** because otherwise just about anything would qualify!
- In addition to documents in the witness' ***possession***, counsel must produce on demand any similar documents which the witness has seen, even if they are no longer in his possession.
  - For example, in the *VCC* proceedings, counsel had a draft of the expert's report which the expert no longer possessed. Counsel was required to produce it.
- Oral communications must be disclosed on the same principles as documents.

See Also Expert's File (p 107), *Vancouver Community College v Phillips, Barratt*, Practical Aspect of Privilege: Listing Privileged Documents (p 43), *Leung v Hanna*, *Keefer Laundry v Pellerin Milnor Corp*

Director of Civil Forfeiture v Doe (No. 1)

2010 BC/SC

Rule 3-8(11) 22-4(2) 1-3(1)

Facts Plaintiff Director obtained a default judgment order against defendant at an earlier date. Terms of the order were that defendant could apply to set the order aside by serving the plaintiff with a notice of motion to that effect within 42 days of the order. If the defendant did not so, certain disputed money which had been paid into court would be paid out to the plaintiff.

Within the 42-day period, defendant filed a statement of defence and a notice of motion, both of which addressed the substantive ***merits*** of the plaintiff's claim and attempted to raise defences, but ***neither of which*** actually applied to set the order aside, as stipulated by the terms of the order. Moreover, nothing in the materials filed by the defendant was relevant to the first *Miracle Feeds* factor—whether the failure to file a response was ***deliberate***. However, it was clear that the defendants ***tried*** to comply with the terms of the default judgment order.

Issue

1. Is the technical failure to apply to have the default judgment order set aside fatal to defendant?
2. Is the failure to prove one of the *Miracle Feeds* factors fatal to an application to set aside a default judgment?

Analysis Technical failure to meet the terms of the order isn't fatal because the time limit to achieve the objective of the default judgment order was ancillary to the order. Defendant should get more time to meet the requirements of the

order. This is justified by:

- Rule 1-3(1) and the object to determine proceedings on their ***merits***;
- Rule 22-4(2), which gives the court discretion to ***extend time limits*** under the Rules and in orders; and
- the fact that a number of cases state that:
  - *Miracle Feeds* factors are just factors to assist court in exercising its discretion under Rule 3-8(11);
  - therefore, failure to meet one or more of the factors cannot be fatal (**but see Note below**); and besides
  - in this case, only the first *Miracle Feeds* factor was not "addressed".

Held Defendant receives a modest extension of the 42-day period in order to file the proper application materials.

Note BG notes that this decision of Voith J is in **tension** with the subsequent decision of Silverman J on the same proceedings in ***Director of Civil Forfeiture v Doe (No. 2)*** (below). The latter states that failure to meet the ***first prong*** of *Miracle Feeds* is ***fatal***.

See Also Factors Bearing on Decision to Set Aside Default Judgment: Miracle Feeds (p 25)

Director of Civil Forfeiture v Doe (No. 2)

2010 BC/SC

Rule 3-8(11)

Facts In an attempt to comply with Voith J's decision in ***Director of Civil Forfeiture v Doe (No. 1)*** (above), defendants filed a notice of application to set aside the plaintiff Director's default judgment. On hearing the application, the defendants advanced the ***position*** that the plaintiff had failed to prove its case against the defendant. The affidavit evidence supplied with the application materials:

- failed to address the first *Miracle Feeds* factor (whether failure to file a response was ***deliberate***);
- lacked specificity and detail; and
- advanced not only ***hearsay***, but worthless hearsay, because sources of information and belief were not revealed on vital issues.

The problems with the affidavits meant that the fourth factor was not satisfied either. The defendants did, however, meet the second factor (application made ***as soon as reasonably possible***).

Issue Are the defendants entitled to have the plaintiff's default judgment set aside?

Analysis

- The problems with the affidavits mean that both the third and fourth *Miracle Feeds* factors are not met.
- Defendant's position that plaintiff failed to prove its case also does not help defendant to meet the third factor. The burden is on the defendant to establish a defence worthy of investigation.

Held Plaintiff wins. Defendant's application dismissed and default judgment stands.

Ratio

1. Failure to meet the first prong of *Miracle Feeds* is ***fatal*** to an application to set aside a default judgment. This is in **tension** with Voith J's decision in *No. 1*, above. (BG thinks ***No. 1* is right and *No.2* is wrong**).
2. In an application to set aside a default judgment, the defendant must advance a ***positive defence***. Simply pointing to plaintiff's alleged failure to prove its case does not meet the third prong of *Miracle Feeds*.

See Also Factors Bearing on Decision to Set Aside Default Judgment: Miracle Feeds (p 25)

Dufault v Stevens and Stevens

1978 BC/CA

Rule 7-1(18) 1-3(1)

Facts Wouldn't you know it, another car crash case! This time, the ***third party*** Surrey Memorial Hospital had some of plaintiff's hospital records which the plaintiff did not possess. Plaintiff applied under the old equivalent of Rule 7-

1(18) to compel the hospital to produce those records. The judge in chambers granted the order to the plaintiff ***but*** refused to grant the defendant any right to inspect and obtain copies of the records. Defendant appealed.

Issue When may a court refuse to order production of a document in possession of a ***third party*** which otherwise meets the criteria for production under Rule 7-1?

Analysis
- If the document otherwise meets the disclosure standards for Rule 7-1†, the court ***should*** order it produced ***unless*** there are compelling reasons not to, such as:
  - it is privileged; or
  - the interests of ***third parties*** might be ***embarrassed*** or adversely affected by such an order.

  This is supported by the object of the rules, which is to decide actions on their ***merits***.
- A party to the action (i.e. the plaintiff in this case) can't resist production because *he* would be embarrassed and "confidentiality" is not a reason to grant the order to one party and deny it to the other.
- However, if respondent party doesn't appear at the Rule 7-1(18) application, court can refuse him the benefit.

Held Plaintiff's hospital records must be produced to the defendant as well.

Ratio Test for refusing production on ground of embarrassment or adverse impact on a third party:

1. probative value of the document is slight; and
2. embarrassment or adverse effect would be so great it would be unjust to require production.

Note †: This case was decided under the old *Peruvian Guano* disclosure standard, but BG says **it continues to apply as modified by *Kaladjian v Jose*** until the courts say different.

First Majestic Silver Corp v Davila

2011 BC/SC

Rule 7-2(5)

Facts The applicant is P_{new}, a corporate plaintiff who was added to the action after the initial corporate plaintiffs, $P_{existing}$, had already discovered one ***representative*** of the corporate defendant, D. P_{new} is represented by the same counsel as $P_{existing}$. Moreover, the crux of Ps' joint position is that they together formed a ***common enterprise*** and that therefore a breach of duty by D to one plaintiff was a breach of duty to all of them. Ps' counsel has already examined one representative of D and is trying to gain an advantage by using P_{new}'s discovery rights to discover a ***different representative*** of D.

Issue Can a plaintiff who was added as a party subsequent to the initial plaintiffs choose a different representative of the corporate defendant to discover than the previous plaintiffs did?

Analysis
- On the face of it, Rule 7-2(5) does give each plaintiff the right to choose a representative of his choice (*unless the court otherwise orders*). But we now have the concept of ***proportionality*** to think about.
- Furthermore, if the defendant were a natural person, the plaintiffs would only be able to examine that specific person. The fact that the party being examined is a corporation should not make a fundamental difference.

Held D wins. P_{new}'s application to examine a different representative of D is dismissed.

Ratio Where there are multiple plaintiffs—at least where they have a ***common interest***—they must all examine the same representative of a corporate defendant.

Note It's not clear where the ***common interest*** of Ps actually features in the analysis, but perhaps in a case in which Ps had a sufficiently different, or even adverse, interest, they would be permitted to discover different representatives?

See Also ***Rainbow Industrial Caterers v Canadian National Railways***, ***Westcoast Transmission v Interprovincial Steel***, Who May Be Examined for Discovery? (p 45)

Fraser River Pile and Dredge v Can-Dive Services

1992 BC/SC

Rule 7-2(17)

Facts In a lawsuit involving the sinking of the plaintiff's barge "Sceptre Squamish", Mr Johnson was defendant's XFD representative. During XFD, Mr Johnson made an unexpected ***admission***, which prompted defendant's counsel to request an immediate adjournment to talk with Mr Johnson in order to find out if there was a change in what he originally understood Mr Johnson's evidence to be. The adjournment was taken over plaintiff's objection.

Issue Under what circumstances can counsel for a witness being examined for discovery communicate with the witness during an adjournment of the XFD?

Analysis
- XFDs in a complex case can go on for several days, and may be adjourned for weeks at a time. ∴ A zero communication with counsel rule is impractical.
- Not only must there be ***no interference*** with witness' evidence, there must be ***no appearance*** of interference.

Ratio
1. Where XFD will last no longer than a day, counsel should refrain any discussion with the witness. ***They should not even be seen to converse*** during any recess. (JF: **Don't go for lunch together, don't do anything!**)
2. Where XFD is scheduled for more than one day, counsel is permitted to discuss all issues relating to the case, including evidence given or to be given, ***at the end of the day***. However, before this discussion takes place, counsel must advise the other side of his intention to do so.
3. Counsel should not seek adjournment during the XFD to discuss evidence given by the witness.

Garcia v Crestbrook Forest Industries

1994 BC/CA

Rule *(Special costs in the Court of Appeal)*

Facts Mr Garcia was fired without cause from his job as a manager at one of Crestbrook's mills. Crestbrook refused to pay the minimum severance pay required by statute. It also refused to prepare a Record of Employment for Mr Garcia, effectively precluding him from collecting UI. Mr Garcia brought a wrongful dismissal suit, demanding a severance package equivalent to 11 months wages. Crestbrook offered 9 and the parties could not agree. The case went to trial and Mr Garcia won an award of 11 months.

Although it knew that the lawsuit was a huge drain on Mr Garcia's financial resources, Crestbrook did not even pay the whole award after judgment for Mr Garcia. Instead, it paid only 8 months wages and appealed, despite the fact that the appeal had no reasonable prospect of success.

Issue Should the Court of Appeal award special costs to Mr Garcia for the cost of the appeal?

Analysis
- Bringing an appeal with little merit is not in itself ***reprehensible***. More is required, like improper allegations of fraud, improper motive for bringing the proceedings, or improper conduct of the proceedings themselves.
- Here, the following factors combined to result in ***reprehensible*** conduct, even though no single factor would necessarily have been sufficient in itself:
  - the appeal had no reasonable prospect of success;
  - the suit was a financial drain on Mr Garcia, and he carefully brought this to Crestbrook's attention;
  - Crestbrook failed to pay statutory minimum severance or get Mr Garcia his ROE for UI purposes; and
  - Crestbrook offered 9 months, but paid only 8 months when it lost even though the entire judgment was only 11 months and Crestbrook knew about Mr Garcia's financial hardship.

Held Mr Garcia gets special costs of the appeal due to Crestbrook's ***reprehensible*** conduct in bringing the appeal.

Ratio Special costs may be awarded for ***reprehensible*** conduct. This term encompasses scandalous or outrageous conduct, but also milder forms of misconduct deserving of reproof or rebuke.

See Also Costs (p 112), *Giles v Westminster Savings and Credit Union*

Giles v Westminster Savings and Credit Union

2010 BC/CA

Rule 14-1

Facts Several hundred plaintiffs who lost money in an investment scheme started a multi-party, as opposed to class or representative, action against the defendants. Ten plaintiffs were selected from among the hundreds to test the case, but they lost both at trial and on appeal. A judge dismissed the remainder of the plaintiffs' claims on the basis of *res judicata* and awarded the defendants 100% of their pre-trial costs, 85% of their trial costs, and 90% of their post-trial costs† on the basis that success was somewhat divided. The trial judge held that the plaintiffs were liable for costs on a several liability basis. Both plaintiffs and defendants appealed the costs order.

Issue Should the costs order be varied?

Analysis
- The plaintiffs should not be relieved from paying costs.
  - They are not unsophisticated, and even if they were, there are no "***access to justice***" issues here.
  - This action is just plain 'ol commercial litigation.
  - Nor should the trial be treated as a "test case".
- The defendants should not get a higher costs award because a costs order is discretionary and should not be subjected to microscopic analysis. There is no basis on which to interfere.

Held The costs award stands, except that the plaintiffs' liability is changed from several to ***joint and several***.

Ratio Costs orders are discretionary. The Court of Appeal will not vary the order unless:

1. the judge who awarded costs erred in principle; or
2. the award is plainly wrong.

An ***error in principle*** may mean making an error as to the facts, considering irrelevant factors, or failing to consider relevant factors.

Note †: i.e. 100, 85, and 90 percent of the party-and-party schedule of costs

See Also Costs (p 112), *Garcia v Crestbrook Forest Industries*

GWL Properties v WR Grace & Co

1992 BC/SC

Rule 7-1(1) 7-1(2)

Facts The plaintiff sued WR Grace & Co, which was embroiled in asbestos lawsuits throughout the US, alleging that Grace supplied asbestos-bearing insulation to the plaintiff's buildings. During document discovery, Grace provided itemized lists, containing dates and document descriptions, for about 1,000 documents. In addition, it provided a "list of documents" which was merely a list of 460 ***banker's boxes***. Each box on this list was described only by its label. In the aggregate, these boxes contained over ***1 million*** documents, which of course were not individually enumerated or described in any way. In an earlier application, Grace told the court that no list of the 1 million documents existed.

It later emerged that Grace did have a hand-written, 25,000 page list of ***12 million*** documents and another list of some 40,000 privileged documents. The million documents in the banker's boxes had been selected out of the 12 million as the producible documents. However, plaintiffs failed to establish that Grace had an actual list of the 1 million documents in the banker's boxes.

Plaintiffs sought to have Graces' defence struck for misleading the court. Alternatively, they sought a further and

better list of documents, which Grace resisted on grounds that creating such a list would be too onerous.

Issue

1. Did Grace deliberately mislead the court, or conceal producible documents, such that it should be denied its right to defend the action?
2. If not, what, if any, further list of documents must Grace deliver?

Analysis

- Since plaintiff failed to establish that Grace truly had a list of the 1 million documents, it did not prove that Grace misled the court.
- However, the list of banker's boxes delivered by Grace is of ***no real value at all***. The rules requires:
    1. an ***ordered enumeration***; and
    2. ***some description***

  of all relevant† documents.
- Grace's claims that it will suffer undue hardship are meritless. It has been working with the documents in the boxes for 9 years and should be familiar enough with them to produce a meaningful list without delay.

Held

1. Grace wins on the first point: its defence is not struck.
2. However, plaintiff succeeds on second point: Grace must deliver a real list of the documents in the 460 banker's boxes, although it may group the documents.

Ratio

> *There is . . . some **flexibility** in the form of the list that will be most suitable in any given case. It is not always possible, nor desirable, that documents be listed individually by date . . . Sometimes, where large volumes of documents are produced, a more worthwhile description can be achieved by **grouping** documents or files of documents, that relate to a particular subject, or time period, or geographical location of origin, or some other relevant common ground. **Groupings** of documents may, in some circumstances, be quite **large**. **What is important is that the list provide the party seeking discovery with a meaningful, reliable, and complete disclosure as well as an effective aid to retrieving the documents** produced . . . What is required in each case depends on the nature of the documentation that must be described.*

Note

†: This should now, of course, read "material".

See Also Ethics of Document Discovery (p 38), ***Myers v Elman***

Haghdust v British Columbia Lottery Corporation

2011 BC/SC

Rule 9-6(4) 9-6(5)(a) 9-6(5)(c)

Facts

BCLC is a provincial government gambling monopoly. Wanting to seem all "socially responsible", BCLC operates a "voluntary self-exclusion" (VSE) program through which gambling addicts can elect to be excluded from BCLC casinos &c. When various participants in the VSE program sneaked into casinos and won jackpots, BCLC followed its "social conscience" and refused to pay the winners. They responded by suing BCLC in contract.

BCLC applies for summary dismissal of the claim, arguing plaintiffs are precluded from claiming their ostensible winnings by the VSE rules, or in the alternative, by the doctrine of *ex turpi causa non oritur actio*. The plaintiffs respond with 4 credible arguments against the VSE argument, and 3 credible arguments on the *ex turpi* issue.

Issue

1. Is the defendant BCLC entitled to summary dismissal under Rule 9-6(5)(a)?
2. Is the defendant BCLC entitled to summary dismissal under Rule 9-6(5)(c)?

Analysis

- At least some of the plaintiff's responses are arguable ⇒ the claim is not bound to fail for want of a genuine issue for trial.
- Moreover, the issues raised on this application are novel and are not well-settled by authoritative jurisprudence, which makes Rule 9-6(5)(c) inapplicable in any event.

Held Plaintiff succeeds. BCLC's application for summary dismissal is dismissed.

Ratio

1. The test for whether a claim can be dismissed summarily under Rule 9-6(5)(a) is whether there is ***no genuine issue for trial***, and the standard is that it must be manifestly clear that there is no matter to be tried.
2. Courts should approach settling all or part of a claim summarily under Rule 9-6(5)(c) where the only genuine issue is a ***question of law*** with caution and apply it only where:
   a. there is no dispute about the material facts;
   b. the issue of law is not mixed up with the facts; and
   c. the issue of law is well settled by authoritative jurisprudence,

   keeping in mind that Rule 9-7 is better suited for deciding novel points of law because on summary trial, the court has a more complete factual record framing the question of law.

See Also ***Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong***, Summary Judgment (p 81)

Halvorson v British Columbia (Medical Services Commission)

2010 BC/CA

Rule 13-1(1)(b)

Facts In 2001, the plaintiff's application for certification of class proceedings was dismissed at first instance. On May 7, 2003, the Court of Appeal allowed the plaintiff's ***first*** appeal and remitted the proceedings to the Supreme Court. At the time, all parties agreed to the following form of order:

> *THIS COURT ORDERS that the appeal is allowed.*
>
> *AND THIS COURT FURTHER ORDERS that the application for the certification of these proceedings as class proceedings be remitted back to the Supreme Court of British Columbia* ***for disposition in accordance with the Reasons for Judgment of this Court****.*

The problem was that the portion of the order **emphasized in bold** didn't stipulate what had to be done, other than referring to the reasons for judgment. As a consequence, the parties soon fell into a dispute over how the remitted proceedings should continue in the trial court.

Issue Is the form of order sufficient?

Analysis

> ***[18]*** *It is the responsibility of the parties, with the assistance of the registrar, if necessary, to prepare orders that give definitive expression to the decisions of the courts. Court orders should be clear, complete and intelligible on their face so that those who are affected by them or just act on them will readily see what rights have been declared and what directions have been given. They should be* ***susceptible of enforcement****. Thus, they should not require resort to extrinsic sources, such as the pleadings or the evidence, or the reasons for the decision . . .*

In this case, counsel should have drafted the order to say exactly what should be done at trial and, if the parties were unable to agree on this, they should have asked the Court of Appeal to resolve any ambiguities in its reasons.

Ratio Court orders must be clear on their faces and not require extrinsic sources to interpret them.

See Also Orders (p 68)

Hamilton v Pavlova

2010 BC/SC

Rule 7-6(2)

Facts Plaintiff sues over an injury allegedly sustained in a car crash. She is exhibiting "cognitive symptoms" and plans to argue that she suffered a brain injury. However, if her symptoms are psychiatric in origin rather than from a physical brain injury, the prognosis is better and her damage award will be lower. Plaintiff has already submitted to ***two*** independent medical exams (IME) ordered upon application by the defence under Rule 7-6 subrules (1) and (2), respectively.

The second IME was with a neurologist, Dr Moll, who thinks plaintiff doesn't have a brain injury. Now the defence wants another IME with a psychiatrist to get an opinion whether the symptoms are psychiatric in origin. However, none of the physicians either on the plaintiff or defence side have said she needs a psychiatric assessment.

Issue Can the defence obtain a third IME under Rule 7-6(2) to have plaintiff examined by a psychiatrist?

Analysis
- An IME will be granted to ensure a "***reasonable equality***" between the parties in preparing their cases. But this doesn't mean that defendant gets to match the plaintiff expert for expert, report for report. (i.e. Defendant doesn't get 14 IMEs just because plaintiff has seen 14 doctors).
- While the application in this case was ***timely*** and counts as an ***exceptional case***, there is no new question.
  - Defendants already have Dr Moll's opinion that there is no brain injury.
  - Nothing in plaintiff's or defence's expert reports requires a psychiatric evaluation.

Held Plaintiff wins. Defence application for third IME denied.

Ratio A subsequent (i.e. subrule(2)) IME must meet a higher threshold than an initial IME and, in particular

1. the application must be ***timely***;
2. there must be some ***new question*** or matter that could not have been dealt with at the earlier examination; and
3. there must be ***exceptional circumstances***.

See Also ***Jones v Donaghey***, Physical Examinations (p 52)

Han v Cho

2008 BC/SC

Facts Plaintiffs, Han and friends, live in Korea and have no connection at all to BC. They complain that devious Mrs Cho stole their life savings in a real estate fraud and plumped it all down for a condo in lovely—if sometimes rainy—Coal Harbour, where Mrs Cho's daughters now live a life of leisure without any apparent source of income.

Plaintiffs bring suit to trace Mrs Cho's ill-gotten gains into the condo. Cho and her daughters want to stymie the claim by requiring plaintiffs to post ***security for costs***, pointing out that Korea is a non-reciprocating jurisdiction under the *Court Order Enforcement Act* and thus that a costs award in their favour is not enforceable in Korea.

On the application for ***security for costs***, plaintiffs bring convincing affidavit evidence. Mrs Cho has not rebutted the evidence of fraud, and the daughters have not rebutted evidence that they are volunteers in equity. Moreover, the defendants have ***not*** established that plaintiffs are ***impecunious*** or ***unlikely to pay*** a judgment sought in Korea.

Issue Should the plaintiffs be required to post security for costs?

Analysis
- The court has ***inherent jurisdiction*** to order security for costs for natural persons. ∄ a Rule.
- Plaintiffs have a ***strong case*** and there is no evidence that they are impecunious or unlikely to pay costs.

Held Plaintiffs win. They do not have to post security for costs.

Ratio The fact that a natural person resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious is not enough to require him to post security for costs. The onus is on the applicant to establish ***special circumstances***, which could include:

- a combination of a weak claim + an impecunious plaintiff; or
- a plaintiff who has failed to pay costs in the past; or
- a plaintiff who has refused a court order to pay maintenance.

Note The dispute concerns a proprietary interest in BC, so s 10(a) *CJPTA* would apply.

See Also Security for Costs (p 116), ***Integrated Contracors v Leduc Developments***

Harfield v Dominion of Canada General Insurance Co

1993 BC/SC

Rule Rule 9-4(1)

Facts The plaintiff and Randy Grabowsky are Named Insureds under a policy of insurance for which one of the defendant insurance companies, Safeco, is liable. The policy has an exclusion clause stating that:

> *We do not cover: 12. loss or damage resulting from your criminal or willful acts.*

The plaintiff's furniture and personal effects were wrecked by a person thought to have been Randy Grabowsky. Grabowsky has since died, but the plaintiff alleges that he was insane at the time he destroyed her possessions. Safeco has denied the plaintiff's claim for indemnity under the policy.

The plaintiff asks the court to determine the following ***point of law***. Does the reference in the exclusion clause to criminal or willful acts include acts committed while a person was insane? The facts which must be assumed by the plaintiff for the purpose of arguing the point of law are apparent from the pleadings. Only the actual language of the exclusion clause must be produced, and it is not in dispute.

Issue Because Safeco ***does not consent*** to having the ***point of law*** determined, the court must decide whether it should order the point of law to be set down for hearing.

Analysis

- ☑ The point of law is raised and clearly defined in the pleadings.
- ☑ Assuming Safeco's pleadings are true, a question arises whether they support a defence in law.
- ☑ The facts relating to the point of law are not in dispute and no evidence (aside from the clause text) is needed.
- ☑ The question is ***determinative of a substantial issue*** in the action and raises the potential of significant savings of time and cost, since a determination in favour of Safeco will eliminate the need to prove whether Randy Grabowsky was insane.

Held The court orders the ***point of law*** to be set down for hearing.

See Also Proceedings on a Point of Law (p 90) under Summary Proceedings

Haughian v Jiwa

2011 BC/SC

Rule 22-2(12) 12-5(46)

Facts In a car crash case, the defendant applies for a ***summary trial*** on the issue of liability and dismissal of the plaintiff's claim. The plaintiff says liability cannot be determined by way of summary trial. In support of her position, the plaintiff relies on two ***affidavits***:

A. An affidavit sworn by the plaintiff which attaches as an exhibit a copy of the transcript of her XFD conducted by defendant's counsel. Plaintiff seeks to rely on this evidence for the truth of its contents.

B. An affidavit sworn by a witness who deposes, for example that:

> *[¶ 8] When I turned onto Sunset Street at almost the same time as Mr Jiwa, I immediately saw that Ms Haughian's vehicle was already in the process of parking. I am certain that Ms Haughian was not making a wide turn from the left lane at the time Mr Jiwa struck her vehicle as Mr Jiwa states at paragraph 12 of his affidavit. ~~I disagree that Mr Jiwa was unable to stop before colliding with Mrs [sic] Haughian's car. If Mr Jiwa had not been speeding he had plenty of time to stop because I noticed the Plaintiff's vehicle immediately upon turning onto Sunset Street and I was behind Mr Jiwa. Since I could see that Ms Haughian was in the process of parking I cannot understand why Mr Jiwa could not see that.~~*
>
> *⋮*
>
> *[¶13] I provided a statement to ICBC on June 17, 2008. Attached hereto and marked as Exhibit "A" to this my affidavit is a true copy of the statement I provided to ICBC. . .*

Issue
1. Is the affidavit attaching the plaintiff's XFD evidence admissible for the truth of its contents?
2. Is the witness' affidavit admissible?
3. Is the exhibit referred to in paragraph 13 of the witness' affidavit admissible?

Analysis The court has the power to strike inadmissible evidence from affidavits. When there is no time between the application to strike inadmissible evidence and the hearing on the merits (as is the case in this summary trial application), the court gives no weight to the portions of the affidavit which are "struck".

Held
1. Ms Haughian's XFD transcript is ***not admissible*** for the truth of its contents. However, it is admissible for the narrow purpose of determining whether the issues are capable of being resolved by summary trial.
2. A number of paragraphs of the witness' affidavit are inadmissible because they constitute ***personal assumptions***, ***commentary***, and ***argument*** rather than fact. In the example paragraph excerpted in this brief, the sentences in ~~strikethrough~~ are struck for this reason.
3. The exhibit is not admissible because the defendant would have had to exhaust his full memory before being given an opportunity to refresh it at trial.

See Also Affidavits (p 64), *Tate v Hennessey*, Use of Examination for Discovery (p 46), Summary Trial (p 85)

Hodgkinson v Simms

1988 BC/CA

Facts Plaintiff's solicitor located a number of ***copies*** of documents as part of a diligent investigation. The originals were not themselves privileged. Defendants learned that plaintiff's solicitor had these copies in his possession because plaintiff disclosed them on his privilege list† and tried to compel plaintiff to produce them.

Issue Can plaintiff rely on solicitor's brief privilege to avoid producing the copies?

Analysis
- Full disclosure is great because it prevents ***ambush*** and helps facilitate settlement. But it is hard for the defendants to argue ambush when they are equally capable of investigating and getting their own copies.
- It would deprive a solicitor of the ability to fully investigate the case, and would force him to disclose his strategy, if he had to hand over copies of everything he turned up in investigation.
- The ***copies*** in this case were obviously produced for the ***dominant purpose*** of being used in litigation.

Held Solicitor's brief privilege protects the plaintiff from any obligation to disclose the ***copies***, even though the originals themselves were not privileged.

Ratio Copies are privileged contents of the solicitor's brief if the ***dominant purpose*** of their creation is to obtain legal advice or aid in the conduct of litigation which at the time of their creation is in reasonable prospect.

Note †: Presumably under what is now Rule 7-1(1)(a)(ii)?

See Also Solicitor's Brief Privilege (p 41), *Shaughnessy Golf & Country Club v Uniguard Services*

Hunt v Carey Canada Inc

1990 CA/SC

Rule Rule 9-5(1)(a)

Facts Plaintiff initiated an action in conspiracy for personal injuries allegedly suffered from exposure to asbestos. The tort of conspiracy had never been recognized to extend to personal injury claims.

Issue Should plaintiff's pleadings be struck as disclosing ***no reasonable claim***?

Analysis

> ***[33]*** *Neither the length and* ***complexity*** *of the issues, the* ***novelty*** *of the cause of action, nor the potential of the defendant to present a* ***strong defence*** *should prevent the plaintiff from proceeding with his or her case. Only if the action is* ***certain to fail*** *because it contains a* ***radical defect*** *ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court [Rule*

> *9-5(1) of the Supreme Court Civil Rules] should the relevant portions of the plaintiff's claim be struck out. . .*

In fact:

> ***[52]** . . . [W]here a statement of claim reveals a difficult or important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.*

Held Plaintiff wins. The pleadings may not be struck out.

Ratio Pleadings may only be struck under Rule 9-5(1)(a) if it is ***plain and obvious***, assuming the facts stated in the pleadings are true as required by Rule 9-5(2), that the pleadings disclose ***no reasonable claim*** or defence, where a "***reasonable***" claim or defence is one with some chance of success.

Note In the Speech of the Chief Justice, McEachern CJBC is very critical of the breadth of language used in *Hunt*:

> *While Hunt may be a perfectly valid case to go to trial, the breadth of the language practically forecloses any action ever being dismissed on the pleadings. . . . Judges naturally feel constrained by authority to allow highly doubtful cases to proceed at great expense of time and money when they should be decided on legal grounds without evidence.*

See Also Striking Pleadings (p 79), ***Citizens for Foreign Aid v Canadian Jewish Congress***

Hunt v T&N Plc

1995 BC/CA

Rule 7-1

Facts In an asbestos lawsuit, the defendant T&N produced documents on the ***condition*** that the plaintiff not use them outside of the immediate lawsuit. The plaintiff, who intended to share Hunt's documents with other plaintiffs who were suing T&N in the US, applied for an order compelling T&N to make ***unconditional*** disclosure. The plaintiff based his application on the earlier decision of McLachlin JA in *Kyuquot Logging v British Columbia Forest Products*.

Issue Is a party receiving documents on discovery obliged to keep the documents produced ***confidential***?

Ratio A party obtaining discovery of documents must obtain the owner's permission or the court's leave to use them other than in the proceedings in which they are produced. This does not preclude the following proper uses:

1. sharing them with advisors, such as expert witnesses, as counsel sees fit;
2. reporting fraud or professional misconduct disclosed by the discovery production.

See Also Confidentiality of Documents Produced (p 43)

Hurn v McLellan

2011 BC/SC

Rule 7-7(5)(c)

Facts McLellan T-boned Hurn in a parking lot. After investigating, ICBC instructed defence counsel to ***admit*** McLellan's liability. Counsel then filed a statement of defence admitting liability. As a result of this admission, plaintiff's counsel took no steps to interview McLellan or indeed to look for witnesses to the accident. Ten months after the admission, defence counsel XFD'd Hurn and sent a "discovery report" to ICBC summarizing the results. Due to bureaucratic sclerosis, ICBC did not look at the report for 3 more months. A total of ***13 months*** after making the admission, ICBC instructed counsel to change liability from "Admit" to "Deny".

Issue Can the defence withdraw its admission of liability?

Analysis The following factors must be considered in this case:

- Since the trial date was set assuming the only issue was damage:
  - A longer trial will be required so the upcoming ***trial date will be lost***.
  - Plaintiff will have to investigate and XFD defendant, which will also require delay.
- Plaintiff has relied on the admission for over a year. An investigation of liability at this stage will be hampered by the passage of time.
- The admission was ***deliberately made*** after an ***investigation***. It was not haphazard, rushed, or delinquent.
- Even after the XFD, defendant ***delayed*** by an additional 3 months. It is possible, although not certain that had this delay been less plaintiff's prejudice would have been less and the withdrawal would have been allowed.

Held Plaintiff wins. An admission would not be in the interests of justice.

Ratio It is not enough that a ***triable issue*** exists. The interests of justice must require the withdrawal of the admission.

See Also *Piso v Thompson*, Admissions (p 53)

Inspiration Management v McDermid St Lawrence Ltd

1989 BC/CA

Rule 9-7

Facts Inspiration alleges that MSL improperly sold securities out of the brokerage account which Inspiration maintained with MSL. MSL's right to sell the securities turns on whether they were collateral for a loan MSL had advanced to an affiliate of Inspiration. Thus the case turns on the interpretation of the terms of the loan contract.

There is a ***serious conflict of between the affidavit evidence*** of the McGowan, the principal of Inspiration, and Wheeler, the principal of MSL, over the collateral for the loan.

When MSL applied for judgment by way of ***summary trial***, the chambers judge concluded that if a full trial were held, the result of the conventional trial would not inevitably be the same as the result on summary trial. Thinking this was the ***test*** for suitability, the chambers judge therefore dismissed MSL's application.

Issue
1. Is the case suitable for disposition by way of summary trial?
2. If so, how should the conflict of evidence be resolved?

Analysis The chambers judge used the wrong test. However, even if she had use the right test, she could not have found the necessary facts because of the conflict in the evidence of McGowan and Wheeler on the central issue. Thus the chambers judge ought to have ordered ***cross-examination on the affidavits***.

Held The defendant is at liberty to renew its summary trial application.

Ratio
1. If a chambers judge can ***find the facts***, then he ***must*** give judgment as he would upon a trial unless for any proper judicial reason it would be ***unjust*** to do so.
2. A chambers judge should not decide an issue of fact or law ***solely*** on the basis of ***conflicting affidavits,*** even if he prefers one version to the other. However:
   - Notwithstanding sworn affidavit evidence to the contrary, ***other admissible evidence*** will make it possible to find the facts necessary for judgment to be given; and
   - Even if there is a conflict which cannot easily be resolved on affidavits, the trial judge is still ***not required*** to remit the case to the trial list. He could, for example, adjourn the application and order ***cross-examination*** on one or more affidavits.

Note The issue decided is that the matter is ***not unsuitable*** for summary trial, not that it definitely is suitable.

See Also Test for Suitability on Summary Trial (p 88), Factors Bearing on Whether it Would Be Unjust to Give Judgment on Summary Trial (p 88), *Charest v Poch*, *Western Delta Lands v 3557537 Canada Inc*

Integrated Contracors v Leduc Developments

2009 BC/SC

Rule *Business Corporations Act* s 236

Facts Leduc is the developer of a residential project in Fort Nelson. Integrated Contractors (IC) is the general contractor. Leduc hired L&M Engineering to provide engineering services related to the project. The project having failed, the property is being foreclosed on by the second mortgagee. Leduc has no other assets. Now IC is suing Leduc for breach of contract. As part of that process, IC obtained security for some of its costs via a pre-judgment garnishing order against Leduc.

Leduc brought a ***counterclaim*** against IC for breach of contract. The counterclaim also names L&M, not previously a party to the action, as defendant by way of counterclaim.† L&M's statement of defence to the counterclaim contains a blanket denial of all facts pleaded by Leduc (except the fact that L&M is a BC company!).

Now IC and L&M apply to require Leduc to post ***security for their costs*** of defending the counterclaim.

Issue
1. Can L&M get security for costs against Leduc?
2. Can IC get security for costs against Leduc?

Analysis
- The *prima facie* case that Leduc will be unable to pay the applicants' costs is made out.
- While the threshold for establishing an arguable defence is quite low, a pleading that merely issues a blanket denial does not meet that low threshold. ∴ L&M has ***no arguable defence*** at this stage.
- Because claim and counterclaim are over the same contractual relationship, most of IC's costs of defending the counterclaim would be incurred anyway prosecuting its claim. On the other hand, if Leduc has to post security, its defence of IC's underlying claim will be ***stifled***, as will its ability to prosecute the ***intertwined*** counterclaim.

Held
1. L&M is denied security for costs because it has ***no arguable defence***.
2. IC is denied security for costs because this would ***stifle*** Leduc's ability to defend IC's claim against it.

Ratio The basic "test" for whether an applicant can get security for costs against a corporate respondent is:

1. ∃ a *prima facie* case that respondent would be unable to pay applicant's costs if respondent's claim fails?
2. Has the respondent rebutted the *prima facie* case by showing:
    a. that it has sufficient available assets to satisfy the award; or
    b. that the applicant has ***no arguable defence*** to its claim?

As well, the following factors may affect the outcome of the "test":

- Would ordering security for costs unfairly ***stifle*** a valid claim?
- Is the application brought against a defendant advancing a ***counterclaim*** which is sufficiently ***intertwined*** with his defence that most of the applicant's costs will be incurred regardless of the counterclaim?
- Is respondent's financial hardship caused by the very actions of the applicant which are at issue in respondent's claim?

Note †: Recall that you can do this under Rule 3-4(2). See also Counterclaim (p 21).

See Also Security for Costs (p 116), *Han v Cho*

Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong

2011 BC/CA

Rule 9-6(4) 9-6(5)(a) 9-5(1)(a)

Facts In a dispute over a contract and real property mortgage, the defendant applied for ***summary dismissal*** of the plaintiff's claim under Rule 9-6(5)(a) or, in the alternative, to have the plaintiff's ***pleadings struck*** under Rule 9-5(1)(a). No evidence was presented on the application.

The defendant's application was partly successful. However, the chambers judge's reasons did not make perfectly clear whether the order granted to the defendant was based on Rule 9-6 or Rule 9-5. If the order was made on the basis of Rule 9-5, it was apparently on the basis that the plaintiff's pleadings did not disclose a cause of action on the ***narrow legal basis*** of the principles of law and equity which relate to real property mortgages.

Issue
1. Should the defendant's application have been allowed under Rule 9-6?
2. Should the defendant's application have been allowed under Rule 9-5?

Held
1. Defendant could not succeed under Rule 9-6 because of the absence of sworn evidence establishing that the claim was without merit.
2. Defendant could not succeed under Rule 9-5 because the plaintiff's pleading could be amended to raise the broader issue of an implied term in the contract, which is a reasonable claim in the circumstances.

Ratio
1. Despite the text of Rule 9-6, both applications for summary judgment by a plaintiff and for summary dismissal by a defendant must be supported by ***evidence***.
2. Where there is an attack on a pleading as showing no reasonable claim or defence the court must first consider whether the pleading can be saved by ***amendment***.

See Also Summary Judgment (p 81), ***Haghdust v British Columbia Lottery Corporation***, Disclosing No Reasonable Claim or Defence (p 79) under Striking Pleadings

Jabs Construction Ltd v Callahan

1991 BC/SC

Rule 9-3

Issue Is it appropriate to determine a hypothetical point of law† as a stated (special) case?

Ratio

> *Where the determination of a hypothetical point of law **may have a conclusive effect** on litigation, the court may choose to make the determination, even if it will not necessarily dispose of the legal problems the parties have. The test is whether determination of the issue will or may serve a useful purpose. It is proper to take into account the practical realities faced by litigants and the saving of their time and court time that a preliminary ruling will achieve.*

Note †: In other words, a question of law based on assumed facts.

See Also ***William v British Columbia***, Special Case (p 91)

Jerry Rose Jr v The University of British Columbia

2008 BC/SC

Rule 9-5(1)

Facts Plaintiff brought a claim against 13 defendants (including UBC, the RCMP, Microsoft, Great Canadian Gaming Corporation, Wal-Mart, and Telus). The numerous allegations included that the plaintiff was subjected to Invasive Brain Computer Interface Technology by the defendants; and that the defendants had variously bludgeoned, poisoned, thrown a boulder at, and dognapped the plaintiff's Guard dogs. Plaintiff sought relief in the amount of $2 sextillion Canadian or US dollars and about 10 vehicles. Generally the ***allegations*** were made ***against all*** 10 defendants ***without distinction***. The claim did not state ***when***, ***where***, or ***how*** the alleged acts were committed.

Issue Can defendants succeed in striking out plaintiff's claim on any of the grounds in Rule 9-5(1)?

Analysis
- The "***plain and obvious***" test applies not just to Rule 9-5(1)(a) but to paragraphs (b) to (d) as well.
- The statements ***do*** allege a cause of action: the facts alleged could support claims in assault and battery.
- With respect to Rule 9-5(1)(a):
  - The general rule is that the facts alleged must be taken as true.

- Nevertheless, the court may ***look behind*** the allegations of fact to determine if they are:
  - based on speculation; or
  - incapable of proof.

  The court may refuse to assume such allegations to be true.
- Two symptoms of wild speculation are:
  - generalized allegations made against all defendants without distinction; and
  - failure to state adequate particulars about when, where, or how the allegations occurred.

- Plaintiff's pleadings are also (b) frivolous and vexatious: and (c) embarrassing and prejudicial.
- It is ***plain and obvious*** that the plaintiff's claim is bound to fail on all of paragraphs (a) to (c) of Rule 9-5(1).

Held
1. The plaintiff's statement of claim is struck out in its entirety.
2. Costs awarded to the defendants who filed notices of motion on the application.

See Also ***National Leasing Group v Top West Ventures***, Disclosing No Reasonable Claim or Defence (p 79)

Jones v Donaghey

2011 BC/CA

Rule 7-6(1) 3-1(2)(a)

Facts Infant plaintiff sued the Director of Child Development alleging he was harmed by his foster mother, Ms Donaghey. The claim was in negligence and was essentially that the Director breached his duty of care to the plaintiff by leaving him with Ms Donaghey when the Director knew or ought to have known that she was prone to violence.

Plaintiff argued that whether Ms Donaghey had a personality disorder or not was ***relevant*** to whether she was prone to violence, putting her mental condition ***in issue*** and entitling plaintiff to have a psychiatrist examine her.

Issue Is Ms Donaghey's mental condition ***in issue*** within the meaning of Rule 7-6(1)?

Analysis
- Example of a time when a person's mental condition is ***in issue***. Suppose in a negligence action for personal injury the plaintiff claims that the harm caused by the defendant made the plaintiff crazy. In this case, the plaintiff's mental condition *is the compensable damage!* Since damage is part of the cause of action, whether the plaintiff is crazy or not is an ***ultimate fact***.
- But in this case, whether Ms Donaghey has a personality disorder or not is not an ***ultimate fact***. It can neither make out the plaintiff's cause of action nor have legal consequences in and of itself. At best, it is an ***intermediate fact*** relevant to proving that Ms Donaghey is prone to violence.

Held Ms Donaghey's mental condition is not ***in issue*** and therefore plaintiff's application is denied.

Ratio The phrase ***in issue*** means an ***ultimate fact*** that has to be proved to make out the cause of action. An alternative definition is a fact which, if proved, would in and of itself have legal consequences for the parties.

See Also ***Hamilton v Pavlova***, Physical Examinations (p 52)

Kaladjian v Jose

2012 BC/SC

Rule 7-1(18) 1-3(2)

Facts In a car crash case, there was an issue about plaintiff's pre-existing injuries. Plaintiff had her MSP report in her possession but didn't disclose it to defendant on discovery because it couldn't ***prove or disprove a material fact***. Rather than seeking to force plaintiff to disclose the report under Rules 7-1(10) or 7-1(11), defendant applied to court to compel the Ministry of Health, which also had a copy of the MSP report, to produce it under Rule 7-1(18). Defendant argued that the laxer *Peruvian Guano* standard applied to Rule 7-1(18).

Issue What is the standard for third party document disclosure under Rule 7-1(18)?

Analysis
- While the language of Rule 7-1(18) is nearly identical to Old Rule 26(11), to which *Peruvian Guano* did apply, the underlying document disclosure framework has changed in the New Rules. The old cases don't help.
- We now have a two-stage document discovery system which strives at the object of ***proportionality***.
  - At Stage 1, the standard for disclosure is ***materiality***: Rule 7-1(1).
  - At Stage 2, governed by Rule 7-1(11), a lower standard applies.
- Under the new system, the scope of ***document discovery*** is now different than the scope of ***oral discovery***.
- It would be inconsistent with the object of ***proportionality***, and arbitrary, if you could get around materiality in Stage 1 by seeking production of the same document from a third party instead of from the opposing party.
- Requiring ***evidence*** at Stage 2 recognizes the ***scope*** difference between oral and document discovery; advances ***proportionality***; and prevents "***fishing expeditions***". Evidence can be obtained in the XFD, which has the broader scope.

Held Defendant's application dismissed.

Ratio An applicant under either Rule 7-1(11) or 7-1(18) will generally have to provide some ***evidence*** to support an application for additional documents.

See Also Our Two-Stage Document Discovery Regime: Rule 7-1 (p 38), ***Dufault v Stevens and Stevens***

Keefer Laundry v Pellerin Milnor Corp

2006 BC/SC

Rule 7-1(20)

Facts In an unfit equipment case, both sides made various claims of privilege. For instance, the defendant claimed solicitor-client privilege over 18 documents. The descriptions of these documents in the defendant's list of documents had sparse descriptions like "printout of email".

Issue
1. What is the test for solicitor-client communication privilege?
2. Is privilege established for the documents in question either from their descriptions or from the court's review of the document?

Analysis
- The fact that a document was sent to or by a lawyer is not enough to establish solicitor-client communication privilege, particularly where the lawyer plays a business role in a company.
- Some facts which first appear to be neutral may be privileged. For example, a lawyer's fees may be privileged because the fee charged could disclose information about the nature of the lawyer-client relationship.
- In disputes over whether documents are privileged, the court's decision whether to review the disputed documents under Rule 7-1(20) depends on factors like the volume of documents and the nature of the dispute.
  - It is preferable if the parties establish privilege by affidavit evidence.
  - If they cannot do this without revealing the privileged information itself, it is appropriate for the court to review the documents.
- The court will frequently lack the context, which the party controlling the document will have the benefit of, necessary to determine whether a given document is privileged.

Held Solicitor-client communication privilege is not established by the descriptions. In review, the court determined that 4 of the 18 documents are privileged but it lacked the context necessary to decide the other 14 claims.

Ratio A communication is privileged under ***solicitor-client communication privilege*** if:
1. it is a communication ***between lawyer and client***;
2. it entails the seeking or giving of ***legal advice***;
3. it is intended to be ***confidential***.

Note This is the authority BG wants us to **cite for the proposition that the *onus* of establishing privilege is on the party**

asserting it.

See Also Solicitor-Client Communications Privilege (p 42), ***Leung v Hanna***

Kendall v Sun Life Assurance Co of Canada

2010 BC/SC

Rule 7-2(2)(a) 7-2(3) 7-2(17) 7-2(18)(a) 7-2(25)

Facts Defendant's representative during XFD was an adjudicator who rejected plaintiff's disability claim at first instance. During XFD of defendant's rep by plaintiff's counsel, defendant's counsel raised a flurry of objections, including on the following grounds:

- irrelevance;
- that the questions asked were "argumentative"; and
- that the defendant was being asked to apply a legal test;

Ultimately, there were so many objections that plaintiff's counsel prematurely, and unilaterally, ended the XFD by walking out. Plaintiff then applied to have defendant re-attend at an XFD and answer the questions objected to.

Issue Should defendant be ordered to submit to continued XFD?

Analysis **Scope**:

- XFD is a ***cross-examination*** and counsel for the examinee must not unduly interfere or interrupt.
- Scope of XFD is very ***broad***. Relevance is bounded by the ***pleadings***, bearing in mind that the pleadings may be ***amended***.
- Part of the purpose of XFD is investigatory, not just to obtain admissible admissions. Moreover, given the 7-hour limit, examining party bears the risk of asking badly-framed questions which elicit no useful answer.

Objections generally:

> ***[40]*** *. . . It is unlikely that a trial judge would allow such overly protective objections during the course of a trial. A witness may be lulled in to a false sense of security when her counsel indulges in overprotective behaviour on examination for discovery.*
>
> ***[41]*** *Furthermore, it would be wrong to overlook the fact that part of the dynamic operating in examinations for discovery is* ***psychological****. By continuing to interrupt the examining counsel, the objecting lawyer seeks to* ***derail the authority*** *of the examiner over the witness and undermine the flow of the examination. When one reads the entire discovery transcript, you can see the effectiveness of this strategy in that the witness appears to become more and more* ***obtuse*** *as the discovery progresses . . .*

- Unless it is very clear that the answer may not be relevant, the better course is to allow the question.
  - Do not interfere unless to resolve ambiguity or prevent injustice.
- Objections on ground of privilege are always OK: Rule 7-2(18)(a).
- Proportionality calls for a hands-off approach by the courts.

Ruling on objections:

- The questions allegedly attempting to elicit the representative's view of how to apply a legal test were only enquiring into her understanding of the defendant's policies and how she was to apply them in adjudicating a disability claim. These might or might not be objected to at trial, but are fine on XFD.
- Except for one valid objection to an attempt to elicit a medical opinion from a lay person, none of the objections had any valid basis.

Continuation of discovery:

- Only in rare cases will a court endorse request to continue XFD by party who unilaterally ended it.
- In this case, plaintiff's ***right*** of cross-examination was ***thwarted*** and applying principles from Rules 7-2(3) and 7-2(25), plaintiff should be able to begin discovery afresh.

Held Plaintiff is entitled to a fresh 7-hour XFD.

Note JF: ***Kendall* tells us to take a pretty hands off approach, especially on the issue of relevance**.

See Also *Allarco Broadcasting v Duke*, Scope of Examination for Discovery (p 48)

Knowles v Peter

1954 BC/SC

Rule *Court Order Enforcement Act* s 3(2)(d)(iii)

Facts An affidavit in support of a pre-judgment garnishing order described the nature of the cause of action as "for a debt on a chattel mortgage".

Issue Is the nature of the cause of action sufficiently described?

Analysis A chattel mortgage is a form of security, not a cause of action. A cause of action is not sufficiently described just because, as here, the court could ***guess***, and would likely guess correctly, what is meant.

Held Garnishing order denied.

Ratio The cause of action must be stated in the affidavit with sufficient particularity to (1) allow the judge to decide, intelligently, whether it is one allowed by the *Court Order Enforcement Act*; and (2) support an indictment for perjury if the statement turns out to be false.

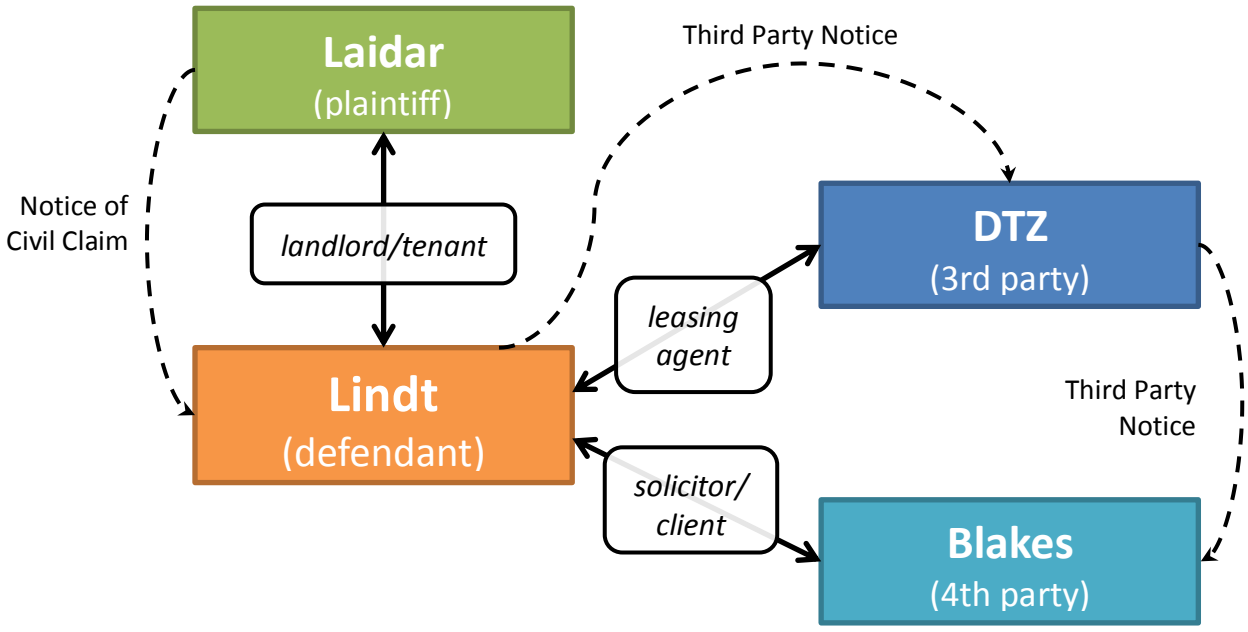
See Also Pre-Judgment Garnishing Orders (p 100), *Silver Standard Resources v Joint Stock Co Geolog*

Laidar Holdings Ltd v Lindt and Sprungli (Canada) Inc

2012 BC/CA

Rule 3-5(1) 3-5(4)

Facts



A land deal went sour, despite the fact that it should have been sugary sweet. Lindt agreed to lease a building from Laidar for the purpose of selling delicious delicious chocolate. After the lease was signed, it discovered that the pointless zoning scheme imposed by our benevolent city planners did not permit that use. Lindt refused to take possession, and Laidar sued for non-payment of rent.

At this point, Lindt third-partied the leasing agents (various companies within the DTZ family) who had helped it

lease the property. DTZ then tried to fourth-party the law firm, Blakes, which represented Lindt on the deal on the ground that Blakes had failed in its ***duty to Lindt*** to ensure that the use of the property was permitted.

As DTZ's 42-day period, prescribed in Rule 3-5(4)(b), to file a third-party notice as of right had expired, DTZ required leave of the court under Rule 3-5(4)(a).

Issue Does DTZ's third party notice to Blakes disclose a valid claim?

Analysis

- There are two kinds of situations in which the first branch of *Adams* applies:
  1. where the acts of the proposed third party (fourth party here) fall within the scope of an ***agency*** relationship between the third party and the plaintiff; and
  2. where the claim is that the third party should have advised or assisted the plaintiff to ***mitigate***.
- In this situation, Lindt (defendant) is analogous to the plaintiff in *Adams*; DTZ (third party) is analogous to the defendants in *Adams*; and Blakes (proposed fourth party) is analogous to the proposed third party in *Adams*.
- There is no claim on the ***pleadings*** that Blakes owed an ***independent duty*** to DTZ.
- Since DTZ is alleging that Blakes breached a duty to Lindt which clearly fell within the ***agency*** relationship between Blakes and Lindt, the "first branch" of *Adams* applies.

Held The third party notice to Blakes is not permitted.

Note Newbury JA was also concerned with the underlying policy reasons, including the "obvious mischief" that arises from allowing a party to sue another party's solicitor.

See Also ***Adams v Thompson, Berwick, Pratt & Partners***; ***McNaughton v Baker***; Unnecessary Third Party Proceedings: Adams (p 30)

Leung v Hanna

1999 BC/SC

Rule 7-1(7) 7-1(20)

Facts Defendant claimed privilege in 8 documents. The descriptions provided on her privilege list stated only:

> Document marked P3, the same having been initialled by handling solicitor.
> Document marked P4, the same having been initialled by handling solicitor.
> ⋮
> Document marked P10, the same having been initialed by handling solicitor.

Plaintiff applied for an order that defendant produce a further and better list of documents on the ground that the defendant's description of allegedly privileged documents did not comply with Rule 7-1(7).

Issue Do the defendant's documents comply with Rule 7-1(7)?

Analysis

- Rule 7-1(7) requires that documents in which privilege be claimed be listed individually. However, as defendant has already done this, there is no violation here.
- Rule 7-1(7) states that the documents "must be described . . . in a manner that will enable other parties to assess the validity of the claim of privilege".
- ***However***, this is ***qualified*** by the wording "without revealing information that is privileged".
- Maintaining privilege is the ***right*** of the client and the ***responsibility*** of the lawyer. The court must therefore err on the side of privilege.
- The relief available to a party that believes documents have been inappropriately or not fully described is an application to have the court inspect the document under Rule 7-1(20).

Held While the descriptions do not assist the plaintiff to "assess the validity of the claim of privilege", the plaintiff's application is dismissed since it is assumed that the reason is that this information could not be provided "without revealing information that is privileged". Plaintiff may, however, apply under Rule 7-1(20).

Ratio A solicitor is an ***officer of the court*** and must be ***presumed*** to have provided the most extensive description possible short of disclosing privileged information.

See Also Practical Aspect of Privilege: Listing Privileged Documents (p 43), ***Keefer Laundry v Pellerin Milnor Corp***

Luu v Wang

2011 BC/SC

Rule 4-4

Facts Defendant applies to set aside the order of a master granting plaintiff an order for substituted service. The order was granted on the ground that the defendant was evading service. The basis for this finding was that the plaintiff's process server had visited the defendant's home three times, and on the second visit, the process server spoke through the door with a man he believed to be the defendant, but who refused to open the door. It turns out that this man was not the defendant, but rather the defendant's father-in-law.

Plaintiff's claim is for a substantial amount (more than $1M). Plaintiff was and is well aware that defendant lives in China and exactly where in China defendant could be found. Plaintiff neither brought (1) any evidence about the actual cost of serving defendant in China; nor (2) any evidence that service could not be easily effected; nor (3) any evidence that plaintiff had attempted to serve defendant in China.

Issue Should the order for substituted service be set aside?

Analysis

- Rule 4-4 provides an exception to the requirement of personal service, not an automatic right for an order for substituted service. Defendant must meet one of the three grounds set out in Rule 4-4.
- Since the evidence that defendant was evading service proved incorrect, there is no evidence that defendant was ***evading service*** and this ground for substituted service fails.
- Plaintiff knew exactly where defendant was, so the "cannot be found after ***diligent search***" ground fails.
- Finally, while plaintiff did take reasonable steps to ***locate*** defendant, plaintiff failed to prove reasonable steps to ***serve*** defendant. In particular, the lack of evidence about cost, ease of service, or attempt at service in China means there are no grounds to find that it was ***impracticable*** to personally serve defendant in China.

Held Defendant wins: the order for substituted service is set aside.

Ratio Definition of ***impracticable***:

1. practically impossible; or
2. that which cannot be done without laying out more than the thing is worth.

See Also Alternative Service (p 17)

McNaughton v Baker

1988 BC/CA

Rule 3-5(1) 3-5(8)

Facts The plaintiffs sold a dairy farm in a transaction that later failed, requiring them to foreclose on a mortgage they had taken from the purchasers. The plaintiffs sued the lawyers who assisted on the transaction for negligence. The lawyers in turn attempted to third-party the plaintiffs' realtors and accountants. The lawyers' third party notice alleged that the accountants and realtors owed the lawyers an ***independent duty***.

Issue Can the accountants and realtors have the lawyers' third-party notice set aside under the *Adams* test?

Held The court will not set aside the third party notice.

Ratio Where the ***pleadings*** (i.e. the third party notice) allege that the third party owed the defendants an ***independent duty***, they disclose a possible third party claim and should be allowed to stand.

See Also *Laidar Holdings Ltd v Lindt and Sprungli (Canada) Inc*, *Adams v Thompson, Berwick, Pratt & Partners*, Unnecessary Third Party Proceedings: Adams (p 30)

MTU Maintenance Canada v Kuehne & Nagel Int'l

2007 BC/CA

Rule 22-1(4)(e)

Facts The defendant US company applied to have service set aside and the action dismissed for want of jurisdiction. Plaintiff's argument on the application was that the facts on which the action was based had a ***real and substantial connection*** to BC, under section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, because the defendant allegedly committed a tort in BC. However, neither the plaintiff's ***pleadings*** nor the ***affidavit*** evidence it brought in support of the application contained facts which brought the action within section 10 *CJPTA*. Plaintiff's counsel attempted to establish these facts through his own statements during argument. Counsel's statement was not explaining affidavit materials but was providing a new fact which was not within counsel's personal knowledge.

Issue Are counsel's statements admissible to establish a ***real and substantial connection*** under Rule 22-1(4)(e)?

Analysis
- If a judgment issued against the US company, it would have to be recognized by a foreign court, which may well look to the court record of the BC Supreme Court to decide if the judgment is enforceable.
- A domestic court should only take jurisdiction based on the court record. It should not rely on statements by counsel when that could have the effect of rendering its judgment unenforceable in foreign jurisdictions.

Held Counsel's statements are inadmissible.

Ratio **While unsworn statements by counsel may be permissible in some circumstances, they should not be relied on to establish new facts, not within the personal knowledge of counsel, or facts which are of singular importance to the outcome of the application**. (JF)

See Also What Kinds of Evidence May Be Adduced in Chambers? (p 59)

Myers v Elman

1940 Eng/HL

Facts The English system at the time of this case required the parties to provide their "list of documents" in the form of a sworn affidavit of documents. The plaintiffs had alleged ***fraud*** against the defendant Rothfield in an underlying action. Rothfield's solicitor in that action, Elman, left the conduct of discovery in the hands of his managing clerk, Osborn. Rothfield swore two ***false affidavits*** of documents.

The first false affidavit was a "mere travesty of discovery". It elicited a letter from plaintiff's solicitor suggesting that Elman explain to his client the meaning and importance of an affidavit with a view to filing a further and better one. This letter produced no result: Elman was satisfied with Rothfield's ***mere denial***. Plaintiff then applied for, and got, an order that Rothfield produce a new affidavit.

The second false affidavit, sworn under order and under supervision of Elman's clerk, Osborn, contained new entries from Rothfield's bank account statement ("pass-book") with the peculiar description "***relevant entries only***". These entries had been selected by Rothfield with some skill and showed only information which had already been disclosed to plaintiff in another form. It was not entirely clear whether Osborn examined the bank statement before the affidavit was sworn, but if he had, he must have discovered that the parts held back were damaging to Rothfield and had to be disclosed.

Because of the second false affidavit, plaintiffs were required to apply to court ***again*** for a new affidavit.

Issue Is Elman guilty of professional misconduct?

Analysis It doesn't matter whether or not Osborn inspected the pass-book before the second affidavit was worn.

- If he did, he ought to have known that the affidavit was false.
- If he did not, it was a gross breach of Elman's obligations to take his client's bare word as to what was relevant, especially considering the allegations of fraud, the first false affidavit, &c.

Held Elman misconducted himself. He must ***personally*** pay 1/3 of plaintiff's costs of the action and 2/3 of the costs of the application.

Ratio A solicitor is an ***officer of the court*** and cannot let his client make whatever affidavit of documents he thinks fit.

See Also Ethics of Document Discovery (p 38), ***GWL Properties v WR Grace & Co***, ***Professional Conduct Handbook*** Chapter 8, Rules 8:1(b) & 8:7–8, Rule 14-1(33)(c).

National Leasing Group v Top West Ventures

2001 BC/SC

Rule 3-4 9-5(1)(a)

Facts Plaintiff sued on a debt allegedly due. Defendant responded with a document containing "statement of defence" and a "counterclaim" written with a "somewhat idiosyncratic approach to English grammar".

Issue The defendant by way of counterclaim applied to get the ***counterclaim*** struck as not disclosing a reasonable claim.

Analysis Master Bolton reasoned:

> *It does not disclose a cause of action, because the* ***nature of the transaction****,* ***the parties****, and the* ***date****, are not set out. But there is* ***some indication*** *of an intention to plead fraud, misrepresentation and the levying of a criminal rate of interest. If properly particularized it might form the basis of an arguable defence or cause of action against the plaintiff. But unfortunately the counterclaim does not give anything I can recognize as particulars in any of its remaining 96 paragraphs. . .*

Held The counterclaim is struck out.

Note

- Master Bolton "invited" the defendant to amend his statement of defence in a comprehensible manner. The clear implication here is that failure to do so would make the statement of defence vulnerable to being struck on application by the plaintiff.
- This purpose of this case is to show that the courts will try to save even the worst pleadings from being struck (even those written in barely comprehensible "English") but that, nevertheless, there is a limit and at a bare minimum the court must be able to make out (a) the nature of the alleged transaction; (b) the parties; and (c) the date of the allegations.

See Also ***Jerry Rose Jr v The University of British Columbia***, Disclosing No Reasonable Claim or Defence (p 79)

Orazio v Ciulla

1966 BC/SC

Rule 4-3(2)

Facts The circumstances involved a car crash lawsuit against the defendant. For bizarre and convoluted reasons, when defendant showed up at the offices of his "usual" lawyer to discuss matters unrelated to the car crash lawsuit, the lawyer's secretary handed the defendant a copy of the plaintiff's writ of summons in the crash action. The lawyer ***explained*** to the defendant what the document was and the defendant did in fact ***read it*** over, at least to the point of seeing the names of the parties and understanding it referred to the car crash. The defendant did not, however, keep the writ but handed it back to the lawyer a few moments later.

According to the Rules of Court in effect at the time, personal service required ***leaving*** a copy of the writ with the defendant. The defendant thus claimed that, as the writ was not "left" with him, he was not validly served.

Issue Was valid ***personal service*** effected on the defendant?

Analysis On the facts, defendant knew that the document was a writ of summons issued by the plaintiff against him. He also knew the ***general nature*** of the plaintiff's claim.

Held The service effected was valid.

Ratio The essential ingredient of personal service is that the process must be delivered under circumstances in which:

1. the defendant knew, or reasonably ought to have known, what it was;
2. put another way: the defendant the document was a writ, issued against him by the plaintiff and, in addition, the general nature of the claim advanced.

See Also *Wang v Wang* (p 163), *Rule 4-3 — Personal Service* (p 187), Personal Service (p 15)

Parti v Pokorny

2011 BC/SC

Rule 5-2(7)

Facts The proceedings in a car crash case included a CPC. ICBC, which conducted the defendant's defence, applied for production of the CPC transcript because ICBC wanted the transcript for internal training purposes.

Issue Should CPC recordings be made available under the open court principle?

Analysis

- Object of CPC is to foster ***full and candid discussion*** between the parties, counsel, and the court. (This in turn furthers object of the rules). CPCs are most productive when there is ***frank and uninhibited*** discussion.
- This may not occur if parties, counsel or court are worried about unguarded comments being made public.
- Even if you could separate procedural and litigation management matters from the merits of the case (which you can't because they are interwoven), trying to separate between "on the record" and "off the record" segments would stifle discussion with ***excessive and awkward formality***.

Held Transcripts not released because defendant has shown no compelling grounds for production.

Ratio The court will only order CPC recordings produced in ***exceptional cases***, on ***reasonable grounds***, such reasonable grounds to be ***compelling***.

See Also *Stockbrugger v Bigney*, Case Planning & Case Management (p 35)

Piso v Thompson

2010 BC/SC

Rule 7-7(5)(c) 1-3(1) 1-3(2)

Facts Despite the best efforts of defence counsel, litigation of a car crash case was proceeding at a glacial pace (meanwhile, plaintiff left Canada and moved to the Dutch Antilles). Six years into the litigation, in an effort to speed things along, defence counsel faxed plaintiff's counsel a ***notice to admit*** which basically requested that plaintiff admit that the defendant had a ***complete defence***. Plaintiff's counsel put the notice to admit in a file and forgot about it. Defendant then initiated a summary trial application based on ***deemed admissions***.

Issue Can plaintiff withdraw the deemed admissions?

Analysis

- This isn't the plaintiff's fault, it's his ***lawyer's fault***. Plaintiff never had notice of the notice to admit.
- Saying that the plaintiff has recourse against his sloppy counsel by way of a professional negligence claim ignores the further delay and expense of such a claim, which lacks ***proportionality***.

Held Plaintiff may withdraw the deemed admissions. However, defendant is entitled to costs thrown away preparing the summary trial application plus costs of plaintiff's application to withdraw, both in any event of the cause.

Ratio Rule 7-7 does not create a trap or add an inescapable obstacle to ensnare or trip up sloppy or inattentive counsel to the detriment of the ***parties*** to the litigation.

See Also ***Hurn v McLellan***, Admissions (p 53)

Power Consolidated (China) Pulp v BC Resources Investment Corp

1988 BC/CA

Rule ***Court of Appeal Act*** s 7(2)

Facts A judge of the Supreme Court ruled on an ***interlocutory*** application that disclosure on discovery of part of a letter written by plaintiff's counsel did not destroy the privilege attached to the remaining undisclosed parts of the latter. Defendants applied for leave to appeal to the Court of Appeal.

Issue Should leave to appeal the ***interlocutory*** order be granted?

Ratio The factors bearing on the granting of leave to appeal an ***interlocutory*** order **include**† the following:

1. whether the point on appeal is of significance to the practice;
2. whether the point raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious‡ or, on the other hand, whether it is frivolous; and
4. whether the appeal will unduly hinder the progress of the action.

Note †: JF emphasis.

‡: Not in the sense of destined to succeed, but in the sense that a legitimate argument can be made…

JF adds to the test for whether leave should be granted the following question: **Is it in the interests of justice that leave be granted?** Given that the courts are inclined to define the "interests of justice" in terms of whatever they happen to decide today (otherwise, why would we have decided it, amirite?), I'm not sure what this adds. . .

See Also ***Rahmatian v HFH Video Biz***, Appealing the Order of a Judge (p 71)

Pye v Pye

2006 BC/CA

Rule PD-34 ***Supreme Court Act*** s 11(7)

Facts In a family dispute, Master Barber made a ***final order***, by ***consent*** of the parties, for disposition of marital property. Despite consenting to the order, eighteen months later the wife decided she was unhappy with the order and applied to have it set aside on the grounds that masters do not have the jurisdiction to make final orders.

Issue Do masters have the jurisdiction to make final orders?

Held Application to set aside the final order is denied.

Ratio The *constitutional* restrictions on the jurisdiction of masters are that they may not:

- decide appeals;
- weigh evidence; or
- decide contested issues of fact or law.

Within these limitations, masters are at liberty to make final orders (subject to the further limitations in the *Supreme Court Act* and any practice directions issued by the Chief Justice of the Supreme Court).

See Also ***PD-34 — Master's Jurisdiction*** ¶ 6(a), Jurisdiction of Masters (p 62)

Rahmatian v HFH Video Biz

1991 BC/CA

Rule *Court of Appeal Act* s 6(1)(a)

Facts At the end of the plaintiff's case at trial, defendant moved for ***nonsuit*** (i.e. an order dismissing plaintiff's claim for want of a reasonable cause of action, or for want of evidence). The trial judge dismissed the motion. Defendant applies for leave to appeal the "***order***" made on the nonsuit motion. No formal order was actually made, but defendant has included a draft order—which was not submitted either to the trial judge or the plaintiff for approval—in his appeal materials.

Issue Is the disposition of a nonsuit motion at trial an "***order***" capable of being appealed to the Court of Appeal?

Analysis
- The trial judge must be a master of proceedings from the commencement until the conclusion of a trial.
- The Court of Appeal only has jurisdiction to hear appeals from orders: *Court of Appeal Act* s 6(1)(a).

Held Defendant's application for leave dismissed.

Ratio The disposition of a motion for nonsuit made during the course of a trial is ***not an order***. It is more properly described as a ***ruling*** which is part of the trial process and is not appealable until the trial has completed.

Note A nonsuit motion, if successful, results in an order dismissing the action, which plaintiff can appeal as of right.

See Also *Power Consolidated (China) Pulp v BC Resources Investment Corp*, Appealing the Order of a Judge (p 71)

Rainbow Industrial Caterers v Canadian National Railways

1986 BC/SC

Rule 7-2(5)

Facts In a suit involving "serious allegations of misrepresentation, recklessness and fraud", plaintiff picked a very junior employee of defendant, Monaghan, to examine for discovery. Defendant wants to substitute a more senior employee, Gregory, in place of Monaghan.

Besides being very junior, Monaghan is not well informed enough to answer questions on the contracts that are the subject of the dispute. Gregory is responsible for the contracts and is fully familiar with their terms. Plaintiff put forward no evidence of prejudice it would suffer if Gregory were examined instead of Monaghan.

Issue Should plaintiff be required to examine Gregory rather than the representative of its choice, Monaghan?

Analysis
- Defendant will be ***prejudiced*** significantly if plaintiff's "very serious allegations" cannot be canvassed through the person having the greatest knowledge and in the most senior position, who is also the person who was responsible for the contracts from the beginning.
- Gregory is the person most responsible and his answers will be binding on the corporation, whereas Monaghan's might not be.
- Plaintiff brought no evidence of prejudice.

Held Defendant wins. Plaintiff must examine Gregory.

Ratio The court may substitute the corporate defendant's choice as a representative to examine for discovery for the plaintiff's choice if this is necessary to achieve justice and fairness.

Note JF's theory: **plaintiff was "playing games" thinking it could get more damaging admissions from a junior employee.**

See Also *First Majestic Silver Corp v Davila*, *Westcoast Transmission v Interprovincial Steel*, Who May Be Examined for Discovery? (p 45)

Ralph's Auto Supply (BC) Ltd v Ken Ransford Holding

2011 BC/SC

Rule 23-6(8)

Issue What is the ***standard of review*** on an appeal from the master?

Analysis

- The current standard of review is given in ***Abermin Corp v Granges Exploration***.
- However, the *Abermin* standard should be changed for the following reasons:
  - *Abermin* adopted the standard of review applied in *Stoicevski v Casement* (1984), 43 OR (2d) 436 (CA), a decision which has since been overruled by a 5-judge panel of the Ontario Court of Appeal in *Zeitoun v Economical Insurance Group*, 2009 ONCA 415.
  - The *Stoicevski* standard was based on historical notions of hierarchy that should now be re-examined in light of:
    - the evolution and rationalization of standards of review in Canadian jurisprudence;
    - the expansion of the role of the master;
    - the values of economy and expediency; and
    - the difficulty of deciding whether an interlocutory order appealed from is vital to the final issue in the case.
  - There should be a presumption of fitness for judges and masters alike.

> *There is no functional value in assigning a task to a particular judicial officer with the reservation that a different judicial officer at a higher point in the hierarchy may substitute his or her view solely by reason of his place in the hierarchy and without some demonstrated deviation in the original decision from the applicable legal principles or some misapprehension of the facts and the evidence that affects the soundness of the result.†*

  - Appellate judges aren't "smarter" than judges at first instance. Their role is just to review the reasons of the lower court in light of the arguments of the parties and the relevant evidence and then to uphold the decision unless a palpable error leading to a wrong result has been made.
  - Similar kinds of decisions and similar kinds of errors should be treated similarly.

Ratio Fenlon J concluded that while she thinks a consistent and deferential standard of review should apply to all appeals from orders of masters, she is bound by *stare decisis* not to change the standard of review and that any change must come from the Court of Appeal.

Note †: If you think there's a hint of irony in this passage being quoted by a judge who then says that she can't make the decision and it has to be done by someone higher up the hierarchy, you are not alone. . .

JF mentions that **when the Court of Appeal heard the application for leave to appeal on the issue of the standard of review applicable on an appeal of the decision of a master, it declined to grant leave** on the basis of the test in ***Power Consolidated (China) Pulp v BC Resources Investment Corp*** 2011 BCCA 390.

See Also ***Abermin Corp v Granges Exploration***, Appealing the Order of a Master (p 69)

Reynolds v Harmanis

1995 BC/SC

Rule 10-4

Facts Plaintiff, a BC resident, claims damages for breach of a partnership agreement against defendant, a resident of Western Australia with no discernible connection to BC other than the alleged partnership. Plaintiff says there was a written partnership agreement, but can't produce the document or establish its terms other than from memory.

Issue Is plaintiff entitled to a worldwide ***Mareva injunction*** against defendant?

Analysis

- Plaintiff must have a ***strong prima face case***: *Aetna*, *Chitel v Rothbart*. But given that plaintiff brings no evidence

on the terms of the contract, or its breach, except his recollection, the ***most*** that can be said is that there is a ***fair question to be tried***. This is enough to dispose of the application in favour of defendant.

- A second ground for rejecting plaintiff's application is that the court probably cannot grant an order whose effect is entirely extraterritorial: **either the assets sought to be tied up must be within the jurisdiction, or the respondent to the application must be here, but at least one or the other is required** (BG).

Held Defendant wins. Plaintiff is not entitled to the injunction.

See Also Mareva Injunction (p 97), *Aetna Financial v Feigelman*, *Silver Standard Resources v Joint Stock Co Geolog*

Roitman v Chan

1994 BC/SC

Rule 7-3(8)

Facts Mr Roitman was badly injured in a car crash. He was taken to St Paul's Hospital in Vancouver for surgery. The next day, he had a ***heart attack*** and died. Plaintiff is Mr Roitman's wife, Mrs Roitman, who alleges that various medical defendants failed to recognize that Mr Roitman was at risk of heart complications associated with the surgery. Plaintiff's counsel sent the following questions by way of interrogatory† to the medical defendants:

1. "Describe in full and complete detail your involvement in the medical care and treatment of . . . Mr Roitman from March 28, 1992 until April 16, 1992."
2. "Describe in full and complete detail your knowledge of the involvement of other persons in the medical care and treatment of Mr Roitman from March 28, 1992 to April 16, 1992. That is, who provided medical care and treatment to Mr Roitman and what did they do. [*sic*]"

Issue Should plaintiffs' interrogatories be struck out?

Analysis

- Question 1 should not be answered.
  - It is not designed to obtain an admission of fact.
  - It offends the ***purpose*** of interrogatories, which is to obtain admissions of fact in order to establish one's case and to provide a foundation on which to cross-examine in XFD.
  - It is more ***conveniently*** dealt with as a ***narrative*** at XFD.
- Question 2 should be answered.
  - It is ***more convenient*** to have the ***chronology*** sorted out before XFD.
  - It does not offend the rule against using interrogatories to obtain witness names because it falls under the exception which requires naming of witnesses whose identity is related to a material fact.

Held Question 1 is struck out. Question 2 is OK.

Ratio An important general principle governing interrogatories is the ***practicality*** of the procedure. The law should encourage the procedure which is likely to achieve the best result for the least effort and cost.‡

Note †: Interrogatories were available as of right under the Old Rules.

‡: JF says—**Ask which procedure will secure the most just, speedy, and inexpensive determination of each case on its merits, having regard to proportionality**.

See Also When May Interrogatories Be Used? (p 51)

Rumley v British Columbia

1999 BC/CA

Rule *Class Proceedings Act* s 4

Facts An ombudsman's investigation into a school for the deaf unearthed systemic sexual, physical, and emotional abuse of the students over the period 1952–1992. In the late 1990s, various plaintiffs sought to have class actions certified

in respect of abuse suffered by individuals in the following three classes:

(i) **students**: students actually abused at the school;
(ii) **family**: family members of students who suffered as a result of the harm to students in their family; and
(iii) **secondary abuse victims**: persons abused by students of the school as a result of the abuse inflicted on the students while at the school.

Issue

1. Is there a ***common issue***?
2. Is a class action the ***preferable procedure*** for the fair and efficient resolution of the common issue?

Analysis

- With respect to the subset of students who allege sexual as opposed to other abuse:
  - The duty of care to take reasonable measures to protect the students from abuse is not controversial.
  - Damage will have to be assessed individually ***but*** this is ***not*** a reason to refuse certification.
  - The ***common issue*** is whether there was systemic negligence (i.e. ***standard of care*** and breach) in failing to take reasonable measures to prevent sexual abuse.
    - While this does not eliminate all potential complications (since school policies likely changed over time), these complications are not insurmountable.
  - The ***common issue*** should not include non-sexual abuse. This is because:
    - s 3(4)(l) of the ***Limitation Act (old)*** states that there is no limitation period for sexual abuse, but limitation periods govern for "regular" assault; and
    - "abuse" beyond the limits of common law assault may not be a recognized cause of action;

  and these complications weigh against including non-sexual abuse in the ***common issue***.
- For the family and secondary abuse victims, there are duty of care issues including proximity, foreseeability, and public policy which are highly individualized and not amenable to class proceedings.

Held The claims of student sexual abuse victims are certified with respect to the narrow ***common issue*** of standard of care. All other claims for certification (student non-sexual abuse victims; family; secondary abuse victims) are dismissed.

Note BG **does not care at all about the "educational malpractice" and negligent misrepresentation aspects**.

See Also ***Tiemstra v ICBC***, Class Action Certification: The Threshold Question (p 32)

Shaughnessy Golf & Country Club v Uniguard Services

1986 BC/CA

Facts A fire burned down the clubhouse after the night security guard had a bit of a wild party. After investigation, the club's insurer pursued a subrogated claim against the security company. The insurer claimed ***litigation privilege*** over a broad swath of adjuster's reports.

Issue Is each individual document covered by litigation privilege?

Analysis

- You can't assert privilege over an indiscriminate blob. Each individual claim of privilege, over each individual document, must be established by the party asserting the privilege and on whom the onus lies.
- But note the meaning of ***dominant purpose***. If you commissioned an adjuster's report 40% because you always investigate whether litigation should be pursued and 60% because you need it in the ordinary course of business to determine how much to pay out, it's not going to be protected by litigation privilege.

Ratio A document is protected by litigation privilege if the sole or ***dominant purpose*** of creating it was obtaining legal advice in current or probable litigation.

See Also Litigation Privilege (p 42), ***Hodgkinson v Simms***

Silver Standard Resources v Joint Stock Co Geolog

1999 BC/CA

Rule 10-4 *Court Order Enforcement Act* s 5(2)

Facts The players are Silver Standard and Cominco, both Canadian companies; and Geolog and Dukat, both Russian companies. Basically, what happened is that G owes Silver Standard heaps of money from loans Silver Standard earlier made to G. Meanwhile, C owes G a whack of money. G is proposing to move 95% of the money it is about to receive from C to Russia to use to pay off debts G incurred to D in the ***ordinary course of business***.

To protect itself in the midst of this massive cluster-issue, SS is suing G. Early on, SS applied *ex parte* for, and obtained, two pre-trial orders:

A. a ***Mareva injunction*** enjoining C from paying any money to G as well as directing C to pay the money it owes G into court; and
B. a ***pre-judgment garnishing order*** against G naming C as the garnishee.

G and D teamed up to get the orders lifted. In setting aside the orders, the chambers judge used the same criteria for both the ***Mareva injunction*** and the ***garnishing order***, namely these elements of the balance of convenience:

- the adverse effect the orders would have on D, a potentially ***innocent third party***;
- the absence of any evidence that G deliberately arranged its affairs to make it judgment-proof in British Columbia; and
- the fact that G was proposing to pay debts owed to D in the ***ordinary course of business*** (but the judge did not adopt a hard and fast rule that an injunction could never issue in this circumstance).

Silver Standard appealed the chambers judge's decision to set both orders aside.

Issue Did the chambers judge err in principle in setting aside:

1. the ***Mareva injunction***; or
2. the ***pre-judgment garnishing order***?

Analysis **Mareva injunction**:

- ∄ a hard and fast rule that a ***Mareva injunction*** may never be made unless there is a fraudulent intent.
- Superior court judges should avoid becoming "prisoners of a formula" and take a ***relaxed***, flexible, approach which addresses the real issue: the balance of justice and convenience.
- Having said that, in most cases it will be neither just nor convenient to tie up a defendant's assets simply to give the plaintiff security for a judgment he might never obtain.
- In this case, the chambers judge considered all of the factors and did not err in principle.

Pre-judgment garnishing order:

- ∃ difference between an equitable remedy (injunction) and statutory remedy (pre-judgment garnishing order).
- ∄ authority for proposition that a fraudulent intent is required as a condition of garnishment.
- Also chambers judge failed to consider factors ordinarily considered in deciding whether it is just in all the circumstances to release the garnishment under s 5(2) of the *Court Order Enforcement Act*, namely: undue hardship, abuse, or that the order is unnecessary.

Held

1. Decision lifting the ***Mareva injunction*** is upheld.
2. Decision lifting the ***pre-judgment garnishing order*** is overturned and the order is restored.

See Also Mareva Injunction (p 97), *Aetna Financial v Feigelman*, *Reynolds v Harmanis*, *Knowles v Peter*

Sinclair v March

2001 BC/SC

Rule 7-5(1) 7-5(3)(c)

Facts Plaintiff sues defendant Dr March alleging negligent performance of plaintiff's bariatric gastric bypass surgery. Dr Christensen is the doctor who treated plaintiff for complications which arose from the surgery, performing some five repair operations. Dr Christensen is the only doctor involved in plaintiff's recovery and the only person with detailed information about it. Dr Christensen declined to be retained as an expert witness for the plaintiff and, in addition, is opposed to giving ***opinion*** evidence in any form. He refused to answer all but one of plaintiff's questions.

Issue Can plaintiff compel Dr Christensen to provide his ***opinion*** during pre-trial examination under oath?

Analysis

- Dr Christensen is not retained by any of the parties, so Rule 7-5(2) does not apply.
- He has refused to provide responsive opinionated information.
- The scope of inquiry is wider under Rule 7-5 than Rule 7-2: it includes all matters generally relevant between the parties, not just what is at issue as defined by the pleadings.
- Dr Christensen has unique and irreplaceable tied to the litigation which he got from being "on the spot".

Held Plaintiff's application allowed. Dr Christensen must answer questions but only to the extent he is able to do so without specific new research.

Ratio Witnesses may be examined as to expert opinion as well as fact under Rule 7-5 in appropriate cases.

See Also ***Professional Conduct Handbook*** 8:12 (p 259), ***Delgamuukw v British Columbia (No. 1)***

Southpaw Credit v Asian Coast Development (Canada) Ltd

2012 BC/SC

Rule 22-1(7)(d)

Facts Southpaw, the minority shareholder in ACDL (a *CBCA* corporation) brought an oppression application by way of petition, as permitted by *CBCA* s 248 and the *Supreme Court Civil Rules*, against ACDL and a New York investment company called Harbinger. All parties invested a great deal of time an effort in affidavits. They also agreed between themselves to an exchange of documents (think document discovery, but done voluntary since this is a petition proceeding, not an action).

After receiving Harbinger's documents, Southpaw began to contemplate an additional claim against Harbinger in the tort of intentional interference with economic relations. It applied to court for an order:

1. converting the oppression application into an action;
2. granting leave to file a notice of civil claim against Harbinger (to bring the tort action); and
3. permitting the joinder of the oppression and tort claims.

Issue Should the oppression application be converted into an action?

Analysis

(a) **Multiplicity of proceedings**

- It makes sense to consider Southpaw's proposed tort action under this factor.
- However, because joinder would prejudice Harbinger's ability to defend the new tort claim (e.g. by challenging jurisdiction), this factor does not point toward conversion at this time.

(b) **Costs and delay**

- All of the time and effort that went into the affidavits will be lost if the proceeding is converted and the parties will have to start over. This points away from conversion.

(c) **Credibility**

- There are *some* credibility issues.
- However, at the moment the necessary findings can be made by cross-examination on affidavits.

(d) **Full grasp of the evidence**

- The materials are voluminous and relatively complex.
- But courts can handle complex evidence in summary proceedings—look at *Icahn Partners LP v Lion's Gate*.
  - JF: **In BC we have a very robust idea of what can be done summarily**.

(e) **Interests of justice to have pleadings and discovery in the usual way**

- No advantage will be gained from a different form of pleadings.
- No one has suggested that document discovery will add anything to the documents already exchanged.
- It is not clear that XFD would do a better job than cross-examination on affidavits.

Held Application denied. At present, Southpaw has not met the test for conversion into an action.

Ratio The test for converting a petition proceeding into an action is whether there are *bona fide* triable issues between the parties that cannot be resolved on the documentary evidence. The following ***factors*** assist in this decision:

(a) the undesirability of a multiplicity of proceedings;
(b) the desirability of avoiding unnecessary costs and delay;
(c) whether any issues require an assessment of the credibility of witnesses;
(d) the need for the court to have a full grasp of all the evidence; and
(e) whether it is in the interests of justice to have pleadings and discovery in the usual way.

See Also Converting a Petition Proceeding into an Action (p 61)

Stockbrugger v Bigney

2011 BC/SC

Rule 5-3(3) 1-3(1) 1-3(2)

Facts The parties attempted to file a case plan order by consent but were informed at the court registry that it is not possible to do so because they had not held a case planning conference.

Issue Despite the fact that Rule 5-3 does not explicitly authorize it, may the parties file a case plan order by consent even if they have not held a case planning conference?

Analysis

- While the rules don't expressly provide for consent case plan orders, they don't prohibit them either.
- Permitting consent case plan orders is consistent with Rule 1-3(1) ("***just, speedy and inexpensive . . . merits***").
- Also, it is consistent with ***proportionality*** under Rule 1-3(2)—every court appearance adds ***cost*** for litigants.

Ratio The parties may file a case plan order by consent even absent a case planning conference.

See Also ***Parti v Pokorny***, Case Planning & Case Management (p 35)

Surrey Credit Union v Wilson

1990 BC/SC

Rule 11-6

Facts In a case involving allegations of a negligent audit, the plaintiff seeks to introduce the expert report of Dr Rosen, CA, on the issue of the standard of care. Dr Rosen's report is ***200 pages long*** and enumerates the facts upon which it is based in ***minute detail***. Plaintiff's counsel says he didn't ask Dr Rosen to edit the report for fear of running afoul of the rule in ***Vancouver Community College v Phillips, Barratt***. The report states the relevant professional standards, but also opines on the ***legal duty*** imposed by those standards.

Issue Is Dr Rosen's report admissible?

Analysis

- The report is far too long.
  - The more prolix the opinion, the more likely it is to defeat the purpose for which it is tendered.

  - Just because a report must state the information or assumptions on which the opinion is based does not mean these need to be included in minute detail.
- A member of a profession is qualified to give expert evidence as to the standards of the profession. The following guidelines apply:
  - Where the expert has been supplied with facts or assumptions, he may offer an opinion as to whether they conform to the standards of which he has given evidence.
  - He may not make findings of fact.
  - If a contrary expert opinion is put to him he may explain why, in his view, his opinion should be accepted over others;
  - He may not, however, give an opinion as to the legal duty imposed by those standards.
- If counsel had spent some time preparing Dr Rosen, the problems of prolixity and offering opinions outside of his expertise might have been avoided.

Held Dr Rosen's report is too defective to be admissible. However, if he rewrites it so that the first part provides an opinion as to professional auditing standards, and the second part an opinion as to what kind of conduct will be regarded as a departure from those standards, the report can be saved.

See Also Qualified Expert (p 105), *Yewdale v ICBC*

Swetlishnoff v Swetlishnoff

2011 BC/SC

Rule 3-2(1)

Facts Son brought two actions claiming constructive trusts against his elderly mom to block certain property sales. He chose not to serve them when it became clear that the sales he was worried about would not actually happen. Despite not serving the notices of civil claim, he attempted to renew them in order to keep alive the certificates of *lis pendens* he had registered against the properties in question.

Action	Commenced	Hearing to Renew	Elapsed
S72360	July 2006	August 2011	5 years
S79280	June 2008	August 2011	3 years

Mom had not been notified of the actions. Moreover, her health had deteriorated considerably during the period between the filing of the notices of civil claim and the application to renew. Finally, the limitation period for an action seeking a constructive trust had not expired in any event.

Issue Can son renew his expired notices?

Analysis Plaintiff fails all five *Bearhead v Moorehouse* factors:

(a) The application was clearly ***not*** brought promptly and the plaintiff was at all times aware that he hadn't served the notice of civil claim. He specifically chose not to serve it.
(b) Defendant (mom) had ***no*** notice of the actions.
(c) Defendant suffered ***prejudice*** due to the deterioration of her health. She is 89, and receives dialysis three times daily. Her increased age and ill health may reduce her ***ability to remember facts*** needed to defend.
(d) Failure to serve the writ was ***not*** attributable to defendant's actions, but to plaintiff's.
(e) The delay was the ***plaintiff's fault***, not his solicitor's fault.

Held Mom wins, son loses. Neither notice is renewed.

Note BG says that **declining health is an "unusual" and "questionable" ground for prejudice and that prejudice is usually about defendant's ability to make his case.** Clearly, however, the Court did tie mom's health to her case.

See Also *Weldon v Agrium Inc* (p 164), Factors to Bearing on Decision to Renew: Bearhead v Moorehouse (p 18)

Tate v Hennessey

1900 BC/CA

Rule 22-2(13)

Facts Plaintiff applies for leave to issue a writ for service out of jurisdiction. Many of the essential points sworn by the plaintiff in his affidavit in support of the application must necessarily be founded only on ***information and belief***, the grounds of which are not stated in the affidavit.

Issue Can the affidavit be received in support of the application?

Held The affidavit is inadmissible.

Ratio An affidavit based on information and belief is worthless if the grounds of the information and belief are not stated.

See Also Affidavits (p 64), *Haughian v Jiwa*, *Director of Civil Forfeiture v Doe (No. 2)*

Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd

1996 BC/CA

Rule 6-1(1)(b)

Facts When part of plaintiff's roof collapsed, plaintiff sued its insurer and the broker who sold it the policy (two distinct defendants). The writ was filed well within the one-year ***limitation period*** set out in the insurance policy but, on advice from its solicitor, plaintiff claimed against the insurer only in tort (for misrepresentation), because the solicitor did not believe that a claim for indemnity under the policy would succeed. In its pleadings, the broker defended the plaintiff's claim against it for misrepresentation on the ground that the policy ***did*** cover the damage.

After the one-year contractual ***limitation period*** expired but also after a relatively short delay of only ***two months***, plaintiff's solicitor changed his opinion on the policy and advised the plaintiff that he probably ***was*** covered. The plaintiff then sought ***leave to amend*** his pleadings to add a fresh cause of action against the insurer, to wit: indemnity under the insurance policy.

Issue Should the court permit the amendment under section 4(4) of the Old *Limitation Act* and Old Rule 24(1)?

Analysis

- Note that Old *Limitation Act* s 4(4) is applicable ***both*** to contractual ***and*** statutory limitation periods.
  - It permits, but does not mandate, that a court can grant leave for amendments that add new causes of action which would otherwise have been barred by a limitation period.
- Old Rule 15(5)(a)(iii) was the rule most often invoked in questions arising under the *Limitation Act*. It contained the qualifying phrase "just and convenient" which was not present in Old Rule 24(1).
  - Old Rule 15(5)(a)(iii) ≈ Rule 6-2(7)(c)
  - Old Rule 24(1) ≈ Rule 6-1(1)

  The court decided to read in "just and convenient" as relevant criteria under Rule 24(1). (*This is roughly equivalent to reading it into Rule 6-1(1)(b)(i) and likely a court would do this if the issue came up again*.)
- Neither
  - a limitation period; nor
  - deliberate dilatory conduct

  will necessarily prevent an amendment, although both are factors to be considered.
- Delay is a factor, but so is any ***explanation*** for the delay.
  - A plaintiff should not be punished for acting based on legal advice which was later reconsidered.
- The insurer will not suffer prejudice because the coverage of the policy was already a live issue due to the broker's defence.

Held Plaintiff wins. Amendment allowed. It would be just and convenient to allow plaintiff to claim coverage.

See Also *Limitation Act (old)* s 4(4) at p 254, Factors Relevant to Application to Amend Pleadings (p 23), *TJA v RKM*

Tiemstra v ICBC

1997 BC/CA

Rule *Class Proceedings Act* s 4

Facts ICBC instituted a policy of rejecting claims for personal injury compensation where **(a)** the vehicle damage in the accident was minimal or non-existent; and **(b)** the claimant reported only subjective symptoms unsupported by objective (e.g. doctor's) findings of injury. Most rejected claims were for $500 or less (i.e. not worthwhile for an individual plaintiff to pursue).

Issue Should the court certify a class action with the following parameters?

class: those whose claims were rejected under the above ICBC policy
common issue: denial of benefits according to a rigid and arbitrary policy was a breach of ICBC's statutory, contractual, and fiduciary duties

Analysis
- The court cannot create a presumption that an entire class of claims is genuine unless otherwise established.
- Thus the best relief plaintiff can hope for is a ***declaration*** that each claim should be assessed on its own ***merits***.
- This would make an individual claimant no better off, since he would still have to bring an individual claim for assessment on the ***merits***.
- Trial of the ***common issue*** would achieve, with greater complexity, no more than a declaratory action pursued as a test case.
- In cases which are certified, the ***common issue*** has been dispositive of a significant feature of the litigation.

Held Defendant wins. Class action certification denied.

Ratio A class action must not be certified where the ***common issue*** does not settle an important element in the dispute.

See Also *Rumley v British Columbia*, Class Action Certification: The Threshold Question (p 32)

TJA v RKM

2011 BC/SC

Rule 6-1(1)(b)(i) 1-3(1)

Facts In a defamation case, defendants sought to amend their pleadings to raise new defence of absolute privilege. The parties had already litigated an issue relating to absolute privilege in the Court of Appeal because defendants had unsuccessfully sought to have plaintiffs' notice of civil claim struck out on the basis of absolute privilege.

Issue Should the court grant leave to amend?

Analysis
- The rationale for allowing amendments is to allow the ***real issues*** to be determined.
- In this case, it is ***not a certainty*** that the newly raised defences do not apply.
- Moreover, the plaintiffs were not taken by surprise because of defendants' earlier unsuccessful application.

Held Defendants win: their desired amendment is permitted by the court.

Ratio The court will grant leave to amend pleadings unless ***prejudice*** can be demonstrated by the opposite party or the amendment will be ***useless***.
- Prejudice exists where the opposite party is caught by surprise.
- Amendments are only useless in the "clearest of cases": where the pleading meets the test for striking pleadings under Rule 9-5(1).

See Also Amendments to Pleadings (p 23), *Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd*, Striking Pleadings (p 79)

Tucker v Asleson

1993 BC/CA

Rule *Negligence Act* s 4

Facts Before the trial arising out of a car crash in which the infant plaintiff had been badly hurt, the plaintiff's mother, a named defendant who was driving the plaintiff's car at the time of the crash, settled out. At the ensuing trial, Mr Justice Finch allocated fault $\frac{1}{3}$ to the mother; $\frac{1}{3}$ to the oncoming driver; and $\frac{1}{3}$ to the Crown for badly maintaining the highway. Since liability of the defendants was ***joint and several*** under section 4 of the *Negligence Act*, the most obvious course for the plaintiff would have been to collect the whole of the judgment (including the amount of the judgment against the mother, despite her settlement) from Mr Moneybags, a.k.a. the Crown. The Crown appealed, hoping to get out of the joint and several obligation.

Issue Did plaintiff's settlement with her mother sever the joint and several liability imposed by *Negligence Act* s 4?

Analysis The various defendants in this case were ***several concurrent*** tortfeasors, not joint tortfeasors.

Held The joint and several liability between the plaintiffs was not severed.

Ratio Settlement with one ***joint*** tortfeasor will likely release all ***joint*** tortfeasors from liability. However, the rule does not apply to several concurrent tortfeasors. Settling with one ***several*** tortfeasor does not release the others.

Note The key factual difference between this case and *BC Ferry Corporation v T&N Plc* is that the plaintiff did not waive its right to collect the settled defendant's portion from the remaining defendants.

See Also Joint Tortfeasors versus Several Tortfeasors: Tucker v Asleson (p 33)

Turpin v Manufacturers Life Insurance Co

2011 BC/SC

Rule 11-2(1) 11-6(1)(a–b) 11-6(1)(f)(iii) 11-6(2)

Facts In a dispute about coverage under a ***travel insurance policy***, the defendant insurance companies sought to adduce into evidence an expert report with the following attributes:

A. the expert's area of expertise was said to be ***internal medicine*** and the expert's qualifications stated that she did a residency in ***internal medicine*** and is "doing ***internal medicine*** on the Clinical Teaching Unit";
B. the nature of the opinion sought was stated to be "whether . . . [one of the plaintiff's] medical treatment . . . was the result of a pre-existing condition as defined in the . . . policy, and whether the condition was stable and controlled within the meaning of the policy. . .";
C. the expert purported to have conducted "a review of the clinical manifestations of appendicitis and diagnosis of appendicitis" and "a review of the literature" related to appendicitis, but the report neither listed what was "reviewed" to obtain the clinical manifestations, nor what literature was "reviewed"; and
D. parts of the report which emphasized the defendants' claim and supported their position were emphasized, without explanation, by way of ***bold*** or ***italicized*** typeface.

Issue Is the report of the defendants' expert admissible?

Analysis **Area of expertise/expert's qualifications**:

- The onus is on the party putting forward the expert evidence to establish that the expert is qualified.
- Assertion of qualifications, under Rule 11-6(2), is evidence of the qualifications, not that the expert is a qualified expert.
- The words ***internal medicine*** do not assist the court, as a layman, in deciding whether a proposed witness is a qualified expert.

Nature of the opinion sought:

- It's not enough that the expert be qualified in the abstract: she must be qualified on the very topic upon

which she will state her opinions.

- Nothing in report suggests that expert has expertise in defining terms in ***travel insurance policies***.
- Besides, an opinion on this matter offends the ***ultimate issue*** rule, since it answers the very question the court is called upon to decide.

Review of clinical manifestations and literature:

- The report contravenes Rule 11-6(1)(f)(iii). *(VS: And I would add, probably subparagraph (ii) as well)*

Typeface:

- If the author of an expert report regards a factor as a major premise leading to the conclusion, then it should be so stated.
- She should not use ***unexplained emphasis***, either ***bold***, ***italics***, or otherwise, in the body of the report.

Held The report is inadmissible.

See Also The Rule against Advocacy (p 103), ***Vancouver Community College v Phillips, Barratt***, Qualified Expert (p 105), ***Surrey Credit Union v Wilson***, Ultimate Issue (p 106)

Vancouver Community College v Phillips, Barratt

1988 BC/SC

Rule 11-2(1)

Facts VCC is suing PB, a firm of architects, for negligence and breach of contract. VCC seeks to rely on the report and testimony of an expert witness, Robert Atkins. Atkins' report was ***substantially rewritten*** on at least 10 different occasions with ***considerable advice*** from counsel. Counsel suggested, and Atkins made, additions and deletions that went to the ***substance*** of Atkins' opinions. For example, opinions critical of VCC were deleted, despite the fact that Atkins continued to hold those opinions at trial, while criticisms of PB were expanded.

Issue What weight should the court place on Atkins' opinions?

Analysis

- Experts are entitled to edit their reports, and counsel are entitled to consult with experts who are preparing reports. But the expert's independence, objectivity, and impartiality must not be compromised.
- Here the suggestions went far beyond matters counsel might properly have advised on—such as factual hypotheses, their evidentiary foundation, and the definition of issues—and into the substance of the opinions.
- Atkins' report and testimony amount to nothing more nor less than ***arguments*** advanced on VCC's behalf through the mouth of an expert.

Held Atkins' evidence is hopelessly partisan and unfair, and has no value whatsoever. The court rejects it in its entirety.

See Also The Rule against Advocacy (p 103), ***Turpin v Manufacturers Life Insurance Co***

Vieweger Construction v Rush & Tompkins Construction

1964 CA/SC

Rule 10-4(5)

Facts Rush contracted with Layden to build a highway. Layden subcontracted some of the work to Vieweger. At some point, Rush obtained an ***injunction*** prohibiting Vieweger from moving its equipment off the construction site on the basis that Layden and Vieweger were a partnership and thus Vieweger was bound by Layden's contract. The order contained an ***undertaking*** that Rush would abide by any future order as to damages.

The injunction survived a motion to vacate heard by a different judge. It was moreover held at the end of trial to have been correctly imposed and this result was upheld on first appeal. Thus ***two judges*** of the Trial Division and a panel of ***three judges*** in the Appellate Division believed that Rush was entitled to its injunction. However, on further appeal, the Supreme Court of Canada held that whether or not there was a partnership, Rush elected to deal with

Layden alone and therefore the injunction was wrongly imposed.

Issue Is Vieweger entitled to damages for the wrongly-imposed injunction, or were there ***special circumstances***?

Analysis
- Neither the fact that various judges thought the injunction had merit nor the fact that Rush was not guilty of any misconduct in obtaining the injunction constitute ***special circumstances***.
- Special circumstances might arise when:
  - a public body acts in the public interest to maintain the *status quo* until rights are determined; or
  - where the defendant, although he was technically successful, was guilty of misconduct.

Held Vieweger wins. The trial judge is directed to conduct a damage assessment.

See Also Undertaking as to Damages (p 94)

Wang v Wang

2012 BC/SC

Rule 4-3(2)

Facts Plaintiff employed process servers to attempt to serve two defendants, Danny Wang (DW) and Ellen Chiang (EC).

1. The process server who served DW served him in a restaurant. The server supported his affidavit with photographs of DW receiving the documents and looking at them. DW claimed to have been too drunk at the time to understand the documents.
2. The process server who served EC approached her car in traffic when she was stopped at a red light, said that he had papers for her, and put them under her windshield wiper just as she accelerated and drove off. Photographs showed that the car windows were closed. EC says she does not recall the incident.

Issue Was valid ***personal service*** effected on the two defendants?

Analysis

> *No reasonable person would conclude that having a stranger approach a car in traffic at a red light (particularly a woman alone in a car approached by a man), announce some words through a closed window, and thrust papers under the windshield as the car began to accelerate away would provide a person with an opportunity to realize [she] was being served with legal documents or what the documents were.*

Held
1. DW was validly served. His excuse, that he was drunk at the time, is not sufficient.
2. EC was not validly served.

Ratio For valid personal service, a copy of the originating document must be delivered to the defendant in such a manner as to make it readily apparent to her, simply by looking at it, what the document is (citing ***Orazio v Ciulla***).

See Also ***Rule 4-3 — Personal Service*** (p 187), Personal Service (p 15)

Ward v Klaus

2012 BC/SC

Rule 9-1(5-6)

Facts Before the trial of a personal injury action, defendant made two formal ***offers to settle***:

A. $500K; and later
B. $600K, although this one was only open for 5 hours.

Plaintiff had ***carefully assessed*** her claim and evaluated it at $975K. She did not accept either of defendant's offers, but she did make a counter-***offer to settle*** for $750K based on her assessment of the risks and cost of trial.

Plaintiff, who did suffer a ***significant injury***, prevailed at trial but won only $430K. This is because the trial judge did not accept her evidence as to past and future income loss. Had he accepted her evidence, she might have recovered

the whole amount.

Issue What costs award should the court make?

Analysis
- Whether plaintiff ***ought reasonably to have accepted*** defendant's offers under Rule 9-1(6)(a) must:
  - be undertaken without regard to the ultimate outcome;
  - be done from the plaintiff's ***subjective*** point of view.
- The fact that defendants' offers beat the final award under Rule 9-1(6)(b) is a factor, but not ***determinative***.
- Plaintiff will not be impoverished she must pay defendant's costs, but it will significantly shrink her award.
- ∄ financial information about defendant but court notes he will likely be indemnified by an insurer.
- There must be some consequence for the fact that defendant offered more than plaintiff won.

Held Defendant must pay cost up to date of first offer to settle. There will be no costs to anyone following that date.

See Also Offers to Settle (p 115)

Weldon v Agrium Inc

2012 BC/CA

Rule 3-2(1)

Facts Master granted an *ex parte* order renewing plaintiff's notice of civil claim. Defendants applied to have the renewal order set aside on the ground that plaintiff's action was brought 17 years after the facts allegedly giving rise to the causes of action pleaded and that plaintiff had tendered no evidence in favour of postponement of the six-year limitation period which appeared to apply to the facts pleaded.

Issue
1. To what extent can the ***merits*** of a claim be considered on an application to renew?
2. What ***evidence*** may be admitted on an application to evaluate the merits?

Analysis At a renewal hearing, there has been no opportunity for ***discovery***. This makes assessment of the ***merits*** difficult and amplifies the likelihood of an incorrect assessment.

Held Defendant's application dismissed. Plaintiff's renewal order stands.

Ratio
1. Court may only consider ***merits*** to the extent that it is ***plain and obvious*** that plaintiff's case is ***bound to fail***. If the defence pleads a limitation defence, it must be conclusive, which would most likely happen when the ultimate limitation period has expired.
2. "Generally", hearing evidence on a renewal application is inappropriate due to the risk of wrong assessment. If evidence is needed to assess the merits, the merits should not be considered on a renewal application.

See Also *Swetlishnoff v Swetlishnoff* (p 158), Renewal (p 18)

Westcoast Transmission v Interprovincial Steel

1984 BC/SC

Rule 7-2(5)

Facts Plaintiff (Westcoast) alleges breach of contract and negligence by defendant (IPSCO) in manufacture and testing of steel pipe sold to plaintiff. Plaintiff has already examined the following representatives of defendant:

A. Mr Welch, defendant's VP sales. Defendant had resisted plaintiff's request to examine Mr Welch and put forward Mr MacLennan, an officer of the defendant, as someone more knowledgeable on the matters in issue. Plaintiff applied for and received an order to compel Mr Welch's examination. At the time of this application, plaintiff was told that Mr Welch was not qualified to answer technical engineering questions.

B. Mr MacLennan. After the above application, defendant had continued to put Mr MacLennan forward as the man most suitable to be examined on all other issues besides contract formation. Plaintiff accepted

defendant's nomination of MacLennan despite knowing of the existence of Mr Schaefer, a man more competent to discuss how the pipes were manufactured. Plaintiff examined Mr MacLennan for 4 days.

Plaintiff now applies for an order compelling Mr Schaefer's examination as a third representative of defendant.

Issue Should plaintiff be permitted to examine Mr Schaefer on any of the following grounds?

1. MacLennan was nominated by defendants as its representative on technical matters, but proved to have less personal knowledge than plaintiffs expected.
2. Plaintiff was denied a "real cross-examination" because MacLennan lacked some personal knowledge.
3. MacLennan's answers based on hearsay cannot constitute admissions of defendant, and plaintiff is entitled to admissions on discovery.

Analysis

- Whether representative was "nominated" by examinee or "chosen" by examiner is irrelevant. The question is whether ***adequate or satisfactory discovery*** has been, or can be, obtained from the representative.
- Cross-examination is a ***means*** of discovery, not the ***ends*** of the discovery process. The ends are to discover the other party's case and obtain admissions which support the examiner's case.
  - Satisfactory discovery may be possible where witness must inform himself *[i.e. under Rule 7-2, subrules (22) to (24)]*.
  - Discovery is not unsatisfactory because cross-examination is interrupted so witness can inform himself.
- The proper course with hearsay is to ask the witness whether he adopts the answer as truthful. Discovery answers based on hearsay may become admissions if the witness accepts their truth. If this were not the case, a second examination would be needed every time a hearsay answer was required as an admission.

Held Defendant wins. Plaintiff's application denied.

Ratio On an application for the examination of a second representative, the ***test*** for whether an XFD has been ***satisfactory***, is ***objective***, not subjective. Has there been a full questioning on all matters which may be relevant to the issues raised on the pleadings, and have the questions been answered either of the witness' own knowledge or upon his informing himself?

To show that an XFD is ***unsatisfactory***, questions must have been either not answered or given incomplete, unresponsive, or ambiguous answers.

See Also Who May Be Examined for Discovery? (p 45), ***First Majestic Silver Corp v Davila***, ***Rainbow Industrial Caterers v Canadian National Railways***

Western Delta Lands v 3557537 Canada Inc

2000 BC/SC

Rule 9-7(11)

Facts Plaintiffs allege that defendants have ceased to carry out their obligations under an ***ongoing partnership***. Plaintiffs claim a big sum (~$20M) for the partnership, which is in urgent need of new working capital. They have applied for ***summary trial***, but the hearing has not yet taken place.

Defendant brings a ***preliminary application*** to have the summary trial adjourned or dismissed as unsuitable for summary disposition (contrast with *Charest v Poch* where the parties argued suitability concurrently with the summary trial application itself). The matter is somewhat complex. Counsel spent two days arguing suitability. The list of authorities contained 50 cases.

Issue Can the court make a preliminary declaration that the matter is unsuitable for summary trial?

Analysis

- While the amount of damages claimed is very high, this is not of itself a bar to holding a summary trial.
- On the other hand, the matter is urgent and the plaintiffs' allegations that defendants have ceased to carry out their obligations under the partnership agreement deserve consideration as soon as possible.

- Preliminary applications for dismissal on unsuitability grounds should only be brought where a summary trial is ***clearly inappropriate***. There is a ***heavy onus*** on the moving party.

Held Defendant's application dismissed. The court refuses to hold that the matter is unsuitable at this time.

Ratio Keeping in mind that the moving party has another opportunity to argue suitability at the summary trial itself, a ***preliminary application*** to have a summary trial application dismissed on suitability grounds is ***likely to fail*** unless:

1. the litigation is extensive and the summary trial hearing itself will take considerable time;
2. the unsuitability of the issues for summary determination is relatively obvious;
3. it is clear that a summary trial involves a substantial risk of wasting time or effort or producing unnecessary complexity; or
4. the issues are not determinative of the litigation and are interwoven with the issues to be determined at conventional trial.

See Also Suitability: The Major Issue of Summary Trials (p 87), *Inspiration Management v McDermid St Lawrence Ltd*, *Charest v Poch*

William v British Columbia

2004 BC/SC

Rule 9-3(2)

Facts The court directed the parties to state a case, but the parties were unable to agree on the facts to be stated. Moreover, there was no question of law that would dispose of the central issue in the case, resolution of which mainly required complex determinations of fact.

Issue Is a stated case appropriate?

Held A stated case is not appropriate for the following reasons:

1. no question of law would dispose of the central issue;
2. In the absence of agreement between the parties on the facts to be stated, the stated case rule provides no mechanism for resolving disputed facts other than proceeding to trial; and
3. a case of this importance (massive aboriginal title litigation) should not move forward on the basis of assumed facts (which could, of course, be wrong).

Note Assumed facts may be appropriate in some cases: *Jabs Construction Ltd v Callahan*.

See Also Special Case (p 91) under Summary Proceedings

Yewdale v ICBC

1995 BC/SC

Rule Rule 11-6

Facts This very sad case is based on earlier litigation involving a motorcycle accident. The plaintiff motorcyclist was very badly injured and the defendant car driver, Mrs Yewdale, financially ruined. Mrs Yewdale now sues sundry of her advisors and insurers in the crash case for negligence, breach of contract, and breach of a duty of good faith.

Mrs Yewdale seeks to tender five expert reports, of which two will suffice to mention:

A. Mr Camp's report, which is professedly about standards of professional conduct, draws ***inferences of fact*** *and* purports to advise the court as to the applicable law.
B. Mr Carson's report is replete with ***statements of the obvious***, such as that "nobody can predict inflation rates in the long term future" and statements of facts which are "the bread and butter of personal injury trials" and with which any trial judge would be aware.

Issue Are the plaintiff's reports admissible?

Analysis
- If the court was to admit Mr Camp's report, it would be put in the position of sitting like a court of appeal over his opinion on the facts and the law.
- Mr Carson's report is ***of no assistance*** to the court.

Held Both the Camp and Carson reports are inadmissible.

See Also Necessity in Assisting the Trier of Fact (p 106), Experts May Not Find Facts (p 106), ***Surrey Credit Union v Wilson***

Zecher v Josh

2011 BC/SC

Rule 8-1(4) 8-1(15)(c)(iii)

Facts Defendants' notice of application seeks an order that the plaintiff and third parties produce documents and other information ranging from medical records to "particulars" of a wage loss claim. The LEGAL BASIS section of defendant's ***notice of application*** (Part 3 of Form 32) is the following single line:

> *1. Supreme Court Civil Rules 7-1, 7-2, 8-1 and 14-1.*

Issue Are defendant's application materials sufficient?

Analysis The rule that a ***notice of application*** must set out "any rule or enactment relied upon" is directory, not mandatory.

- The real test is whether it gives the persons to whom it is directed ***reasonable notice*** of the application against them and what is being sought in that application.
- Basing a decision on authority not referred to in the ***notice of application*** might deprive a party of his ***right to be heard*** by depriving him of true notice of the application.

Misstating, or failing to state, the authority for the relief sought can result in the denial of that relief.

Held The application is dismissed due to the inadequacy of the materials.

Ratio Part 3 of the ***notice of application*** is intended to contain more than a cursory listing of the Rules which *might* support the application.
- Common law authorities can and should be cited along with a brief legal analysis.
- A comprehensive legal analysis can easily fit in a 10-page notice of application. Moreover Rule 8-1(15)(c)(iii) permits the parties to include a ***list of authorities*** with the ***application record***.

See Also Application Materials (p 68)

12. Statute Chart

SUPREME COURT

Supreme Court Civil Rules

TABLE OF CONTENTS

RULES

PART 1 — INTERPRETATION

RULE 1-1 — INTERPRETATION

Definitions

(1) In these Supreme Court Civil Rules, unless the context otherwise requires:

"accessible address" means an address that describes a unique and identifiable location in British Columbia that is accessible to the public during normal business hours for the delivery of documents;

"action" means a proceeding started by a notice of civil claim;

[. . .]

"document" has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device;

[. . .]

"order" includes a judgment and a decree;

"originating pleading" means a notice of civil claim, counterclaim, third party notice or any document, other than a petition, that starts a proceeding;

"party" , in relation to a proceeding, means a person named as a party in the style of proceeding;

"party of record" , in relation to a proceeding, means a person who has filed a pleading, petition or response to petition in the proceeding, and includes,

(a) in a proceeding referred to in Part 18, a person who has filed a notice of interest under that Part, and

(b) *[. . .]*;

"petition proceeding" means a proceeding started by a petition;

"plaintiff" means a person who starts an action;

"pleading" means a notice of civil claim, a response to civil claim, a reply, a counterclaim, a response to counterclaim, a third party notice or a response to third party notice; *[does not include petition]*

"pleading period" , in relation to an action, means the period for filing a responding pleading to the pleading that was most recently filed in the action;

[. . .]

"responding pleading" means a response to civil claim, a response to counterclaim, a response to third party notice, a reply or any other document filed in response to an originating pleading;

"serve" , in relation to a document, means

(a) serve by ordinary service in accordance with Rule 4-2 (2), or

(b) if the document is one referred to in Rule 4-3 (1), serve by personal service in accordance with Rule 4-3 (2);

[. . .]

"third party" means a person referred to in Rule 3-5 (1) against whom a third party claim is pursued;

"witness list" means a list referred to in Rule 7-4 (1);

[. . .]

[. . .]

RULE 1-3 — OBJECT OF THE RULES

Object

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

Proportionality

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are ***proportionate*** to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and
(c) the complexity of the proceeding.

PART 2 — HOW TO MAKE A CLAIM

RULE 2-1 — CHOOSING THE CORRECT FORM OF PROCEEDING

Commencing proceedings by notice of civil claim

(1) Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.

Commencing proceedings by petition or requisition

(2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:

(a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
(b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;
(c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;
(d) the relief, advice or direction sought relates to a question arising in the administration of an estate of a deceased person or the execution of a trust, or the performance of an act by a person in the person's capacity as executor, administrator or trustee, or the determination of the persons entitled as creditors or otherwise to the estate or trust property;
(e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;
(f) the relief sought is for payment of funds into or out of court;
(g) the relief sought relates to land and is for
    (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,
    (ii) a declaration that settles the priority between interests or charges,
    (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or
    (iv) an order of partition or sale;
(h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

Procedures applicable to particular proceedings

(3) Without limiting subrules (1) and (2), the following provisions apply to the following applications and proceedings:

(a) Rule 8-3 applies to an application for an order by consent;
(b) Rule 8-4 applies to an application of which notice need not be given;
(c) Rule 10-3 applies to a proceeding brought to obtain relief by way of interpleader or in which such relief is sought;
(c.1) Rule 14-1 (21) applies to an appointment for a review of a bill or an examination of an agreement under the *Legal Profession Act*;
(d) Rule 15-1 applies to a fast track action;
(e) Rule 18-2 applies to a stated case;
(f) Rule 18-3 applies to an appeal that is authorized, by an enactment, to be made to the court;
(g) Rule 19-3 applies to a proceeding to register a reciprocally enforceable judgment within the meaning of Rule 19-3;
(h) Rule 21-1 applies to a proceeding brought *in rem* against a ship or other property;
(i) Rule 21-4 applies to a proceeding in relation to the administration of an estate if the proceeding is contentious;
(j) Rule 21-5 applies to a proceeding in relation to the administration of an estate if the proceeding is not contentious;
(k) Rule 21-7 applies to a proceeding for foreclosure of the equitable right to redeem mortgaged property, for redemption or for cancellation of an agreement for sale.

PART 3 — PROCEEDINGS STARTED BY FILING A NOTICE OF CIVIL CLAIM

RULE 3-1 — NOTICE OF CIVIL CLAIM

Notice of civil claim

(1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.

Contents of notice of civil claim

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the ***material facts*** giving rise to the claim *[on how material facts pleaded relate to Rule 7-6(1), see Jones v Donaghey]*;

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

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

(d) set out the proposed place of trial;

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

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

(g) otherwise comply with Rule 3-7.

RULE 3-2 — SERVING AND RENEWING THE NOTICE OF CIVIL CLAIM

Renewal of original notice of civil claim

(1) An original notice of civil claim does not remain in force for more than 12 months, but if a defendant named in a notice of civil claim has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original notice of civil claim be renewed for a period of not more than 12 months. *[Swetlishnoff v Swetlishnoff (p 158), Weldon v Agrium Inc (p 164)]*

Further renewal of notice of civil claim

(2) If a renewed notice of civil claim has not been served on a defendant named in the notice of civil claim, the court, on the application of the plaintiff made during the currency of the renewed notice of civil claim, may order the renewal of the notice of civil claim for a further period of not more than 12 months.

When renewal period begins

(3) Unless the court otherwise orders, a renewal period ordered under subrule (1) or (2) begins on the date of the order.

After renewal of notice of civil claim

(4) Unless the court otherwise orders, a copy of each order granting renewal of a notice of civil claim must be served with the renewed notice of civil claim, and the renewed notice of civil claim remains in force and is available to prevent the operation of ***any*** statutory ***limitation*** and for all other purposes. *[See Limitation Periods (p 13)]*

RULE 3-3 — RESPONDING TO A NOTICE OF CIVIL CLAIM

Filing a response to civil claim

(1) To respond to a notice of civil claim, a person must, within the time for response to civil claim referred to in subrule (3),

(a) file a response to civil claim in Form 2, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

Contents of response to civil claim

(2) A response to civil claim under subrule (1)

(a) must

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

(A) admitted,

(B) denied, or

(C) outside the knowledge of the defendant,

(ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact *[This is crucial because it means blanket denials without more are not allowed—and see also Rule 3-7 (15). As well, this rule applies to all forms of responding pleadings: response to counterclaim under Rule 3-4(6) and response to third party notice under Rule 3-5(11)]*, and

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

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

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

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

Period for filing response to civil claim

(3) Unless the court otherwise orders, to respond to a notice of civil claim, a response to civil claim under this rule must be filed and served within the following period:

(a) in the case of a notice of civil claim that is served on a person,

(i) if the person was served anywhere in Canada, within ***21 days*** after that service,

(ii) if the person was served anywhere in the United States of America, within ***35 days*** after that service, or

(iii) if the person was served anywhere else, within ***49 days*** after that service;

(b) in the case of a notice of civil claim that is served on a ship or property under Rule 21-1 (5), within 21 days after service.

Payment into court when tender pleaded

(4) *[. . .]*

[. . .]

Consequence if fact not responded to

(8) An allegation of fact in a notice of civil claim, if not admitted, denied or stated to be outside the knowledge of the defendant, is deemed to be outside the knowledge of the defendant.

RULE 3-4 — COUNTERCLAIM

Counterclaim

(1) A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.

Counterclaim against another person

(2) If the counterclaim referred to in subrule (1) raises questions between the defendant bringing the counterclaim and a person other than the plaintiff, the defendant may join that other person as a party against whom the counterclaim is brought.

Identification of parties

(3) In a counterclaim,

(a) the plaintiff against whom the counterclaim is brought must be identified as the "plaintiff",

(b) each defendant against whom the counterclaim is brought must, along with the defendant bringing the counterclaim, be identified as a “defendant”, and

(c) any other person against whom the counterclaim is brought must be identified as a "defendant by way of counterclaim".

Service of counterclaim

(4) Unless the court otherwise orders, a defendant who files a counterclaim

(a) must ***serve*** a copy of the filed counterclaim on all parties of record within the time set out in Rule 3-3 (3) for the filing and service of a response to civil claim, and

(b) if the counterclaim is brought against a person who is not yet a party of record to the action, must ***serve*** that defendant by way of counterclaim by ***personal service*** with

(i) a copy of the filed counterclaim, and

(ii) a copy of the filed notice of civil claim

within ***60 days*** after the date on which the counterclaim was filed.

Response to counterclaim

(5) A person against whom a counterclaim is brought must, if that person wishes to dispute the counterclaim,

(a) file a response to counterclaim in Form 4 that accords with Rule 3-7, and

(b) serve a copy of that filed response to counterclaim on all parties of record.

Application of rules

(6) Except to the extent that this rule otherwise provides, Rules 3-1, 3-3 and 3-8 apply to a counterclaim as if it were a notice of civil claim and to a response to counterclaim as if it were a response to civil claim.

If action stayed or discontinued

(7) Without limiting subrule (6) of this rule, a defendant's counterclaim in an action may proceed even though the plaintiff's claim in the action has been stayed, discontinued or dismissed.

Separate trial of counterclaim

(8) If, on the application of a party against whom a counterclaim is made, it appears that the subject matter of the counterclaim ought to be dealt with separately, the court may order that the counterclaim be struck out or tried separately or may make any other order the court considers will further the object of these Supreme Court Civil Rules.

Judgment

(9) If a set-off or counterclaim of a defendant establishes a defence to the plaintiff's claim, the court may grant judgment in favour of the defendant for any balance in the defendant's favour or for other relief as the court considers appropriate.

RULE 3-5 — THIRD PARTY CLAIMS

Making a third party claim

(1) A party against whom relief is sought in an action may, if that party is ***not a plaintiff*** *[but see subrule (1.1)]* in the action, pursue a third party claim against any person if the party alleges that

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

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

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

(i) is substantially the same as a question or issue that relates to or is connected with

(A) relief claimed in the action, or

(B) the subject matter of the action, and

(ii) should properly be determined in the action.

Plaintiff as defendant to counterclaim

(1.1) Subrule (1) does not preclude a ***plaintiff*** from pursuing a third party claim in his or her capacity as a defendant to a counterclaim.

Third party need not be party to original action

(2) A third party claim may be pursued against a person, whether or not that person is a party to the action.

Pursuing a third party claim

(3) Subject to subrule (4), a party wishing to pursue a third party claim referred to in subrule (1) must file a third party notice in Form 5 that accords with Rule 3-7.

When leave is required

(4) A party may file a third party notice

(a) at any time with leave of the court, or

(b) without leave of the court, within ***42 days*** after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

Court may consider case plan order

(5) If the court makes an order under subrule (4) (a) in an action in which a case plan order has been made, the court may

(a) consider if and to what extent the case plan order is appropriate given the third party notice, and

(b) amend the case plan order, if necessary, for that purpose.

Application for leave

(6) Notice of an application for leave under subrule (4) (a) must be served on

(a) the third party, and

(b) all parties of record.

Service

(7) Unless the court otherwise orders, a party who files a third party notice must,

(a) within 60 days after the date on which the third party notice is filed, serve on the third party

(i) a copy of the filed third party notice, and

(ii) if the third party is not a party of record at the time of service, a copy of any filed pleading that has previously been served by any party to the action, and

(b) promptly after the date on which the third party notice is filed, serve a copy of the filed third party notice on all parties of record.

Application to set aside third party notice

(8) At any time, on application, the court may set aside a third party notice.

Response to third party notice

(9) Subject to subrule (10), if a third party wishes to dispute the third party notice, the third party must

(a) file a response to third party notice in Form 6 that accords with Rule 3-7, and

(b) serve a copy of the filed response to third party notice on all parties of record.

When response to third party notice not required

(10) A third party who is a defendant in the action need not file or serve a response to third party notice and is deemed to deny the facts alleged in the third party notice and to rely on the facts pleaded in that party's response to civil claim if all of the following apply:

(a) the third party notice contains no claim other than a claim for contribution or indemnity under the *Negligence Act*;

(b) the third party has filed and served a response to civil claim to the plaintiff's notice of civil claim;

(c) the third party intends, in defending against the third party notice, to rely on the facts set out in the third party's response to civil claim and on no other facts.

Application of rules

(11) Except to the extent that this rule otherwise provides, Rules 3-1 and 3-3 apply to a third party notice as if it were a notice of civil claim and to a response to third party notice as if it were a response to civil claim.

Response to civil claim

(12) A third party who has filed a response to third party notice may, within the period for filing and serving a response to the third party notice, file and serve on all parties of record a response to civil claim to the plaintiff's notice of civil claim, raising any defence open to a defendant.

Application for directions

(13) A party affected by a third party procedure may apply to the court for directions.

Powers of court

(14) The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by a party as a result of that third party procedure.

Third party issues

(15) An issue between the party filing the third party notice and the third party may be tried at the time the court may direct.

Default of response to third party notice

(16) If a third party has not filed a response to third party notice and the time for filing the response to third party notice has expired, the party who filed the third party notice may apply for judgment in default of response to third party notice against the third party and notice of the application must be served on each other party of record.

Relief

(17) On an application under subrule (16), the court may grant any or all of the relief claimed in the third party notice.

RULE 3-7 — PLEADINGS GENERALLY

Content of Pleadings

Pleading must not contain evidence

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

Documents and conversations

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

When presumed facts need not be pleaded

(3) A party need not plead a fact if

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

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

When performance of a condition precedent need not be pleaded

(4) A party need not plead the performance of a condition precedent necessary for the party's case unless the other party has specifically denied it in the other party's pleadings.

Matters arising since start of proceeding

(5) A party may plead a matter that has arisen since the start of the proceeding.

Inconsistent allegations

(6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.

Alternative allegations

(7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

Objection in point of law

(8) A party may raise in a pleading an objection in point of law.

Pleading conclusions of law

(9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

Status admitted

(10) Unless the incorporation of a corporate party or the office or status of a party is specifically denied, it is deemed to be admitted.

Set-off or counterclaim

(11) A defendant in an action may ***set off*** or set up by way of counterclaim any right or claim, whether the ***set-off*** or counterclaim is for damages or not, so as to enable the court to pronounce a final judgment on all claims in the same action.

Pleading after the notice of civil claim

(12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that

(a) the party alleges makes a claim or defence of the opposite party not maintainable,

(b) if not specifically pleaded, might take the other party by surprise, or

(c) raises issues of fact not arising out of the preceding pleading.

General relief

(13) A pleading need not ask for general or other relief.

General damages must not be pleaded

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

Substance to be answered

(15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance. *[See also Rule 3-3(2)(a)(ii)]*

Denial of contract

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

Allegation of malice

(17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

Particulars

When particulars necessary

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

Lengthy particulars

(19) If the particulars required under subrule (18) of debt, expenses or damages are lengthy, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in a separate document either before or with the pleading.

Further particulars

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

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

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

Particulars in libel or slander

(21) In an action for libel or slander,

(a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense, and

(b) if the defendant alleges that, insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and that insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest, the defendant must give particulars stating which of the words complained of the defendant alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

Order for particulars

(22) The court may order a party to serve further and better particulars of a matter stated in a pleading. *[Camp Development v South Coast British Columbia Transportation Authority (p 123)]*

Demand for particulars

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

Demand for particulars not a stay of proceedings

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

Rule 3-8 — Default Judgment

Default in filing and serving a response to civil claim

(1) A plaintiff may proceed against a defendant under this rule *[subject to Rule 20-2(14)]* if

(a) that defendant has not filed and served a response to civil claim, and

(b) the period for filing and serving the response to civil claim has expired. *[see Rule 3-3(3) at p 178]*

[But there is an ethical feature. See Professional Conduct Handbook 11:12 at p 261]

Filings required

(2) A plaintiff who wishes to proceed against a defendant under this rule must file

(a) proof of service of the notice of civil claim on that defendant,

(b) proof that the defendant has failed to serve a response to civil claim,

(c) a requisition endorsed by a registrar with a notation that no response to civil claim has been filed by that defendant, and

(d) a draft default judgment order in Form 8.

Claims for Which Default Judgment Is Available

Claim for specified or ascertainable amount

(3) If the plaintiff's action against a defendant includes a claim for recovery of money in a specified or ascertainable amount, the plaintiff may

(a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of

(i) the amount claimed,

(ii) the interest, if any, to which the plaintiff is entitled, and

(iii) costs, and

(b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).

Interest

(4) For the purpose of subrule (3), a claim may be treated as a claim for recovery of money in a specified or ascertainable amount even though

(a) part of the claim is for interest accruing after the date of the notice of civil claim, and

(b) the interest is to be computed from the date of the notice of civil claim to the date that judgment is granted.

Claim for damages to be assessed

(5) If the plaintiff's action against a defendant includes a claim for damages in an amount that is neither specified nor ascertainable, the plaintiff may

(a) on that claim, obtain judgment in Form 8 against that defendant for damages to be assessed and costs, and

(b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).

Claim for detention of goods

(6) If the plaintiff's action against a defendant includes a claim for the detention of goods, the plaintiff may

(a) on that claim, obtain

(i) judgment in Form 8 against that defendant for the delivery of the goods, or their value to be assessed and costs, or

(ii) judgment in Form 8 against that defendant for the value of the goods to be assessed and costs, and

(b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).

Repealed

(7) Repealed. [en. B.C. Reg. 95/2011, Sch. A, s. 2 (a).]

Application to judge or master

(8) If a registrar is not certain that a plaintiff's claim against a defendant relates to a claim within subrule (3), (5) or (6), the registrar may refuse to grant judgment and the plaintiff may apply to a judge or master for default judgment.

Judgment in other actions

(9) If the plaintiff's claim against a defendant is not one referred to in subrule (3), (5) or (6), the plaintiff may apply for judgment against the defendant under subrule (10).

Application for judgment

(10) The following apply to an application under subrule (9): *[. . .]*

Court may set aside or vary default judgment

(11) The court may set aside or vary any judgment granted under this rule. *[See Director of Civil Forfeiture v Doe (No. 1) and Director of Civil Forfeiture v Doe (No. 2)]*

Assessments

Method of assessment

(12) Subject to subrule (13), if a plaintiff has obtained judgment for damages to be assessed or value to be assessed,

(a) the plaintiff may set the assessment down for trial, and

(b) if the assessment is set for trial, unless the court otherwise orders, the assessment must be tried at the same time as the trial of the action or issues against any other defendant.

Alternative methods of assessment

(13) If a plaintiff has obtained judgment under subrule (5) or (6), the plaintiff may, instead of proceeding to trial to assess the damages or the value of the goods, apply to the court, and, on that application, the court may

(a) assess the damages or value of the goods summarily on affidavit or other evidence,

(b) order an assessment, an inquiry or an accounting,

(c) give directions as to the trial or hearing of the assessment or determination of value, or

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

PART 4 — SERVICE

RULE 4-1 — ADDRESS FOR SERVICE

Party must have address for service

(1) Each party of record to a proceeding must,

(a) if the party is represented by a lawyer in the proceeding, have, as the party's address for service, an accessible address that is the office address of that lawyer, or

(b) if the party is not represented by a lawyer in the proceeding,

(i) have, as the party's address for service, an accessible address within 30 kilometres of the registry, or

(ii) if the party does not have an accessible address within 30 kilometres of the registry, have, as the party's addresses for service, both

(A) an accessible address, and

(B) a postal address in British Columbia, a fax number or an e-mail address.

Additional addresses for service

(2) A party may have, in addition to the address or addresses for service the party is required to have under subrule (1), one or more of the following as addresses for service:

(a) a postal address;

(b) a fax number;

(c) an e-mail address.

Change of address for service

(3) A party of record may change his or her address or addresses for service by filing and serving on the other parties of record a notice of address for service in Form 9 that shows, for the party,

(a) the address or addresses for service required under subrule (1), and

(b) any additional addresses for service referred to in subrule (2) that the party wishes to include.

RULE 4-2 — ORDINARY SERVICE

Documents normally to be served by ordinary service

(1) Subject to Rule 4-3 (1) and unless the court otherwise orders, documents to be served by a party under these Supreme Court Civil Rules may be served by ordinary service.

How to serve documents by ordinary service

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

(a) by leaving the document at the person's address for service;

(b) by mailing the document by ordinary mail to the person's address for service;

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

(d) if an e-mail address is provided as one of the person's addresses for service, by e-mailing the document to that e-mail address.

When service by delivery is deemed to be completed

(3) A document served by leaving it at a person's address for service is deemed to be served on the person as follows:

(a) if the document is left at the address for service at or before 4 p.m. on a day that is not a Saturday or holiday, the document is deemed to be served on the day of service;

(b) if the document is left at the address for service on a Saturday or holiday or after 4 p.m. on any other day, the document is deemed to be served on the next day that is not a Saturday or holiday.

When service by mail is deemed to be completed

(4) A document sent for service by ordinary mail under this rule is deemed to be served one week later on the same day of the week as the day of mailing or, if that deemed day of service is a Saturday or holiday, on the next day that is not a Saturday or holiday.

When documents may be served by fax

(5) A document may be served by fax as follows:

(a) if the document, including the fax cover sheet, is less than 30 pages, the document may be served by fax at any time;

(b) if the document, including the fax cover sheet, is 30 pages or more, the document may be served by fax if it is transmitted

(i) between 5 p.m. and the following 8 a.m., or

(ii) at another time if the person receiving the document agreed to that time before service.

When service by fax or e-mail is deemed to be completed

(6) A document transmitted for service by fax or e-mail under this rule is deemed to be served as follows:

(a) if the document is transmitted before 4 p.m. on a day that is not a Saturday or holiday, the document is deemed to be served on the day of transmission;

(b) if the document is transmitted on a Saturday or holiday or after 4 p.m. on any other day, the document is deemed to be served on the next day that is not a Saturday or holiday.

If no address for service given

(7) If, despite these Supreme Court Civil Rules, a party of record on whom a document is to be served has no address for service, and if these Supreme Court Civil Rules do not specify that the document must be served by personal service on the party,

(a) the document may be served by mailing a copy of the document by ordinary mail to

(i) the party's lawyer, or

(ii) if the party has no lawyer representing the party in the proceeding, to the party's last known address, and

(b) subrule (4) applies.

RULE 4-3 — PERSONAL SERVICE

When documents must be served by personal service

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

(a) a notice of civil claim;

(b) a petition;

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

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

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

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

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

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

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

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

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

How to serve documents by personal service

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

(a) on an ***individual***, by leaving a copy of the document with him or her; *[Orazio v Ciulla (p 148), Wang v Wang (p 163)]*

(b) on a ***corporation***,

(i) by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation,

(ii) by leaving a copy of the document with the city clerk or municipal clerk,

(iii) by leaving a copy of the document with the manager, cashier, superintendent, treasurer, secretary, clerk or ***agent*** of the corporation or of any branch or agency of the corporation in British Columbia, or

(iv) in the manner provided by the *Business Corporations Act [section 9 at p 247]* or any enactment relating to the service of court documents,

and, for the purpose of this paragraph, if the chief place of business of the corporation is ***outside British Columbia***, every person who, within British Columbia, transacts or carries on any of the business of, or any business for, that corporation is ***deemed*** to be an ***agent*** of the corporation; *[See subparagraph(iii)above]*

(c) on an unincorporated association, other than a trade union, by leaving a copy of the document with any officer of the association;

(d) on a trade union, by leaving a copy of the document with any officer of the trade union or with a business agent;

(e) on an infant, in the manner provided by the *Infants Act*;

(f) on a mentally incompetent person, by leaving a copy of the document

(i) with the person's committee or, if there is no committee, with the person with whom the mentally incompetent person resides or in whose care he or she is or with the person appointed by the court to be served in the mentally incompetent person's place, and

(ii) with the Public Guardian and Trustee,

and in no case is it necessary to show the original document;

(g) on a principal referred to in subrule (3), in accordance with subrules (3) to (5);

(h) on the Attorney General, in accordance with subrule (6).

[See Rule 20-1(2) for service on partnerships]

Agent may be served

(3) If an agent residing or carrying on business in British Columbia enters into a contract, in British Columbia, on behalf of a principal who resides outside British Columbia, and a proceeding is brought that relates to or arises out of that contract, a pleading or other document in that proceeding may be served on the agent with ***leave*** of the court.

Court may grant leave

(4) The court may make an order granting leave under subrule (3) before the agent's authority or the agent's business relations with the principal have been determined.

Notice to principal

(5) Promptly after a pleading or other document is served on an agent under subrule (3), the party serving the pleading or other document must send, by registered mail to the principal at the principal's address outside British Columbia,

(a) a copy of the entered order giving leave for that service, and

(b) a copy of the filed pleading or other document.

Service on Attorney General

(6) A document to be served on the Attorney General must be served at the Ministry of Attorney General in the City of Victoria, and is sufficiently served if it is left during office hours with any lawyer on the staff of the Attorney General at Victoria or mailed by registered mail to the Deputy Attorney General at Victoria.

When personal service is deemed to be completed

(7) A document served by personal service is deemed to be served as follows:

(a) if the document is served at or before 4 p.m. on a day that is not a Saturday or holiday, the document is deemed to be served on the day of service;

(b) if the document is served on a Saturday or holiday or after 4 p.m. on any other day, the document is deemed to be served on the next day that is not a Saturday or holiday.

Date of deemed service

(8) If an originating pleading or petition has not been served on a person, but the person files a responding pleading or response to petition or attends at the trial or at the hearing of the petition, the originating pleading or petition is deemed to have been served on that person on the date the person files or attends.

Rule 4-4 — Alternative Methods of Service

Alternative service methods

(1) If it is impracticable to serve a document by personal service or if the person to be served by personal service

(a) cannot be found after a diligent search, or

(b) is evading service of the documents,

the court may, on application without notice, make an order for substituted service granting permission to use an alternative method of service. *[Luu v Wang (p 146)]*

If an alternative service method is permitted

(2) If a document is to be served by an alternative method permitted under subrule (1), a copy of the entered substituted service order that granted permission to use that alternative method must be served with the document unless

(a) the court otherwise orders, or

(b) the alternative method of service permitted under subrule (1) is service by advertisement.

Service by advertisement

(3) If, under subrule (1), the court permits a document to be served by advertisement, the advertisement must be in Form 10.

RULE 4-5 — SERVICE OUTSIDE BRITISH COLUMBIA

Service outside British Columbia without leave

(1) An originating pleading, petition or other document may be served on a person outside British Columbia without leave in any of the circumstances enumerated in section 10 of the ***Court Jurisdiction and Proceedings Transfer Act*** *[section 10 at p 248 below]*.

Required endorsement

(2) A copy of an originating pleading or petition served outside British Columbia without leave must state, by endorsement in Form 11, the circumstances enumerated in section 10 of the ***Court Jurisdiction and Proceedings Transfer Act*** *[section 10 at p 248 below]* on which it is claimed that service is permitted under this rule.

Application for leave to serve outside the jurisdiction

(3) In any case not provided for in subrule (1), leave of the court must be obtained before an originating pleading, petition or other document may be served outside British Columbia, and the court may grant such leave on an application referred to in subrule (4).

Applications may be made without notice

(4) An application for leave to serve a person outside British Columbia

(a) may be made without notice in accordance with Rule 8-1 (2) (b), and

(b) must be supported by an affidavit or other evidence showing

(i) in what place or country that person is or probably may be found, and

(ii) the grounds on which the application is made.

Service of order and related documents

(5) If an order is made granting leave to serve an originating pleading, petition or other document outside British Columbia, the following documents must be served with that originating pleading, petition or other document:

(a) a copy of the filed notice of application or requisition for leave to serve;

(b) a copy of all filed affidavits in support of the application;

(c) a copy of the entered order granting leave to serve.

If service without leave valid

(6) This rule does not invalidate service of a document outside British Columbia without leave of the court if the document could have been validly served apart from this rule.

Contract containing terms for service

(7) Despite this rule, the parties to a contract may agree

(a) that the court will have jurisdiction to hear a proceeding in respect of the contract, and

(b) that a document in the proceeding may be served

(i) at any place, within or outside British Columbia,

(ii) on any party,

(iii) on any person on behalf of any party, or

(iv) in any manner

specified or indicated in the contract.

Contract does not invalidate effective service

(8) Service of a document in accordance with a contract referred to in subrule (7) is effective service, but no contractual stipulation as to service of a document invalidates service that would otherwise be effective under these Supreme Court Civil Rules.

Definition

(9) In subrules (10) to (13), **"Convention"** means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at the Hague on November 15, 1965.

Manner of service abroad

(10) A document may be served outside British Columbia

(a) in a manner provided by these Supreme Court Civil Rules for service in British Columbia,

(b) in a manner provided by the law of the place where service is made if, by that manner of service, the document could reasonably be expected to come to the notice of the person to be served, or

(c) in a state that is a contracting state under the Convention, in a manner provided by or permitted under the Convention.

Proof of service abroad

(11) Service of a document outside British Columbia may be proved

(a) in a manner provided by these Supreme Court Civil Rules for proof of service in British Columbia,

(b) in the manner provided for proof of service by the law of the place where service was made regardless of the manner under subrule (10) by which service was effected, or

(c) in accordance with the Convention, if service was effected under subrule (10) (c).

Forms

(12) If service is to be made in accordance with Article 5 of the Convention, Forms 12 and 13 must be used.

Certificate

(13) If an authority has, in accordance with Article 6 of the Convention, completed a certificate in Form 14, the certificate is evidence of the facts stated in it.

RULE 4-6 — PROVING SERVICE

Proof of service

(1) Service of a document is proved as follows:

(a) service on a person of an originating pleading is proved

(i) by filing an affidavit of personal service in Form 15, or

(ii) by the person filing a responding pleading;

(b) service on a person of a petition is proved

(i) by filing an affidavit of personal service in Form 15, or

(ii) by the person filing a response to petition;

(c) service of any other document served by personal service is proved by filing an affidavit of personal service in Form 15;

(d) service of any document that is served by ordinary service is proved

(i) by filing an affidavit of ordinary service in Form 16, or

(ii) by filing a requisition in Form 17 to which is attached a written acknowledgment of receipt signed by the party or lawyer on whom the document was served.

Proof of service by sheriff

(2) Service of a document by a sheriff may be proved by a certificate in Form 18 endorsed on a copy of the document.

Service on member of Canadian Armed Forces

(3) If a member of the Canadian Armed Forces has been served with a document by an officer of the Canadian Armed Forces, proof of the service in the form of a certificate annexed to a copy of the document served, signed by the officer and stating his or her rank and when, where and how service was effected, may be filed as proof of service.

Admissibility of other evidence of service

(4) Nothing in subrules (1) to (3) restricts the court from considering any other evidence of service that the court considers appropriate in the circumstances.

PART 5 — CASE PLANNING

RULE 5-1 — REQUESTING A CASE PLANNING CONFERENCE

Case planning conference may be requested

(1) A party of record to an action may, at any time ***after the*** pleading period ***has expired***, request a case planning conference by

(a) obtaining a date and time for the case planning conference from the registry, and

(b) filing a notice of case planning conference in Form 19.

Case planning conference may be directed

(2) Without limiting subrule (1), at any stage of an action after the pleading period has expired, the court

(a) may direct that a case planning conference take place, and

(b) in that case, must direct that a party request a case planning conference in accordance with subrule (1).

Time for service of notice

(3) Unless the court otherwise orders or the parties of record otherwise agree, a party who is requesting a case planning conference under subrule (1) or who has been directed to file a notice of case planning conference under subrule (2) must serve the filed notice of case planning conference on the other parties of record,

(a) in the case of the first case planning conference to be held in the action, at least ***35 days***, or any shorter period that the court may order, before the date set for the case planning conference, and

(b) in the case of any other case planning conference to be held in the action, at least ***7 days***, or any shorter period that the court may order, before the date set for the case planning conference.

Application must be made by requisition

(4) *[. . .]*

Case plan proposal required

(5) Unless the court otherwise orders, if a case planning conference is requested or ordered under this rule, the parties of record must, before the first case planning conference to be held in the action, file case plan proposals as follows:

(a) the plaintiff must, within ***14 days*** after the notice of case planning conference in the action was served by the plaintiff or, if the notice of case planning conference was served by another party of record, within 14 days after receipt of that notice of case planning conference,

(i) file the plaintiff's case plan proposal, and

(ii) serve a copy of the filed case plan proposal on all parties of record;

(b) each other party of record must, within ***14 days*** after receipt of the plaintiff's case plan proposal,

(i) file the party's case plan proposal, and

(ii) serve a copy of the filed case plan proposal on all parties of record.

Contents of case plan proposal

(6) A party's case plan proposal referred to in subrule (5) must be in Form 20 and must, in a summary manner, indicate the party's proposal with respect to the following steps:

(a) discovery of documents;

(b) examinations for discovery;

(c) dispute resolution procedures;

(d) expert witnesses;

(e) witness lists;

(f) trial type, estimated trial length and preferred periods for the trial date.

Rule 5-2 — Conduct of Case Planning Conference

Case planning conference must be conducted by judge or master

(1) A case planning conference held in an action must be conducted by a judge or master.

Who must attend

(2) Unless the court otherwise orders, the following persons must attend a case planning conference in accordance with subrule (3):

(a) each lawyer representing a party of record;

(b) a party of record if

(i) the party is not represented by a lawyer in the action, or

(ii) the party is ordered to attend by the court.

Manner of attendance

(3) Unless the court otherwise orders, a lawyer or party of record referred to in subrule (2) must

(a) attend in person at the first case planning conference held in an action, and

(b) attend any subsequent case planning conference held in the action

(i) by telephone or other communication medium, if all persons participating in the case planning conference, whether by telephone, by other communication medium or in person, are able to communicate with each other, or

(ii) in person.

[. . .]

Non-attendance at case planning conference

(6) If a person who, under subrule (2), is required to attend a case planning conference fails to attend at that case planning conference, the case planning conference judge or master may do one or more of the following:

(a) proceed in the absence of the person who failed to attend;

(b) adjourn the case planning conference;

(c) order that the person, or the party on whose behalf the person was to attend, pay costs to one or more other parties.

Proceedings must be recorded

(7) Proceedings at a case planning conference must be recorded, but no part of that recording may be made available to or used by any person without court order. *[See **Parti v Pokorny**]*

Rule 5-3 — Case Planning Conference Orders

Orders

(1) At a case planning conference, the case planning conference judge or master may make one or more of the following orders in respect of the action, whether or not on the application of a party:

(a) setting a timetable for the steps to be taken;

[. . .]

(g) respecting ***discovery*** of parties ***or*** the ***examination or inspection of persons or property***, including, without limitation, that discovery, examination or inspection be ***limited***, ***expanded*** or otherwise conducted in the manner ordered;

[. . .]

(n) respecting the conduct of any application, including, without limitation, that an application may be made by written submissions under Rule 8-6;

[. . . yes, I have cut out (b) . . . (u) except (g) and (n) because (v) covers everything! . . .]

(v) any orders the judge or master considers will further the object of these Supreme Court Civil Rules. *[Note this is limited by subrule (2)]*

Prohibited orders

(2) A case planning conference judge or master must not, at a case planning conference,

(a) hear any application supported by ***affidavit evidence***, except under subrule (6), or

(b) make an order for ***final judgment***, except by consent or under subrule (6).

Case plan order required

(3) Without limiting subrules (1) and (2), the judge or master conducting a case planning conference ***must***, at the conclusion of the case planning conference, make a case plan order. *[Stockbrugger v Bigney]*

Case plan order

(4) A case plan order under subrule (3) must be in Form 21 and

(a) must set out any order made under subrule (1), and

(b) may but need not include any other matter referred to in Form 21.

When approval in writing by lawyer not required

(5) Without limiting Rule 13-1 (2), if a case plan order under subrule (3) is approved in writing by the case planning conference judge or master, that order need not be approved in writing by a lawyer or by a party.

Consequences of non-compliance

(6) If a party fails to comply with this Part or an order made under this rule or if anything is done or omitted improperly or unnecessarily by or on behalf of a party in relation to anything under this Part, the court may, on application, do one or both of the following:

(a) make an order under Rule 22-7;

(b) despite any other provision of these Supreme Court Civil Rules to the contrary and without limiting Rule 14-1 (14),

(i) award costs of the application in a lump sum fixed under Schedule 3 of Appendix B, and

(ii) set the period within which those costs must be paid.

Application may be made at case planning conference

(7) Without limiting Part 8, a party may apply for an order under subrule (6) at a case planning conference.

Rule 5-4 — Applications to Amend Case Plan Orders

Requesting amendments to case plan orders

(1) Without limiting the ability of a case planning conference judge or master to amend a case plan order at a case planning conference under Rule 5-3 (1) (b), the parties may apply to amend a case plan order as follows:

(a) if the application is to be by ***consent***, the parties of record must apply under Rule 8-1 (2) (a);

(b) if the application is not to be by consent, a party of record must

(i) *[. . .]*

(ii) *[. . .]*

[. . .]

Part 6 — Amendment of Pleadings and Change of Parties

Rule 6-1 — Amendment of Pleadings

When pleadings may be amended

(1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party

(a) ***once without leave*** of the court *[see Broom v The Royal Centre]*, at any time before the earlier of the following:

(i) the date of service of the notice of trial, and

(ii) the date a case planning conference is held, or

(b) after the earlier of the dates referred to in paragraph (a) of this subrule, only with

(i) ***leave*** of the court *[see TJA v RKM; note also that Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd appears to have read in the just and convenient test from Rule 6-2(7)(c) here]*, or

(ii) written consent of the parties of record.

How amendments made

(2) Unless the court otherwise orders, to amend a pleading under subrule (1), a party must

(a) amend the pleading in accordance with subrule (3),

(b) indicate on the amended pleading the date on which the original version of the pleading was filed, and

(c) file the amended pleading.

Identifying amendments

(3) Unless the court otherwise orders, if a pleading is amended under this rule,

(a) any deleted wording must be shown as struck out, and

(b) any new wording must be underlined.

Service of amended documents

(4) Unless the court otherwise orders, if a party amends a pleading under this rule, the party must do both of the following:

(a) within ***7 days*** after filing the amended pleading, serve, by ***ordinary service***, a copy of the filed amended pleading on all parties of record;

(b) if the amended pleading is an originating pleading, promptly after filing the amended pleading and before taking any further step in the proceeding, serve, by ***personal service***, a copy of the filed amended originating pleading on any person who

(i) was served with a copy of the filed original version of the originating pleading, and

(ii) has not filed a responding pleading to the original version of the originating pleading.

Response of a party to amended document

(5) If a pleading (in this subrule and in subrule (6) called the "primary pleading") is amended under this rule and the amended pleading is served on a party of record under subrule (4) (a), that party

(a) may amend, under this rule, any pleading he or she had filed in response to the original version of the primary pleading but only with respect to any matter raised by the amendments to the primary pleading, and

(b) in that event, must, within ***14 days*** after being served with the amended pleading, serve a copy of the filed amended responding pleading on all parties of record.

Failure to serve amended responding document

(6) If a party on whom an amended pleading is served under subrule (4) (a) does not serve an amended responding pleading as provided in subrule (5),

(a) the pleading he or she filed in response to the original version of the primary pleading is deemed to be the pleading he or she filed in response to the amended pleading, and

(b) any new facts set out in the amended pleading are deemed to be outside the knowledge of the defendant.

Responding to amended pleading

(7) If an ***originating pleading*** is amended under this rule and served under subrule (4) (b) on a person who is not yet a party of record, the person has the same period for filing a responding pleading to that amended originating pleading as the party had to file a responding pleading to the original version of the originating pleading.

Amendment at trial

(8) Unless the court otherwise orders, if an amendment is granted during a trial or hearing, an order need not be taken out and the amended pleading need not be filed or served.

RULE 6-2 — CHANGE OF PARTIES

Change of Party Status or Interest

Party ceasing to exist

(1) If a party dies or becomes bankrupt, or a corporate party is wound up or otherwise ceases to exist, but the claim survives, the proceeding may continue in spite of the death or bankruptcy or the corporate party having been wound up or ceasing to exist.

Effect of death

(2) Whether or not the claim survives, a proceeding may continue in spite of either party dying between the verdict or finding on the issues of fact and the entry of judgment, but judgment may be entered despite the death.

Assignment or conveyance of interest

(3) If, by assignment, conveyance or death, an estate, interest or title devolves or is transferred, a proceeding relating to that estate, interest or title may be continued by or against the person on whom that estate, interest or title has devolved or to whom that estate, interest or title has been transferred.

Change or transmission of interest or liability

(4) If, after the start of a proceeding,

(a) a change or transmission of interest or liability of a party takes place or a person interested comes into existence, and

(b) it becomes necessary or desirable that

(i) a person not already a party should be made a party, or

(ii) a person already a party should be made a party in another capacity,

the court may order that the proceeding be continued between the continuing parties and the new party.

Prosecution of proceeding if plaintiff or petitioner dies

(5) If a plaintiff or petitioner has died and the proceeding may be continued, a defendant or respondent may apply to the court for an order that the person entitled to proceed do proceed within the time that the court orders and that, in default, the proceeding be dismissed for want of prosecution.

Costs on dismissal

(6) If a proceeding is dismissed under subrule (5), an order for payment of costs may be made and enforced against the assets of the deceased's estate.

Change of Parties

Adding, removing or substituting parties by order

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

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

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

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

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

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

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be ***just and convenient*** *[see* ***Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd****]* to determine as between the person and that party.

Procedure if party added, removed or substituted by order

(8) Unless the court otherwise orders, if an order is made under subrule (7) adding, removing or substituting a party,

(a) the originating pleading or petition must be amended in accordance with these Supreme Court Civil Rules, a reference to the order must be endorsed on that amended pleading or petition and Rule 6-1 (4) to (7) applies,

(b) no further steps may be taken against a person added or substituted as a party under this subrule until a copy of the filed amended originating pleading or filed amended petition and a copy of the entered order adding or substituting the party are served on the person, and

(c) if a person is made a party under the order,

(i) the person may apply to the court to vary or discharge the order within 21 days after the date on which the order is served on the person under paragraph (b) of this subrule, and

(ii) unless the court orders, in an application under subparagraph (i) of this paragraph or otherwise, that the person not be added as a party, these Supreme Court Civil Rules apply in relation to that added party as if the amended originating pleading or petition were a new originating pleading or petition.

If case plan order in effect

(9) If an order is made under subrule (4) or (7) in an action in which a case plan order has been made,

(a) if a person is removed as a party, the case plan order remains in effect, and

(b) if a person is added or substituted as a party and that person becomes a party of record, no step may be taken by or against the added or substituted party until the case plan order is amended to apply to the added or substituted party.

General

Consent required

(10) A person must not be added or substituted as a plaintiff or petitioner without the person's consent.

Effect of order

(11) Unless the court otherwise orders, if a person becomes a party in substitution for a former party, all things done in the proceeding before the person became a party have the same effect in relation to that person as they had in relation to the former party, but the substituted party must file a notice of address for service in Form 9.

PART 7 — PROCEDURES FOR ASCERTAINING FACTS

RULE 7-1 — DISCOVERY AND INSPECTION OF DOCUMENTS

List of documents

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within ***35 days*** after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that ***are or have been*** in the party's ***possession or control*** and that could, if available, be used by any party of record at trial to ***prove or disprove a material fact***, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Documents to be enumerated

(2) Subject to subrules (6) and (7), each party's list of documents must include a ***brief description*** of each listed document.

*[See **GWL Properties v WR Grace**]*

Insurance policy

(3) A party must include in the party's list of documents any insurance policy under which an insurer may be liable

(a) to satisfy the whole or any part of a judgment granted in the action, or

(b) to indemnify or reimburse any party for any money paid by that party in satisfaction of the whole or any part of such a judgment.

Information not to be disclosed

(4) Despite subrule (3), information concerning the insurance policy must not be disclosed to the court at trial unless it is relevant to an issue in the action.

Insurance policy

(5) *[. . .]*

Claim for privilege

(6) If it is claimed that a document is privileged from production, the claim must be made in the list of documents with a statement of the grounds of the privilege.

Nature of privileged documents to be described

(7) The nature of any document for which privilege from production is claimed ***must be described*** in a manner that, without revealing information that is privileged, will ***enable other parties to assess the validity*** of the claim of privilege. *[See **Leung v Hanna**]*

Affidavit verifying list of documents

(8) The court may order a party of record to serve an affidavit verifying a list of documents. *[See: **Myers v Elman**]*

Amending the list of documents

(9) If, after a list of documents has been served under this rule,

(a) it comes to the attention of the party serving it that the list is inaccurate or incomplete, or

(b) there comes into the party's possession or control a document that could be used by any party of record at trial to prove or disprove a material fact or any other document to which the party intends to refer at trial,

the party ***must*** promptly amend the list of documents and serve the amended list of documents on the other parties of record.

Party may demand documents required under this rule

(10) If a party who has received a list of documents believes that the list omits documents or a ***class*** of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to

(a) amend the list of documents,

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

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

Party may demand additional documents

(11) If a party who has received a list of documents believes that the list should include documents or ***classes*** of documents that

(a) are within the listing party's possession, power or control,

(b) relate to any or all matters in question in the action, and

(c) are ***additional to*** the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable ***specificity*** and that indicates the ***reason*** why such additional documents or classes of documents should be disclosed, may require the listing party to

(d) amend the list of documents,

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

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

Response to demand for documents

(12) A party who receives a demand under subrule (10) or (11) must, within ***35 days*** after receipt, do one of the following:

(a) comply with the demand in relation to the demanded documents;

(b) comply with the demand in relation to those of the demanded documents that the party is prepared to list and indicate, in relation to the balance of the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and

(ii) why those documents are not being made available;

(c) indicate, in relation to the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and

(ii) why those documents are not being made available.

Application for production of documents

(13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.

Court may alter requirements

(14) On an application under subrule (13) or otherwise, the court may

(a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or

(b) order a party to

(i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,

(ii) serve the amended list of documents on all parties of record, and

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

Inspection of documents

(15) A party who has served a list of documents on any other party must allow the other party to inspect and copy, during normal business hours and at the location specified in the list of documents, the listed documents except those documents that the listing party objects to producing.

Copies of documents

(16) If a party is entitled to inspect listed documents under subrule (15), the listing party must, on the request of the party entitled to inspection and on receiving payment in advance of the cost of reproduction and service, serve on the requesting party copies of the documents, if reproducible, for which a request has been made.

Order to produce document

(17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate.

Documents not in possession of party

(18) If a document is in the ***possession or control*** of a person who is ***not a*** party of record, the court, on an application under Rule 8-1 brought on notice to the person ***and*** the parties of record, may make an order for one or both of the following:

(a) production, inspection and copying of the document;

(b) preparation of a certified copy that may be used instead of the original.

*[See **Kaladjian v Jose**; see also **Dufault v Stevens and Stevens**]*

Order by consent

(19) An order under subrule (18) may be made by consent if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

Inspection of document by court

(20) If, on an application for production of a document, production is objected to on the grounds of ***privilege***, the court may inspect the document for the purpose of deciding the validity of the objection. *[See Keefer Laundry v Pellerin Milnor Corp, see also Leung v Hanna]*

Party may not use document

(21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

[. . .]

RULE 7-2 — EXAMINATIONS FOR DISCOVERY

Examination of parties

(1) Subject to subrule (2), each party of record to an action must

(a) make himself or herself available, or

(b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available,

for examinations for discovery by the parties of record to the action who are ***adverse in interest*** to the party subject to examination.

Limitations

(2) Unless the court otherwise orders *[i.e. you can apply for more time under subrule (3)]*, the examinations for discovery, including all examinations under subrules (17), (22) and (24), conducted under this rule of a party of record, including any such examinations conducted of a person referred to in subrule (1) (b) who is examined in relation to that party of record, by any other party of record who is ***adverse in interest*** must not, in total, exceed in duration

(a) 7 hours *[see also Rule 15-1(11) and Rule 7-5(9)]*, or

(b) any greater period to which the person to be examined ***consents***.

[See Rule 15-1 (11) and (12) for limits on examinations for discovery in fast track actions.]

Considerations of the court

(3) In an application under subrule (2) to ***extend*** the examination for discovery period, the court must consider the following:

(a) the conduct of a person who has been or is to be examined, including

(i) the person's unresponsiveness in any examination for discovery held in the action,

(ii) the person's failure to provide complete answers to questions, or

(iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;

(c) the conduct of the examining party; *[for an example of this, see Kendall v Sun Life Assurance Co of Canada]*

(d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);

(e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

Oral examination on oath

(4) An examination for discovery is an oral examination on oath.

Examination of party that is not an individual

(5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

(a) the examining party may examine ***one*** representative of the party to be examined *[see Westcoast Transmission v Interprovincial Steel]*,

(b) the party to be examined must ***nominate*** as its representative an individual, who is ***knowledgeable*** concerning the matters in question in the action, to be examined on behalf of that party, and

(c) the examining party may examine

(i) the representative ***nominated*** under paragraph (b), or

(ii) ***any other person*** the examining party considers appropriate and who ***is*** or ***has been*** a director, officer, employee, agent or external auditor of the party to be examined. *[See First Majestic Silver Corp v Davila and Rainbow Industrial Caterers v Canadian National Railways for cases in which the court "otherwise ordered", thus denying the examining party's choice of "any other person. . ."]*

[. . .]

Place

(11) Unless the court otherwise orders or the parties to the examination for discovery otherwise agree, an examination for discovery must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.

Examination before reporter

(12) An examination for discovery must be conducted before an official reporter who is empowered to administer the oath.

Service of notice

(13) Before conducting an examination for discovery under this rule, the party wishing to conduct that examination for discovery must do the following:

(a) if the person to be examined is a party of record to, and has a lawyer in, the action, ensure that, at least 7 days before the examination for discovery,

(i) an appointment in Form 23 is served on that lawyer, and

(ii) witness fees in the amount required under Schedule 3 of Appendix C are tendered to that lawyer;

(b) in any other case, ensure that, at least ***7 days*** before the examination for discovery,

(i) an appointment in Form 23 is served on the person to be examined, and

(ii) witness fees in the amount required under Schedule 3 of Appendix C are tendered to the person to be examined;

(c) at least ***7 days*** before the examination for discovery, serve a copy of the appointment on all parties of record.

Person must attend examination

(14) A person to be examined for discovery must attend and submit to examination for discovery if the party wishing to conduct that examination for discovery has complied with subrule (13) (a) or (b), as the case may be.

Fees must not be attached

(15) If a lawyer receives witness fees under subrule (13) (a), those fees must not be attached.

Production of documents

(16) Unless the court otherwise orders, if the person to be examined for discovery is a person referred to in subrule (6), (7), (8), (9) or (10), the person must produce for inspection on the examination for discovery all documents in his or her possession or control, not privileged, relating to the matters in question in the action.

Examination and re-examination

(17) The examination for discovery of a person is in the nature of a ***cross-examination*** *[on scope of questions, see: **Kendall v Sun Life Assurance Co of Canada** and **Allarco Broadcasting v Duke**; on communications between person being examined and his lawyer, see: **Fraser River Pile and Dredge v Can-Dive Services**]*, and the person examined for discovery may be re-examined on his or her own behalf or on behalf of a party of record not adverse in interest to him or her in relation to any matter respecting which he or she has been examined.

Scope of examination

(18) Unless the court otherwise orders, a person being examined for discovery

(a) must answer any question within his or her knowledge ***or means of knowledge*** *[see subrule (22) on the duty to inform self]* regarding any matter, ***not privileged***, relating to a matter in question in the action *[see: **Kendall v Sun Life Assurance Co of Canada** and **Allarco Broadcasting v Duke**]*, and

(b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

Scope includes insurance

(19) Without limiting subrule (18), unless the court otherwise orders, a person being examined for discovery must answer any question within his or her knowledge or means of knowledge that is related to

(a) the existence and contents of any insurance policy under which an insurer may be liable

(i) to satisfy the whole or any part of a judgment granted in the action, or

(ii) to indemnify or reimburse a party for any money paid by that party in satisfaction of the whole or any part of such a judgment, and

(b) if the hearing of the application is adjourned to a date later than the following business day, after the hearing is adjourned.

Information not to be disclosed

(20) Despite subrule (19), information concerning the insurance policy must not be disclosed to the court at trial unless it is relevant to an issue in the action.

[. . .]

Person must inform self

(22) In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.

Response may be provided by letter

(23) If a person is required to inform himself or herself under subrule (22) in order to respond to one or more questions posed on the examination for discovery, the examining party may request the person to provide the responses by letter.

If letter provided

(24) If the examining party receives a letter under subrule (23),

(a) the questions set out in the letter and the answers given in response to those questions are deemed for all purposes to be questions asked and answers given under oath in the examination for discovery, and

(b) the examining party may, subject to subrule (2), continue the examination for discovery.

Objections

(25) If a person under examination objects to answering a question put to him or her, the question and the objection must be taken down by the official reporter and the court may

(a) decide the validity of the objection, and

(b) order the person to submit to ***further examination*** and set a maximum duration for that further examination.

*[See **Kendall v Sun Life Assurance Co of Canada**]*

How recorded

(26) An examination for discovery is to be taken down in the form of question and answer, and copies of the transcript may be obtained on payment of the proper fee by

(a) any party of record,

(b) the person examined, or

(c) any other person as the court for special reason may permit.

Application to persons outside British Columbia

(27) So far as is practicable, this rule applies to a person residing outside British Columbia, and the court, on application on notice to the person, may order the examination for discovery of the person at a place and in the manner the court considers appropriate.

Service of order and notice

(28) Unless the court otherwise orders, if an order is made under subrule (27) for the examination for discovery of a person,

(a) the order and the notice of appointment may be served on, and

(b) the witness fees referred to in subrule (13) may be paid to

the lawyer for the person.

RULE 7-3 — DISCOVERY BY INTERROGATORIES

Party may serve interrogatories by consent or with leave

(1) A party of record to an action may serve interrogatories in Form 24 on any other party of record, or on a director, officer, partner, agent, employee or external auditor of a party of record, if

(a) the party of record to be examined ***consents***, or

(b) the court grants ***leave***.

If a party is a body of persons

(2) If a party of record to an action is a body of persons, corporate or unincorporate, that is empowered to sue or to be sued in its own name or in the name of an officer or other person, another party of record may, with leave of the court granted at an application or if authorized to do so by a case plan order, serve interrogatories on the officer or member of the body specified in the order.

Powers of court

(3) In an order granting leave under subrule (1) (b) or (2), the court may set terms and conditions on the interrogatories, including terms and conditions respecting

(a) the number or length of the interrogatories,

(b) the matters the interrogatories are to cover,

(c) the timing of any response to the interrogatories, and

(d) the notification, if any, to be given to the other parties of record respecting the interrogatories.

Timing of answer to interrogatories

(4) A person to whom interrogatories are directed must, within ***21 days*** or such other period as the court may order under subrule (3), serve an answer on affidavit to the interrogatories.

If more than one person to answer interrogatories

(5) If interrogatories are required to be answered by more than one officer, director, partner, agent or employee of a party, the interrogatories must state which of the interrogatories each person is required to answer.

Objection to answer interrogatory

(6) If a person objects to answering an interrogatory on the grounds of privilege or on the grounds that it does not relate to a matter in question in the action, the person may make the objection in an affidavit in answer.

Insufficient answer to interrogatory

(7) If a person to whom interrogatories have been directed answers any of them insufficiently, the court may require the person to make a further answer either by affidavit or on oral examination.

Application to strike out interrogatory

(8) If a party of record objects to an interrogatory on the grounds that it will not further the object of these Supreme Court Civil Rules,

(a) the party may apply to the court to strike out the interrogatory, and

(b) the court must take into account any offer by the party to make admissions, to produce documents or to give oral discovery.

[See Roitman v Chan]

Service of interrogatories on lawyer

(9) A party of record may, instead of serving interrogatories under subrule (1) or (2), serve the interrogatories on the lawyer of the person to whom the interrogatories are directed.

Lawyer must inform

(10) If a lawyer receives interrogatories under subrule (9), the lawyer must promptly inform the person to whom the interrogatories are directed.

Continuing obligation to answer

(11) If a person who has given an answer to an interrogatory later learns that the answer is inaccurate or incomplete, the person must promptly serve on the party who served the interrogatory an affidavit deposing to an accurate or complete answer.

Rule 7-4 — Witness Lists

Witness lists

(1) Unless the court otherwise orders, each party of record to an action must, within the time set out in the case plan order or, if none, on or before the earlier of the trial management conference and the date that is 28 days before the scheduled trial date, file and serve on every other party of record a list of the witnesses the party may call at trial, other than

(a) expert witnesses who are to provide evidence under Part 11, and

(b) adverse witnesses referred to in Rule 12-5 (20) (a) or (b).

Requirements for list

(2) Unless the court otherwise orders, a witness list must include the full name and address of each listed witness.

Continuing obligation

(3) If a party who has provided a witness list or an amended witness list later learns that the list is inaccurate or incomplete, the party must promptly

(a) amend the witness list,

(b) file the amended witness list, and

(c) serve a copy of the filed amended witness list on all parties of record.

Witness need not be called

(4) Nothing in this rule requires a party to call as a witness at trial an individual named as a witness on a witness list served by the party under subrule (1) or (3).

Rule 7-5 — Pre-trial Examination of Witness

Order for examination

(1) If a person who is ***not*** a party of record to an action may have ***material evidence*** relating to a matter in question in the action *[see **Sinclair v March**]*, the court may

(a) order that the person be examined on oath on the matters in question in the action, and

(b) either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.

Expert

(2) An expert ***retained*** or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule ***unless*** the party seeking the examination is ***unable*** to obtain facts and opinions on the same subject by other means. *[see **Delgamuukw v British Columbia (No. 1)**]*

Affidavit in support of application

(3) An application for an order under subrule (1) must be supported by affidavit setting out

(a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,

(b) if the proposed witness is an expert ***retained*** or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means, and

(c) that the proposed witness

(i) has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question *[see **Delgamuukw v British Columbia (No. 1)** as well as **Sinclair v March**]*, or

(ii) has given conflicting statements.

Application procedure

(4) An applicant for an order under subrule (1) must comply with Rule 8-1, and, without limiting this, the applicant must serve the application materials on the proposed witness and Rule 8-1 applies to the witness as if he or she were a party of record.

Subpoena

(5) If the court makes an order under subrule (1) entitling a party to examine a person under this rule, the party may, by serving on the person to be examined a subpoena in Form 25, require the person to bring to the examination

(a) any document in the person's possession or control relating to the matters in question in the action, and

(b) any physical object in the person's possession or control that the party contemplates tendering at the trial as an exhibit.

Identification of documents and objects

(6) A subpoena referred to in subrule (5)

(a) need not identify any document referred to in subrule (5) (a), and

(b) must identify any object referred to in subrule (5) (b).

Notice of examination

(7) The examining party must give notice of an examination under this rule by serving copies of the subpoena referred to in subrule (5) on all parties of record at least ***7 days*** before the date appointed for the examination.

Mode of examination

(8) The proposed witness must be ***cross-examined*** by the party who obtained the order, then may be ***cross-examined*** by any other party of record, and then may be further cross-examined by the party who obtained the order.

Time for examination

(9) Unless the court otherwise orders, examinations conducted of a person under this rule by all parties of record must not, in total, exceed ***3 hours*** in duration. *[See also Rule 7-2(2)]*

Application of examination for discovery rules

(10) Rule 7-2 (12), (16), (18), (22) and (25) to (28) applies to an examination under this rule.

Rule 7-6 — Physical Examination and Inspection

Order for medical examination

(1) If the physical or mental condition of a person is ***in issue*** *[see Jones v Donaghey]* in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make

(a) an order respecting any expenses connected with the examination, and

(b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

Subsequent examinations

(2) The court may order a further examination under this rule. *[See: Hamilton v Pavlova]*

Questions by examiner

(3) A person who is making an examination under this rule may ask any relevant question concerning the medical condition or history of the person being examined.

Order for inspection and preservation of property

(4) If the court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may

(a) order the production, inspection and preservation of any property, and

(b) authorize

(i) samples to be taken or observations to be made of the property, or

(ii) experiments to be conducted on or with the property.

Entry on land or building

(5) For the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

Application to persons outside British Columbia

(6) Rule 7-2 (27) and (28) applies to examinations and inspections ordered under this rule.

Rule 7-7 — Admissions

Notice to admit

(1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.

Effect of notice to admit

(2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a ***notice to admit*** is ***deemed to be admitted***, for the purposes of the action only, unless, within ***14 days*** after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that

(a) specifically denies the truth of the fact or the authenticity of the document,

(b) sets out in detail the reasons why the party cannot make the admission, or

(c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.

Copy of document to be attached

(3) Unless the court otherwise orders or the demanding party and the responding party consent, a copy of a document specified in a notice to admit must be attached to the notice to admit when it is served.

Unreasonable refusal to admit

(4) If a responding party ***unreasonably*** denies or refuses to admit the truth of a fact or the authenticity of a document specified in a ***notice to admit***, the court may order the party to pay the ***costs of proving*** the truth of the fact or the authenticity of the document and may award as a ***penalty*** additional costs, or ***deprive*** a party of costs, as the court considers appropriate.

Withdrawal of admission

(5) A party is not entitled to withdraw

(a) an admission made in response to a notice to admit,

(b) a ***deemed admission*** under subrule (2) *[see Piso v Thompson]*, or

(c) an admission made in a pleading *[see Hurn v McLellan]*, petition or response to petition

except by consent or with leave of the court.

Application for order on admissions

(6) An application for judgment or any other application may be made to the court using as evidence

(a) admissions of the truth of a fact or the authenticity of a document made

(i) in an affidavit or pleading filed by a party,

(ii) in an examination for discovery of a party or a person examined for discovery on behalf of a party, or

(iii) in response to a notice to admit, or

(b) admissions of the truth of a fact or the authenticity of a document ***deemed*** to be made under subrule (2)

and the court, without waiting for the determination of any other question between the parties, may make any order it considers will further the object of these Supreme Court Civil Rules.

Rule 7-8 — Depositions

Examination of person

(1) By ***consent*** of the parties of record or by ***order*** of the court, a person may be examined on oath before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial.

Examination of person

(2) An examination under subrule (1) may be conducted before an official reporter or any other person as the court may direct.

Grounds for order

(3) In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account

(a) the convenience of the person sought to be examined,

(b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence,

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial,

(d) the possibility and desirability of having the person testify at trial by ***video conferencing*** or other electronic means *[see Campbell v McDougall]*, and

(e) the expense of bringing the person to the trial.

Time limits

(4) In an order under subrule (1), the court may impose ***limits on the duration*** of the direct examination or cross examination of a person under this rule.

Subpoena

(5) If the court makes an order under subrule (1) entitling a party to examine a person under this rule, the party may, by serving on the person to be examined a subpoena in Form 25, require the person to bring to the examination,

(a) if the person to be examined is ***not*** a party of record or a representative of a party of record, ***any document*** in the person's ***possession or control*** relating to the matters in question in the action, and

(b) any ***physical object*** in the person's possession or control that the examining party contemplates tendering at the trial as an exhibit.

Identification of documents and objects

(6) A subpoena referred to in subrule (5)

(a) need not identify any document referred to in subrule (5) (a), and

(b) must identify any object referred to in subrule (5) (b).

Place of examination

(7) Unless the court otherwise orders or the parties to the examination consent, an examination under this rule must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.

Application of rule outside British Columbia

(8) So far as is practicable, this rule applies to the examination of a person residing outside British Columbia, and the court may order the examination of a person in the place and the manner the court considers appropriate.

If person willing to testify

(9) If the person whose examination is ordered under subrule (8) is willing to testify, the order under subrule (8) must be in Form 27 and the instructions to the examiner appointed in the order must be in Form 28.

If person not willing to testify

(10) If the person whose examination is ordered under subrule (8) is unwilling to testify, or if for any other reason the assistance of a foreign court is necessary, the order under subrule (8) must be in Form 29 and the letter of request referred to in the order must be in Form 30.

Letter of request

(11) If an order referred to in subrule (10) is made, the letter of request must be sent by the party obtaining the order to the Under Secretary of State for External Affairs of Canada (or, if the evidence is to be taken in Canada, to the Deputy Attorney General for the Province of British Columbia), and must have attached to it

(a) any interrogatories to be put to the witness,

(b) a list of the names, addresses and telephone numbers of the lawyers or agents of the parties, both in British Columbia and in the other jurisdiction, and

(c) a copy of the letter of request and any interrogatories

(i) translated into the appropriate official language of the jurisdiction where the examination is to take place, and

(ii) *[. . .]*

Filing of undertaking

(12) The lawyer for the party obtaining the order referred to in subrule (10) must file with the Under Secretary of State for External Affairs of Canada (or the Deputy Attorney General for the Province of British Columbia, as the case may be) the

lawyer's undertaking to be personally responsible for all the charges and expenses incurred by the Under Secretary (or the Deputy Attorney General, as the case may be) in respect of the letter of request and to pay those charges and expenses on receiving notification of the amount.

Notice of examination

(13) The examining party must give notice of an examination under this rule by ***serving*** copies of the subpoena referred to in subrule (5) on all parties of record at least ***7 days*** before the date appointed for the examination.

Mode of examination

(14) The examining party must conduct a direct examination of the witness and the witness is subject to cross-examination and re-examination.

Objection to question

(15) If an objection is made to a question put to a witness in an examination under this rule,

(a) the question and the objection must be taken down by the official reporter,

(b) the validity of the objection may, on application, be decided by the court, and

(c) the court may, on an application referred to in paragraph (b), order the witness to submit to further examination.

Recording of deposition evidence

(16) Unless otherwise ordered, an examination under this rule must be recorded by the person authorized under subrule (2) to conduct the examination

(a) in the form of questions and answers, or

(b) on a video recording.

[. . .]

PART 8 — APPLICATIONS

RULE 8-1 — HOW TO BRING AND RESPOND TO APPLICATIONS

Definitions

(1) In this rule:

"application respondent" means a person who files an application response under subrule (9);

"business day" means a day on which the court registries are open for business.

How applications must be brought

(2) To apply for an order from the court ***other than at trial or at the hearing of a petition***, a party must do the following:

(a) in the case of an application for an order by consent, apply in accordance with

(i) this rule, or

(ii) Rule 8-3;

(b) in the case of an application of which notice need not be given, apply in accordance with

(i) this rule, or

(ii) Rule 8-4;

(c) in the case of an urgent application, apply in accordance with Rule 8-5;

(d) *[. . .]*;

(e) in the case of an application for which a procedure is provided for by these Supreme Court Civil Rules, apply in accordance with that procedure;

(f) in the case of any other application, apply in accordance with this rule.

[The ability of a party to a fast track action to bring an application under this Part may be limited – see Rule 15-1 (7) to (9).]

Notice of application

(3) A party wishing to apply under this rule must file

(a) a ***notice of application***, and

(b) the original of every ***affidavit***, and of every other document, that

(i) is to be referred to by the applicant at the hearing, and

(ii) has not already been filed in the proceeding.

Contents of notice of application

(4) A notice of application must be in Form 32 and must

(a) set out the orders sought or attach a draft of the order sought,

(b) briefly summarize the factual basis for the application,

(c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted,

(d) list the affidavits and other documents on which the applicant intends to rely at the hearing of the application,

(e) set out the applicant's estimate of the time the application will take for hearing,

(f) subject to subrules (5) and (6), set out the date and time of the hearing of the application,

(g) set out the place for the hearing of the application in accordance with Rule 8-2, and

(h) provide the data collection information required in the appendix to the form,

and the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length. *[A comprehensive legal analysis can easily be included in a 10-page notice of application: **Zecher v Josh**]*

Date and time of hearing

(5) Subject to subrule (6), the hearing of an application must be set for 9:45 a.m. on a date on which the court hears applications or at such other time or date as has been fixed by the court or a registrar.

Date and time if hearing time more than 2 hours

(6) If the applicant's estimate referred to in subrule (4) (e) is more than 2 hours, the date and time of hearing must be fixed by a registrar.

Service of application materials

(7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on ***every other person*** who ***may be affected*** by the orders sought:

(a) a copy of the filed notice of application;

(b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;

(c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).

*[For effect of failure of service, consider **Bache Halsey Stuart Shields Inc v Charles**]*

Time for service

(8) The documents referred to in subrule (7) of this rule must be served,

(a) subject to paragraph (b) of this subrule, at least 8 business days before the date set for the hearing of the application, or

(b) in the case of an application under Rule 9-7, at least 12 business days before the date set for the hearing of the application.

Application response

(9) A person who is served with documents referred to in subrule (7) of this rule and who wishes to respond to the notice of application (in this subrule called the "responding person") must do the following within 5 business days after service or, in the case of an application under Rule 9-7, within 8 business days after service:

(a) file an application response;
(b) file the original of every affidavit, and of every other document, that
(i) is to be referred to by the responding person at the hearing, and
(ii) has not already been filed in the proceeding;
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and documents, referred to in the application response under subrule (10) (b) (ii), that has not already been served on that person;
(iii) if the application is brought under Rule 9-7, any notice that the application respondent is required to give under Rule 9-7 (9).

Contents of application response

(10) An application response must be in Form 33, must not exceed 10 pages in length and must
(a) indicate, for each order sought on the application, whether the application respondent consents to, opposes or takes no position on the order, and
(b) if the application respondent wishes to oppose any of the relief sought in the application,
(i) briefly summarize the factual and legal bases on which the orders sought should not be granted,
(ii) list the affidavits and other documents to which the application respondent intends to refer at the hearing of the application, and
(iii) set out the application respondent's estimate of the time the application will take for hearing.

Address for service

(11) An application respondent who has not yet provided an address for service in the proceeding must include an address for service in any application response filed under subrule (9), and Rule 4-1 applies.

Repealed

(12) Repealed. [B.C. Reg. 241/2010, Sch. A, s. 1 (g).]

Applicant may respond

(13) An applicant who wishes to respond to any document served under subrule (9) must file and serve on each application respondent any responding affidavits no later than 4 p.m. on the business day that is one full business day before the date set for the hearing.

No additional affidavits

(14) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13).

Application record

(15) Subject to subrule (18), the applicant must provide to the registry where the hearing is to take place, no later than 4 p.m. on the business day that is one full business day before the date set for the hearing, an ***application record*** as follows:
(a) the application record must be in a ring binder or in some other form of secure binding;
(b) the application record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:
(i) a title page *[. . .]*;
(ii) an ***index***; *[see subrule (17)]*
(iii) a copy of the filed notice of application;
(iv) a copy of each filed application response;
(v) a copy of every filed affidavit and pleading, and of every other document other than a written argument, that is to be relied on at the hearing;

(vi) if the application is brought under Rule 9-7, a copy of each filed pleading;

(c) the application record may contain

(i) a draft of the proposed order,

(ii) subject to subrule (16), a ***written argument***,

(iii) a ***list of authorities*** *[see Zecher v Josh]* and

(iv) a draft bill of costs;

(d) the application record must not contain

(i) affidavits of service,

(ii) copies of authorities, including case law, legislation, legal articles or excerpts from text books, or

(iii) any other documents unless they are included with the consent of all the parties of record.

Written argument

(16) Unless an application is estimated to take ***more than 2 hours***, no party to the application may file or submit to the court a ***written argument*** in relation to the application other than that included in the party's notice of application or application response.

Service of application record index

(17) The applicant must serve a copy of the application record ***index*** on each application respondent no later than 4 p.m. on the business day that is one full business day before the date set for the hearing.

If application respondent's application is to be heard at the hearing

(18) If an application respondent intends to set an application for hearing at the same time as the applicant's application, those parties must, so far as is possible, prepare and provide to the registry where the hearing is to take place a joint application record and agree to a date for the hearing of both applications.

[. . .]

RULE 8-2 — PLACE APPLICATION IS HEARD

Place of hearing of application

(1) An application may be heard at

(a) the place ordered by a registrar under subrule (4),

(b) if an order is not made under subrule (4), the place on which all parties of record have agreed, or

(c) if paragraphs (a) and (b) do not apply, a place at which the court normally sits in the judicial district in which the proceeding is being conducted.

If more than one place

(2) If there is more than one place within the judicial district referred to in subrule (1) (c) at which the court normally sits, the applicant may name, as the place for hearing, any of those places.

If place of hearing is a place other than that at which the proceeding is being conducted

(3) If, under subrule (2), the applicant names as the place for hearing a place that is different than the place at which the proceeding is being conducted, the court may, if the court considers that it was unreasonable to have that named place as the place of hearing, make a special order as to costs and may

(a) order that the application be heard at some other place,

(b) dismiss the application, or

(c) hear the application.

Place of hearing of application with leave of registrar

(4) If a registrar is satisfied that, due to urgency or the convenience of the parties, an application should be heard at a place outside the judicial district in which the proceeding is being conducted, the registrar may, without notice, grant leave for the applicant to do either or both of the following:

(a) file the notice of application in some other judicial district;

(b) name as the place of hearing a place in that other judicial district.

Notice of application must be endorsed to reflect grant of leave

(5) If a registrar grants leave under subrule (4), he or she must endorse the notice of application accordingly.

If place of hearing is a place chosen with leave of registrar

(6) If, in respect of an application for which leave was granted under subrule (4), the court at the hearing of the application considers that the application should not be heard at that place, the court may make a special order as to costs and may

(a) order that the application be heard at some other place,

(b) dismiss the application, or

(c) hear the application.

Rule 8-3 — Consent Applications

Application by consent

(1) Subject to subrule (2), an application for an order by consent may be made by filing

(a) a requisition in Form 31,

(b) a draft of the proposed order in Form 34,

(c) evidence, in accordance with Rule 13-1 (10), that the application is consented to, and

(d) *[. . .]*

Consent order

(2) On being satisfied that an application referred to in subrule (1) of this rule is consented to and that the materials appropriate for the application have been filed in accordance with subrule (1), a registrar may

(a) refer the application to a judge or, if the order sought is within the jurisdiction of a master, to a judge or master, or

(b) if the registrar is satisfied that

(i) none of the parties applying for or consenting to the order is under a legal disability, or

(ii) if a party is under a legal disability, section 40 (7) of the *Infants Act* applies,

enter the order or proceed under paragraph (a) of this subrule.

Disposition of referred applications

(3) If an application is referred by a registrar to a judge or master under subrule (2), the judge or master may

(a) make the order, or

(b) give directions respecting the application.

Rule 8-4 — Applications of Which Notice Is Not Required

Application of which notice is not required

(1) An application of which notice is not required may be made by filing

(a) a requisition in Form 31,

(b) a draft of the proposed order in Form 35, and

(c) affidavit or other evidence in support of the application. *[Keep in mind Professional Conduct Handbook 8:21 at p 260]*

Rule 8-5 — Urgent Applications

When Applications May Be Heard on Short Notice

Short notice

(1) Without limiting subrule (6), in case of urgency, a person wishing to bring an application (in this subrule and in subrules (2) to (5) called the "main application") on less notice than would normally be required may make an application (in this subrule and in subrules (2) to (4) called the "short notice application") for an order that the main application may be brought on short notice.

How to make a short notice application

(2) A short notice application may be made by requisition in Form 17, without notice, and in a summary way.

Normal time and notice rules don't apply

(3) The time limits and notice requirements provided in these Supreme Court Civil Rules do not apply to a short notice application.

Powers of court on short notice application

(4) On a short notice application, the court or a registrar may

(a) order that the main application be heard on short notice,

(b) fix the date and time for the main application to be heard,

(c) fix the date and time before which service of documents applicable to the main application must be made, and

(d) give any other directions that the court or registrar considers will further the object of these Supreme Court Civil Rules.

Effect of short notice order

(5) If an order is made under subrule (4) that the main application be heard on short notice, the time limits and notice requirements provided in these Supreme Court Civil Rules do not apply to the main application.

When Applications May Be Heard without Any Notice

Orders without notice

(6) The court may make an order ***without notice*** in the case of urgency. *[See also Professional Conduct Handbook 8:21 at p 260]*

Service of orders required

(7) Promptly after an order is made without notice by reason of urgency, the party who obtained the order must serve a copy of the entered order and the documents filed in support on each person who is affected by the order.

Setting aside orders made without notice

(8) On the application of a person affected by an order made without notice under subrule (6), the court may change or set aside the order.

Rule 8-6 — Applications Made By Written Submissions

Application made by written submissions

(1) If an order is made at a case planning conference that an application may be made by written submissions,

(a) the case planning conference judge or master must give directions respecting the application, *[. . .]*

(b) the application may be made in the manner provided for in those directions.

Part 9 — Pre-Trial Resolution Procedures

Rule 9-1 — Offers to Settle

Definition

(1) In this rule, **"offer to settle"** means

[. . .]

(c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, ***or made under this rule***, that

(i) is made in writing by a party to a proceeding,

(ii) has been served on all parties of record, and

(iii) contains the following sentence: "The .....*[party(ies)]*....., ...*[name(s) of party(ies)]*....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

Offer not to be disclosed

(2) The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, ***until all issues*** in the proceeding, other than costs, ***have been determined***.

Offer not an admission

(3) An offer to settle is not an admission.

Offer may be considered in relation to costs

(4) The court ***may*** consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a proceeding in which an offer to settle has been made, the court ***may*** do one or more of the following:

(a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

(c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;

(d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

Considerations of court

(6) In making an order under subrule (5), the court ***may*** consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

*[See **Ward v Klaus**]*

[. . .]

Counter offer

(8) An offer to settle does not expire by reason that a counter offer is made.

[. . .]

Rule 9-3 — Special Case

Statement of special case

(1) The parties to a proceeding may ***concur*** in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the opinion of the court.

Court may order special case

(2) The court may ***order*** a question or issue arising in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be stated in the form of a special case. *[See William v British Columbia]*

Form of special case

(3) A special case must

(a) be divided into paragraphs numbered consecutively,

(b) state concisely such facts and set out or refer to such documents as may be necessary to enable the court to decide the questions stated, and

(c) be signed by the parties or their lawyers.

Hearing of special case

(4) On the hearing of a special case, the court and the parties may refer to any document mentioned in the special case, and the court may draw from the stated facts and documents any inference, whether of fact or law, that might have been drawn from them if proved at a trial or hearing.

Order after hearing of special case

(5) With the ***consent*** of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

Rule 9-4 — Proceedings on a Point of Law

Point of law may be set down for hearing

(1) A point of law arising from the pleadings in an action may, by ***consent*** of the parties or by ***order*** of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial. *[This rule is appropriate only in places where, assuming the allegations in a **pleading** of the opposite party are true, a question arises whether such allegations raise and support a claim or a defence in law: Harfield v Dominion of Canada General Insurance Co]*

Court may dispose of whole action

(2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

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

(a) it discloses no reasonable claim or defence, as the case may be *[note that subrule (2) on the inadmissibility of evidence applies only to this paragraph]*,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs. *[See Hunt v Carey Canada Inc, plus the cases listed under Striking Pleadings at p 79]*

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

[. . .]

RULE 9-6 — SUMMARY JUDGMENT

Definitions

(1) In this rule:

"answering party" , in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;

"claiming party" means a party who filed an originating pleading.

Application

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on ***all or part of the claim***.

Response to application

(3) An answering party may respond to an application for judgment under subrule (2) as follows:

(a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;

(b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in ***affidavit*** material ***or other evidence***, specific facts showing that there is a ***genuine issue for trial***. *[On evidence requirements generally, see **Int'l Taoist Church of Canada v Ching Chung Taoist Ass'n of Hong Kong**]*

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing ***all or part of a claim*** in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is ***no genuine issue for trial*** with respect to a claim or defence, ***must*** pronounce judgment or dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, ***may*** order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a ***question of law***, ***may*** determine the question and pronounce judgment accordingly *[see **Haghdust v British Columbia Lottery Corporation**]*, and

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

Claiming party may proceed

(6) If, under this rule, a claiming party obtains judgment against a person on a claim made against that person in the originating pleading, the judgment is without prejudice to the right of the claiming party to

(a) proceed with the action in respect of any other claim made, in the originating pleading, against the person against whom the judgment was obtained, and

(b) proceed with the action against any other person against whom a claim is made in the originating pleading.

Costs consequences

(7) Subject to subrule (8), if the party applying under subrule (2) or (4) obtains no relief on the application, the court may

(a) fix the costs of the party responding to the application, and

(b) fix the period within which those costs must be paid.

Court may decline to fix costs

(8) The court may decline to fix and order costs under subrule (7) if the court is satisfied that the application under subrule (2) or (4), although unsuccessful, was nevertheless reasonable.

Bad faith or delay

(9) If it appears to the court that a party to an application under subrule (2) or (4) has acted in bad faith or primarily for the purpose of delay, the court may

(a) fix the costs of the application as special costs, and

(b) fix the period within which those costs must be paid.

RULE 9-7 — SUMMARY TRIAL

Definition

(1) In this rule, **"summary trial application"** means an application referred to in subrule (2).

Application

(2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

(a) an action in which a response to civil claim has been filed;

(b) a proceeding that has been transferred to the trial list under Rule 22-1 (7) (d);

(c) a third party proceeding in which a response to third party notice has been filed;

(d) an action by way of counterclaim in which a response to counterclaim has been filed.

When application must be heard

(3) A summary trial application must be heard at least ***42 days*** before the scheduled trial date.

Setting application for hearing

(4) Unless the court otherwise orders, a summary trial application must be set for hearing in accordance with Rule 8-1.

Evidence on application

(5) Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender evidence by any or all of the following:

(a) ***affidavit***;

(b) an answer, or part of an answer, to ***interrogatories***;

(c) any part of the evidence taken on an ***examination for discovery***; *[note that subrule (6) makes Rule 12-5 (46) apply, and see also **Haughian v Jiwa**]*

(d) an ***admission*** under Rule 7-7;

(e) a ***report*** setting out the opinion ***of an expert***, if

(i) the report conforms with Rule 11-6 (1), or

(ii) the court orders that the report is admissible even though it does not conform with Rule 11-6 (1).

[In addition to these forms of evidence which are available as of right, don't forget that Rule 22-1 (4) also applies and certain other types of evidence will be admissible with leave of the court]

Application of Rule 12-5

(6) Rule 12-5 (46), (49), (50), (51), (56) to (58) applies to subrule (5) of this rule.

Application of Rule 11-6

(7) Rule 11-6 (2) applies to a summary trial application.

Filings with application

(8) A party who applies for judgment under subrule (2)

(a) must serve, with the ***notice of application*** and the other documents referred to in Rule 8-1 (3), every expert report, not already filed, on which the party will rely in support of the application, and

(b) must not serve any further affidavits, expert reports or notices except

(i) to tender evidence that would, at a trial, be admitted as rebuttal evidence,

(ii) to respond to a notice of application filed and served by another party of record, or

(iii) with leave of the court.

Notice of evidence to be used on application

(9) If a party intends, on a summary trial application, to rely on

(a) evidence taken on an examination for discovery,

(b) answers to interrogatories, or

(c) admissions,

the party must give notice of that fact in accordance with subrule (10).

Giving notice

(10) Notice under subrule (9) must be given

(a) by an applicant, in accordance with Rule 8-1 (7) and (8), and

(b) by a party who is not an applicant, in accordance with Rule 8-1 (9).

Adjournment or dismissal

(11) On an application heard before or at the same time as the hearing of a summary trial application, the court may

(a) adjourn the summary trial application, or

(b) dismiss the summary trial application on the ground that

(i) the issues raised by the summary trial application are ***not suitable*** for disposition under this rule, or

(ii) the summary trial application will ***not assist the efficient resolution*** of the proceeding.

*[On the **suitability** issue, see Inspiration Management v McDermid St Lawrence Ltd, Charest v Poch, and Western Delta Lands v 3557537 Canada Inc, and see also subrule (15)(i) and (ii)]*

Preliminary orders

(12) On or before the hearing of a summary trial application, the court may order that

(a) a party file and serve, within a fixed time, any of the following on which the party intends to rely in support of the application:

(i) an affidavit;

(ii) a notice referred to in subrule (9),

(b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for cross-examination, either before the court or before another person as the court directs,

(c) cross-examinations on affidavits be completed within a fixed time,

(d) no further evidence be tendered on the application after a fixed time, or

(e) a party file and serve a brief, with such contents as the court may order, within a fixed time.

Ancillary or preliminary orders may be made at or before application

(13) An order under subrule (11) or (12) may be made by a judge or by a master, and may be made before or at the same time as a summary trial application.

Judge not seized of application

(14) A judge who makes an order under subrule (11) or (12) in relation to a summary trial application is not seized of the summary trial application unless the judge otherwise orders.

Judgment

(15) On the hearing of a summary trial application, the court may

(a) grant ***judgment*** in favour of any party, either ***on an issue or generally***, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

No further application without leave

(16) If the court does not grant judgment under subrule (15), the applicant may not apply again under subrule (2) without leave of the court.

Orders

(17) If the court is unable to grant judgment under subrule (15) and considers that the proceeding ought to be expedited, the court may order the trial of a proceeding generally or on an issue and may

(a) order that the parties attend a case planning conference,

(b) make any order that may be made under Rule 5-3(1), or

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

[. . .]

PART 10 — PROPERTY AND INJUNCTIONS

RULE 10-4 — INJUNCTIONS

Applications for pre-trial injunctions

(1) An application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.

Applications for pre-trial injunctions before proceeding started

(2) An application for a pre-trial injunction may be made ***before the start of a proceeding*** and the injunction may be granted on terms providing for the start of the proceeding.

Applications for interim injunctions without notice

(3) If an application for a pre-trial injunction is made ***without notice***, the court may grant an ***interim*** injunction. *[Don't forget your ethics! Professional Conduct Handbook 8:21 at p 260]*

Injunction by court order

(4) An injunction must be imposed by order of the court.

Undertaking as to damages

(5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's ***undertaking*** to abide by any order that the court may make as to damages. *[On when the court must make a damage assessment where an undertaking has been given, see Vieweger Construction v Rush & Tompkins Construction]*

Application for injunction after judgment

(6) In a proceeding in which an injunction has been or might have been claimed, a party may apply by petition after judgment to restrain another party from the repetition or continuance of the wrongful act or breach of contract established by the judgment or from the commission of any act or breach of a like kind.

PART 11 — EXPERTS

RULE 11-1 — APPLICATION OF PART 11

Application of this Part

(1) This Part does not apply to

(a) summary trials under Rule 9-7, except as provided in that rule, or

(b) a witness giving evidence in an action in relation to a matter if that witness is an individual whose conduct is in issue in the action in relation to that matter.

Case plan order

(2) Unless the court otherwise orders, if a case planning conference has been held in an action, expert opinion evidence must not be tendered to the court at trial unless provided for in the case plan order applicable to the action. *[Here see Rule 5-3(1)(k), although I have elided that paragraph in this summary to save space]*

RULE 11-2 — DUTY OF EXPERT WITNESSES

Duty of expert witness

(1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a ***duty to assist the court*** and is ***not to be an advocate*** for any party.

Advice and certification

(2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),

(b) has made the report in conformity with that duty, and

(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

RULE 11-3 — APPOINTMENT OF JOINT EXPERTS

Appointment agreement

(1) If 2 or more parties who are ***adverse in interest*** wish to or are ordered under Rule 5-3 (1) (k) to jointly appoint an expert, the following must be settled before the expert is appointed:

(a) the identity of the expert;

(b) the issue in the action the expert opinion evidence may help to resolve;

(c) any facts or assumptions of fact agreed to by the parties;

(d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;

(e) the questions to be considered by the expert;

(f) when the report must be prepared by the expert and given to the parties;

(g) responsibility for fees and expenses payable to the expert.

[. . .]

Application to court

(3) If the parties referred to in subrule (1) are unable to agree on the matters referred to in subrule (1), any party may apply, on an application under Part 8, at a case planning conference or at an application to amend the case plan order, to settle the terms of the expert's appointment.

[. . .]

Powers of court

(5) On an application under subrule (3), the court may do one or more of the following:

(a) settle the terms of the appointment referred to in subrule (1) (a) to (h);

(b) if the parties are unable to agree on the identity of the expert, identify the person to be appointed as expert, whether or not that expert is named under subrule (4) (b);

(c) if the application is made at a case planning conference or at an application to amend a case plan order, make or amend a case plan order to reflect the orders made under paragraphs (a) and (b) of this subrule.

Agreement

(6) The parties referred to in subrule (1) must enter into an agreement that reflects the terms agreed on under subrule (2) or ordered under subrule (5), and *[. . .]*

Role of expert appointed under this rule

(7) Unless the court otherwise orders on an application referred to in subrule (8), if an agreement is made under this rule for a joint expert to give expert opinion evidence on an issue, the joint expert is ***the only expert*** who, ***in relation to the parties to the agreement***, may give expert opinion evidence in the action on the issue.

[. . .]

Additional experts

(9) The court may, on an application referred to in subrule (8) of this rule, grant leave for the evidence of an additional expert to be tendered at trial if the court is satisfied that the evidence of that additional expert is necessary to ensure a fair trial.

Cross examination

(10) Each party of record, ***including each of the appointing parties***, has the right to ***cross-examine*** at trial a joint expert appointed under this rule.

Common experts

(11) Nothing in this rule prevents parties who are ***not adverse*** in interest from appointing a common expert.

Rule 11-4 — Appointment of Own Experts

When each party may retain their own experts

(1) Subject to Rule 11-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

Rule 11-5 — Appointment of Court's Own Expert

Appointment of experts by court

(1) Subject to this rule, the court may, ***on its own initiative*** at any stage of an action, appoint an expert if it considers that expert opinion evidence ***may*** help the court in resolving an issue in the action.

Materials required by court

(2) In deciding whether to appoint an expert under this rule in relation to an issue in an action, the court may

(a) ask each party of record to name one or more persons who

(i) are ***qualified*** to give expert opinion evidence on the issue, and

(ii) have been made aware of the content of this Part and ***consent*** to being appointed,

(b) require each party of record to state any connection between an expert named under paragraph (a) and a party to the action, and

(c) receive other material and make other inquiries to help decide which expert to appoint.

Court may name different expert

(3) The court may appoint an expert under this rule whether or not that expert was named by a party under subrule (2) (a).

Expert must consent

(4) The court may appoint an expert under this rule if the expert consents to the appointment after he or she has been made aware of the content of this Part.

Previous report not a bar

(5) The court may appoint an expert under this rule in relation to an issue even if that expert has already given a report to a party on the issue or on another issue in the action.

Consequences of court appointment

(6) Unless the court otherwise orders, if an expert is appointed under this rule to give expert opinion evidence on an issue, each party of record has the right to ***cross-examine*** the expert.

Directions to expert

(7) The court, after consultation with the parties of record, must

(a) settle the questions to be submitted to any expert appointed by the court under this rule,

(b) give the expert any directions the court considers appropriate, and

(c) give the parties of record any directions the court considers appropriate to facilitate the expert's ability to provide the required opinion.

[. . .]

Security for remuneration

(10) The court may make one or both of the following orders without prejudice to any party's right to costs:

(a) an order directing that the expert's remuneration be paid by the persons and at the time ordered by the court;

(b) an order for security for the expert's remuneration.

Reports

(11) An expert appointed under this rule must

(a) prepare a report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs, and

(b) if the expert's opinion changes in a material way after an expert's report is sent to the registry under paragraph (a), prepare a supplementary report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs.

Report must be tendered as evidence

(12) Each report and supplementary report of an expert appointed by the court under this rule ***must*** be tendered as evidence at the trial of the action, unless the trial judge otherwise orders.

RULE 11-6 — EXPERT REPORTS

Requirements for report

(1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2(2) and must set out the following:

(a) the expert's name, address and ***area of expertise***;

(b) the expert's ***qualifications*** and employment and educational experience in his or her area of expertise;

(c) the instructions provided to the expert in relation to the proceeding;

(d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;

(e) the expert's opinion respecting those issues;

(f) the expert's reasons for his or her opinion, including

(i) a description of ***the factual assumptions*** on which the opinion is based,

(ii) a description of ***any research*** conducted by the expert that led him or her to form the opinion, and

(iii) a list of ***every document***, if any, relied on by the expert in forming the opinion.

Proof of qualifications

(2) The assertion of ***qualifications*** of an expert is ***evidence*** of them. *[But it does not necessarily follow that the assertion of qualifications yields a finding that the witness is a "qualified expert". Furthermore, the description of the area of expertise and qualifications must assist a judge, as a lay person, in understanding what opinions the expert is qualified to give: : **Turpin v Manufacturers Life Insurance Co**]*

Service of report

(3) Unless the court otherwise orders, at least ***84 days*** before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record, along with written notice that the report is being served under this rule,

(a) by the party who intends, with leave of the court under Rule 11-3 (9) ***or otherwise***, to tender the expert's report at trial, or

(b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.

Service of responding report

(4) Unless the court otherwise orders, if a party intends to tender an expert's report at trial to respond to an expert witness whose report is served under subrule (3), the party must serve on every party of record, at least ***42 days*** before the scheduled trial date,

(a) the responding report, and

(b) notice that the responding report is being served under this rule.

Supplementary report of joint or court-appointed expert

(5) If, after an expert's report is served under subrule (3) (b), the expert's opinion ***changes in a material way***,

(a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party who served the report under subrule (3), and

(b) the party to whom the supplementary report is provided under paragraph (a) of this subrule must promptly serve that supplementary report on every other party of record.

Supplementary report of own expert

(6) If, after an expert's report is served under subrule (3) (a) or (4), the expert's opinion ***changes in a material way*** and the party who served the report intends to tender that expert's report at trial despite the change,

(a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and

(b) the party must promptly serve that supplementary report on every other party of record.

Requirements for supplementary report

(7) A supplementary report under Rule 11-5 (11) or under subrule (5) (a) or (6) (a) of this rule must

(a) be identified as a supplementary report,

(b) be signed by the expert,

(c) include the certification required under Rule 11-2 (2), and

(d) set out the change in the expert's opinion and the reason for it.

Production of documents

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

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

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

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

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

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

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

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

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

*[See **Vancouver Community College v Phillips, Barratt**. This rule appears to be a codification of earlier decisions taken in the VCC proceeding. See also **Delgamuukw v British Columbia (No. 2)**, which provides a guide for what must be disclosed as part of the "expert's file".]*

Notice of trial date to expert

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

Notice of objection to expert opinion evidence

(10) A party who receives an expert report or supplementary report under this Part must, on the ***earlier of*** the date of the trial management conference and the date that is ***21 days*** before the scheduled trial date, serve on every party of record a ***notice of any objection*** to the admissibility of the expert's evidence that the party receiving the report or supplementary report intends to raise at trial.

When objection not permitted

(11) Unless the court otherwise orders, if reasonable notice of an objection could have been given under subrule (10), the objection must not be permitted at trial if that notice was not given.

Rule 11-7 — Expert Opinion Evidence at Trial

Reports must be prepared and served in accordance with rules

(1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless

(a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and

(b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

When report stands as evidence

(2) Unless the court otherwise orders, the following apply to a report or supplementary report of an expert:

(a) if, within ***21 days*** after service of the report or within such other period as the court may order, a demand is made under subrule (3) of this rule that the expert who made the report attend at trial for ***cross-examination***, the report must not be tendered or accepted as evidence at the trial unless the appointing party calls the expert at trial to be cross-examined in compliance with the demand;

(b) if no such demand is made under subrule (3) within the demand period referred to in paragraph (a) of this subrule,

(i) the expert whose report has been served under this Part need not attend at trial to give oral testimony, and

(ii) the report, if admissible, may be tendered and accepted as evidence at the trial.

Cross-examination of expert

(3) A party of record may demand that an expert whose report has been served on the parties of record under Rule 11-6 attend at the trial for ***cross-examination*** as follows:

(a) if the expert was jointly appointed under Rule 11-3 or was appointed by the court under Rule 11-5, any party of record may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for ***cross-examination*** by that party or by any of the other parties of record;

(b) if the expert was appointed by a party under Rule 11-4 or by a party with leave of the court granted under Rule 11-3 (9), any party of record who is ***adverse in interest*** to the party who appointed that expert may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for ***cross-examination***.

Costs of cross-examination

(4) If an expert has been required to attend at trial for cross-examination by a demand under subrule (3) and the court is of the opinion that the ***cross-examination was not of assistance***, the court may order the party who demanded the attendance of the expert to pay to the other party or to the expert costs in an amount the court considers appropriate.

Restrictions on calling expert as witness at trial

(5) Unless the court otherwise orders, if a party appoints an expert under Rule 11-3 (9) or 11-4,

(a) the party ***must not call the expert to give oral evidence*** at trial ***unless***

(i) the expert's attendance has been ***demanded*** under subrule (3) of this rule, or

(ii) the expert's report has been served in accordance with Rule 11-6, the party ***believes direct examination*** of the expert is ***necessary*** to ***clarify*** terminology in the report or to ***otherwise make the report more understandable*** and any direct examination of that expert is limited to those matters, and

(b) the party must not cross-examine the expert at trial.

When court may dispense with requirement of this Part

(6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if

(a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,

(b) the non-compliance is unlikely to cause prejudice

(i) by reason of an inability to prepare for cross-examination, or

(ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or

(c) the interests of justice require it.

PART 12 — TRIAL

RULE 12-1 — HOW TO SET TRIAL FOR HEARING

[. . .]

Notice of trial

(2) To set a proceeding for trial, a party must file a notice of trial in Form 40.

[Special rules apply to fast track actions in relation to the setting of trials – see Rule 15-1 (13) and (14).]

[. . .]

When notice of trial must be served

(6) Promptly after a notice of trial has been filed, the plaintiff, or such other party as may be ordered by the court, must serve a copy of the filed notice of trial on all parties of record.

[. . .]

RULE 12-2 — TRIAL MANAGEMENT CONFERENCE

Date for trial management conference

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

Trial management conference must be conducted by judge

(2) A trial management conference must be conducted by a judge or master and, if reasonably practicable, is to be conducted by the judge who will preside at the trial.

Trial brief required

(3) Unless the court otherwise orders, each party of record must, at least ***7 days before*** the date set for the trial management conference,

(a) file a ***trial brief*** in Form 41, and

(b) serve a copy of the filed trial brief on all parties of record.

Who must attend the trial management conference

(4) Unless the court otherwise orders, the following persons must attend a trial management conference in person:

(a) each lawyer representing a party of record;

(b) subject to the exception set out in subrule (5), each party of record.

Absent parties must be available and accessible by telephone or other means

(5) A party of record need not attend the trial management conference in person if the party is represented by a lawyer and one of the following is readily available for consultation during the trial management conference, either in person or by telephone:

(a) the party;

(b) an individual who

(i) has full authority to make decisions for that party concerning the action, or

(ii) has ready access to a person who has, or to a group of persons who collectively have, full authority to make decisions for that party concerning the action.

[. . .]

Non-attendance at trial management conference

(7) If a person who, under subrule (4), is required to attend a trial management conference fails to attend at that trial management conference, the trial management conference judge or master may do one or more of the following:

(a) proceed in the absence of the person who failed to attend;

(b) adjourn the trial management conference;

(c) order that the person, or the party on whose behalf the person was to attend, pay costs to one or more other parties.

Proceedings must be recorded

(8) Proceedings at a trial management conference must be recorded, but no part of that recording may be made available to or used by any person without court order.

Orders at a trial management conference

(9) The judge or master presiding at a trial management conference may consider the following and, without limiting the ability of the trial judge or master to make other orders at trial, may, whether or not on the application of a party, make orders respecting one or more of the following:

(a) a plan for how the trial should be conducted;

[. . .]

(q) any other matter that may assist in making the trial more efficient;

(r) any other matter that may aid in the resolution of the proceeding;

(s) any orders the judge considers will further the object of these Supreme Court Civil Rules.

[. . .]

Prohibited orders

(11) A trial management conference judge or master must not, at a trial management conference,

(a) hear any application for which ***affidavit evidence*** is required, or

(b) make an order for ***final judgment***, except by consent.

[. . .]

Rule 12-3 — Trial Record

Trial record for the court

(1) The party who files a notice of trial must file a trial record for the court, which trial record must contain

(a) the pleadings,

(b) particulars served under a demand, together with the demand made,

(c) the case plan order, if any,

(d) any order relating to the conduct of the trial, and

(e) any document required by a registrar under subrule (2).

[. . .]

Filing and service of trial record

(3) The party referred to in subrule (1) must

(a) file the trial record at least ***14 days*** before but not more than ***28 days*** before the scheduled trial date, and

(b) promptly after filing, serve a copy of the filed trial record on the other parties of record.

[. . .]

Rule 12-4 — Trial Certificate

Trial certificate

(1) Each party of record must file a trial certificate in Form 42 in the registry where the trial is to be held.

When trial certificate must be filed

(2) A trial certificate must be filed at least ***14 days*** before but not more than ***28 days*** before the scheduled trial date.

What trial certificate must contain

(3) A trial certificate must contain the following:

(a) a statement that the party filing the trial certificate will be ready to proceed on the scheduled trial date;

(b) a statement certifying that the party filing the trial certificate has completed all examinations for discovery that the party intends to conduct;

(c) the party's current estimate of the length of the trial;

(d) a statement that a trial management conference has been conducted in the action.

Service

(4) Promptly after filing a trial certificate, the filing party must serve a copy of the filed trial certificate on all parties of record.

Failure to file

(5) Unless the court otherwise orders, if no party of record files a trial certificate, the trial must be removed from the trial list.

Rule 12-5 — Evidence and Procedure at Trial

[. . .]

Persons against whom discovery evidence is admissible

(46) If ***otherwise admissible***, the evidence given on an examination for discovery by a party or by a person examined under Rule 7-2 (5) to (10) may be tendered in evidence at trial by any party ***adverse in interest***, unless the court otherwise orders, but the evidence is admissible against the following persons only:

(a) the ***adverse party*** who was examined;

(b) the ***adverse party*** whose status as a party entitled the examining party to conduct the examination under Rule 7-2 (5) to (10) *[i.e. in the case of a corporation &c]*;

(c) if the person was examined under section 17 of the *Class Proceedings Act* as a member of a class, the members of that class.

[See also: Rule 9-7(5)(c), Rule 22-2(12), and the case of Haughian v Jiwa]

[. . .]

Part 13 — Orders

Rule 13-1 — Orders

Drawing and approving orders

(1) An order of the court

(a) subject to subrule (15), may be drawn up by any party,

(b) subject to subrule (2) and paragraph (c) of this subrule, ***must***, unless the court otherwise orders, be ***approved*** in writing by all parties of record or their lawyers, *[see Halvorson v British Columbia (Medical Services Commission)]*

(c) need not be approved by a party who has not consented to it and who did not attend or was not represented at the trial or hearing following which the order was made, and

(d) after approval under this rule, must be left with a registrar to have the seal of the court affixed.

When approval in writing not required

(2) If an order is signed or initialled by the presiding judge or master, that order need not be approved in writing by a lawyer or by a party.

Form of order

(3) Unless these Supreme Court Civil Rules otherwise provide,

(a) an order made without a hearing and by consent must be in Form 34,

(b) an order made after a trial must be in Form 48, and

(c) any other order must be in Form 35.

Endorsement of order on application sufficient in certain cases

(4) If an order has been made substantially in the same terms as requested, and if the court endorses the notice of application, petition or other document to show that the order has been made or made with any variations or additional terms shown in the endorsement, it is not necessary to draw up the order, but the endorsed document must be filed.

Order granted conditionally on document to be filed

(5) If an order may be entered on the filing of a document, the party seeking entry of the order must file the document when leaving the draft order with a registrar, and the registrar must examine the document and, if satisfied that it is sufficient, must enter the order accordingly.

Waiver of order obtained on condition

(6) If a person who has obtained an order on condition does not comply with the condition, the person is deemed to have abandoned the order so far as it is beneficial to the person and, unless the court otherwise orders, any other person interested in the proceeding may take either the steps the order may warrant or the steps that might have been taken if the order had not been made.

Order of judge or master

(7) An order of a single judge or master is an order of the court.

Date of order

(8) An order

(a) must be dated as of the ***date on which it was pronounced*** or, if made by a registrar, as of the date on which it is signed by the registrar, and

(b) unless the court otherwise orders, ***takes effect*** on the day of its date.

Approval of order

(9) An order may be approved by any judge.

Requirement of consent order

(10) A consent order must not be entered unless the consent of each party of record affected by the order is signified as follows:

(a) if the party is represented by a lawyer, by the signature of the lawyer;

(b) if the party is not represented by a lawyer,

(i) by the oral consent of the party who attends before the court or a registrar, or

(ii) by the written consent of the party.

Settlement of orders

(11) An order must be settled, when necessary, by a registrar, who may refer the draft to the judge or master who made the order.

Appointment to settle

(12) A party may file an appointment in Form 49 to settle an order and must serve a copy of the filed appointment and a draft order on all parties whose approval of the order is required under subrule (1) at least one day before the time fixed by the appointment.

Party failing to attend on appointment to settle

(13) If a party fails to attend at the time appointed for the settlement of an order, a registrar may settle the order in the party's absence.

Review of settlement

(14) The court may review and vary the order as settled.

Registrar may draw order

(15) The court may direct a registrar to draw up and enter an order.

Special directions for entry or service

(16) The court may give special directions respecting the entry or service of an order.

Correction of orders

(17) The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

Opinions, advice and directions of the court

(18) The opinion, advice or direction of the court must be entered in the same manner as an order of the court and is to be termed a "judicial opinion", "judicial advice" or "judicial direction", as the case may require.

Orders on terms and conditions

(19) When making an order under these Supreme Court Civil Rules, the court may impose terms and conditions and give directions it considers will further the object of these Supreme Court Civil Rules.

PART 14 — COSTS

RULE 14-1 — COSTS

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as ***party and party*** costs in accordance with Appendix B ***unless*** any of the following circumstances exist:

(a) the parties ***consent*** to the amount of costs and file a certificate of costs setting out that amount;

(b) the court orders that

(i) the costs of the proceeding be assessed as ***special costs***, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as ***special costs*** in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(c) the court awards ***lump sum costs*** for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;

(d) the court awards ***lump sum costs*** in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;

(f) subject to subrule (10) of this rule,

(i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100,000 or less, exclusive of interest and costs, or

(ii) the trial of the action was completed within 3 days or less,

in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Assessment of party and party costs

(2) On an assessment of ***party and party costs*** under Appendix B, a registrar must

(a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and

(b) consider Rule 1-3 and any case plan order.

Assessment of special costs

(3) On an assessment of special costs, a registrar ***must***

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

[. . .]

Costs to follow event

(9) Subject to subrule (12), costs of a proceeding ***must*** be awarded to the successful party ***unless*** the court otherwise orders.

[. . .]

Costs where party represented by an employee

(11) A party is not disentitled to costs merely because the party's lawyer is an employee of the party.

Costs of applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[. . .]

Disallowance of fees and costs

(33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

(a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;

(b) order that the lawyer ***indemnify*** his or her client for all or part of any costs that the client has been ordered to pay to another party;

(c) order that the lawyer be ***personally liable*** for all or part of any costs that his or her client has been ordered to pay to another party *[For an English case where this was done, see **Myers v Elman**]*;

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

[. . .]

PART 15 — FAST TRACK LITIGATION PROCEEDINGS

RULE 15-1 — FAST TRACK LITIGATION

When rule applies

(1) Subject to subrule (4) and unless the court otherwise orders, this rule applies to an action if

(a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is $100,000 or less, exclusive of interest and costs:

(i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;

(ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;

(iii) the fair market value, as at the date the action is commenced, of

(A) all real property and all interests in real property, and

(B) all personal property and all interests in personal property

claimed in the action by the plaintiff,

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

(c) the parties to the action consent, or

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

Subsequent filings

(2) If this rule applies to an action,

(a) any party may file a notice of fast track action in Form 61,

(a.1) the filing party must serve a copy of the filed notice of fast track action on each of the other parties of record, and

(b) the words "Subject to Rule 15-1" must be added to the style of proceeding, immediately below the listed parties, for all documents filed after the notice of fast track action is filed under paragraph (a) or the court order is made under subrule (1) (d), as the case may be.

Damages not limited

(3) Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of $100,000.

Rule does not apply to class proceedings

(4) This rule does not apply to a class proceeding within the meaning of the *Class Proceedings Act*.

Conflict

(5) These Supreme Court Civil Rules apply to a fast track action but in the event of a conflict between this rule and another rule, this rule applies.

When rule ceases to apply

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

Case planning conference required

(7) Subject to subrule (8), a party to a fast track action must not serve on another party a notice of application or an affidavit in support of an application unless a case planning conference or a trial management conference has been conducted in relation to the action.

Exception

(8) Subrule (7) does not apply to an application made

(a) for an order under subrule (6) that this rule cease to apply to the action,

(b) to obtain leave to bring an application referred to in subrule (9),

(c) under Rule 9-5, 9-6 or 9-7,

(d) to add, remove or substitute a party, or

(e) by consent.

Court may relieve

(9) On application by a party, a judge or master may relieve a party from the requirements of subrule (7) if

(a) it is impracticable or unfair to require the party to comply with the requirements of subrule (7), or

(b) the application referred to in subrule (7) is urgent.

Trial to be without jury

(10) A trial of a fast track action must be heard by the court without a jury.

Oral discovery

(11) Unless the court otherwise orders, in a fast track action the examinations for discovery of a party of record, including any person referred to in Rule 7-2 (1) (b) who is examined in relation to that party of record, by ***all*** parties of record who are ***adverse in interest*** must not, in ***total***, exceed in duration

(a) 2 hours *[see also Rule 7-2(2)(a)]*, or

(b) any greater period to which the person to be examined consents.

When discoveries must be completed

(12) Unless the court otherwise orders or the parties to the examination consent, all examinations for discovery in a fast track action must be completed at least ***14 days*** before the scheduled ***trial*** date.

Setting of trial date

(13) If a party to a fast track action applies for a trial date within 4 months after the date on which this rule becomes applicable to the action, the registrar must set a date for the trial that is not later than 4 months after the application for the trial date.

If trial will require more than 3 days

(14) If, as a result of the trial management conference in a fast track action, the trial management conference judge or master considers that the trial will likely require more than 3 days, the trial management conference judge or master

(a) may adjourn the trial to a date to be fixed as if the action were not subject to this rule, and

(b) is not seized of the action.

Costs

(15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:

(a) if the time spent on the hearing of the trial is one day or less, $8 000;

(b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9 500;

(c) if the time spent on the hearing of the trial is more than 2 days, $11 000.

Settlement offers

(16) In exercising its discretion under subrule (15), the court may consider an ***offer to settle*** as defined in Rule 9-1.

[. . .]

PART 16 — PETITION PROCEEDINGS

RULE 16-1 — PETITIONS

Definitions

(1) In this rule, **"petition respondent"** means a person who files a response to petition under subrule (4).

Petitions

(2) A person wishing to bring a proceeding referred to in Rule 2-1 (2) by filing a petition must file a petition in Form 66 and each affidavit in support.

Service

(3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.

Response to petition

(4) A person who has been served with a copy of a filed petition under subrule (3) of this rule must, if the person wishes to receive notice of the time and date of the hearing of the petition, do the following:

(a) file a response to petition in accordance with subrule (5);

(b) file, with the response to petition, all affidavits that have not already been filed and on which the person intends to rely at the hearing of the petition;

(c) unless the court otherwise orders, serve on the petitioner 2 copies and on every other party of record one copy of each document filed under paragraph (a) or (b) as follows:

(i) if the petition respondent was served with the petition anywhere in Canada, within ***21 days*** after that service;

(ii) if the petition respondent was served with the petition anywhere in the United States of America, within ***35 days*** after that service;

(iii) if the petition respondent was served with the petition anywhere else, within ***49 days*** after that service.

[. . .]

PART 18 — OTHER COURT PROCEEDINGS

RULE 18-3 — APPEALS

Application

(1) If an appeal or an application in the nature of an appeal from a decision, direction or order of any person or body, including the Provincial Court, is authorized by an enactment to be made to the court or to a judge, the appeal is governed by this rule to the extent that this rule is not inconsistent with any procedure provided for in the enactment.

Form

(2) An appeal is to be started by filing in a registry a ***notice of appeal*** in Form 73 or 74.

Directions

(3) A ***notice of appeal*** must include

(a) the standard set of directions, in the form directed by the Chief Justice, governing the conduct of the appeal, or
(b) an application for directions as to the conduct of the appeal.

Conduct of appeal

(4) If the notice of appeal includes a standard set of directions under subrule (3) (a), the appeal must be conducted in accordance with those directions unless the court otherwise orders.

Application for directions

(5) Unless the court otherwise orders, an application for directions under subrule (3) (b) must be set for hearing on a date that is at least 7 days after the date on which the notice of appeal is served in accordance with subrule (6).

Service of notice of appeal

(6) Unless the court otherwise orders, a notice of appeal must be served on
(a) the person or body that gave the decision or direction, or made the order, being appealed, and
(b) all other persons who may be affected by the order sought.

Powers of court

(7) The court may give directions for the proper hearing and determination of an appeal and, without limiting this, may make an order
(a) that documents, transcripts or minutes be produced,
(b) that evidence be tendered by way of affidavit, or that it be given orally,
(c) that the appeal be determined by way of stated case or argument on a point of law,
(d) prescribing time limits for taking steps in and for the hearing of the appeal, or
(e) that the appeal be disposed of summarily,
and may exercise any of the powers of the court exercisable in a petition proceeding.

Filing notice of interest

(8) A person who intends to oppose an appeal must,
(a) file a notice of interest in Form 70 within the following period:
(i) if the person was served with the notice of appeal anywhere in Canada, within 14 days after that service;
(ii) if the person was served with the notice of appeal anywhere in the United States of America, within 28 days after that service;
(iii) if the person was served with the notice of appeal anywhere else, within 42 days after that service, and
(b) promptly after filing the notice of interest, serve a copy of the filed notice of interest on the appellant.

Notice of hearing of appeal

(9) After obtaining from a registrar a date for the hearing of the appeal, the appellant must, if the appellant wishes to proceed with the appeal, set the appeal for hearing on that date by
(a) filing a notice of hearing of appeal in Form 75, and
(b) serving a copy of the filed notice of hearing of appeal on all parties of record.

Notice of abandonment of appeal

(10) An appellant may abandon an appeal by
(a) filing a notice of abandonment of appeal in Form 76, and
(b) serving a copy of the filed notice of abandonment of appeal on all parties of record.

PART 20 — SPECIAL RULES FOR CERTAIN PARTIES

RULE 20-1 — PARTNERSHIPS

Partners may sue or be sued in firm name

(1) Two or more persons claiming to be entitled, or alleged to be liable, as partners may sue or be sued in the name of the firm in which they were partners at the time when the alleged right or liability arose.

Service on firm

(2) Service is effected on a firm by leaving a copy of the document to be served with

(a) a person who was a partner at the time the alleged right or liability arose, or

(b) a person at a place of business of the firm who appears to manage or control the partnership business there.

Responding pleading

(3) A responding pleading or a response to petition by a partnership must be in the name of the firm, but a partner or a person served as a partner may file a responding pleading or a response to petition and defend in the person's own name, whether or not named in the originating pleading or petition.

Affidavit naming partners

(4) If a firm is a party to a proceeding, any other party may serve a notice requiring one of the partners to serve, within 10 days, an affidavit setting out the names and addresses of all persons who were partners when the alleged right or liability arose.

Court may order service

(5) If the affidavit requested under subrule (4) is not served, the court may order service.

Execution against partnership property

(6) If an order is made against a firm, execution to enforce the order may issue against any property of the firm.

Execution against partners

(7) Without limiting subrule (8), if an order is made against a firm, execution to enforce the order may issue against any person who

(a) filed a responding pleading or response to petition in the proceeding in the person's own name as a partner,

(b) having been served with the originating pleading or petition as a partner, failed to file a responding pleading or response to petition in the proceeding,

(c) admitted in a pleading or affidavit that the person is a partner, or

(d) was adjudged to be a partner.

Execution against other persons

(8) If a party who has obtained an order against a firm claims that a person who is not a person described in subrule (7) is liable to satisfy the order as being a member of the firm, the party may apply to the court for leave to issue execution against that person.

Liability may be determined

(9) If the person against whom an application under subrule (8) is made disputes liability, the court may order that the liability of the person be determined in any manner in which an issue or question in an action may be determined.

Action against person carrying on business in a name other than the person's own

(10) *[. . .]*

RULE 20-2 — PERSONS UNDER DISABILITY

Interpretation

(1) In this rule, **"committee"** means the committee, appointed under the *Patients Property Act,* of the estate of a patient.

Start of proceedings by person under disability

(2) A proceeding brought by or against a person under ***legal disability*** must be started or defended by his or her litigation guardian.

Role of litigation guardian

(3) Unless a rule otherwise provides, anything that is required or authorized by these Supreme Court Civil Rules to be done by or invoked against a party under disability must

(a) be done on the party's behalf by his or her litigation guardian, or

(b) be invoked against the party by invoking the same against the party's litigation guardian.

Lawyer must be involved

(4) A litigation guardian must act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

Litigation guardian

(5) Unless the court otherwise orders or an enactment otherwise provides, a person ordinarily resident in British Columbia may be a litigation guardian of a person under disability without being appointed by the court.

[. . .]

Party becoming incompetent

(10) If a party to a proceeding becomes a mentally incompetent person, the court must appoint a litigation guardian for him or her unless

(a) a committee has been appointed for the party, or

(b) the party has a litigation guardian under section 35 (1) of the *Representation Agreement Act.*

Removal of litigation guardian

(11) If it is in the interest of a party who is under disability, the court may remove, appoint or substitute a litigation guardian.

Party attaining age of majority

(12) A party to a proceeding who attains the age of majority may, if the party is then under no legal disability,

(a) file an affidavit, in Form 78, confirming the attainment of the age of majority, and

(b) serve a copy of the filed affidavit on all parties of record.

Effect of filing affidavit

(13) After an affidavit is filed under subrule (12) (a),

(a) the party on whose behalf the affidavit was filed assumes conduct of that party's claim or defence in the proceeding, and

(b) the style of proceeding must no longer refer to a litigation guardian for that party.

Step in default

(14) A party must not take a step in default against a person under disability without leave of the court.

Service

(15) Unless the court otherwise orders, notice of an application for leave under subrule (14) must be served, in the manner provided by Part 4, on the person under disability at least 10 days before the hearing of the application.

Litigation guardian must be appointed

(16) If no response to civil claim, response to counterclaim, response to third party notice or response to petition has been filed to an originating pleading or petition on behalf of a person under disability, the person who started the proceeding, before continuing the proceeding against the person under disability, must obtain an order from the court appointing a litigation guardian for the person under disability.

Compromise by person under disability

(17) Unless an enactment otherwise provides, if a claim is made by or on behalf of a person under disability, no ***settlement***, compromise, payment or acceptance of money paid into court, whenever entered into or made, so far as it relates to that person's claim, is binding without the ***approval*** of the court.

Approval of compromise

(18) If, before a proceeding is started, an agreement is reached for the settlement or compromise of a claim of a person under disability, whether alone or with others, and it is desired to obtain the court's approval, application may be made by petition or, if Rule 17-1 (1) applies, by requisition, and the court may make any order it considers will further the object of these Supreme Court Civil Rules.

Rule 20-3 — Representative Proceedings

Representative proceeding

(1) If numerous persons have the ***same interest*** in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

Court may appoint representative

(2) At any stage of a proceeding referred to in subrule (1), the court, on the application of a party, may appoint one or more of the defendants or respondents or another person to represent one or more of the persons having the same interest in the proceeding, and if the court appoints a person not named as a defendant or a respondent, the court must make an order under Rule 6-2 adding that person as a defendant or respondent.

Enforcement of order made in representative proceeding

(3) An order made in a proceeding referred to in subrule (1) of this rule is binding on all the persons represented in the proceeding as parties, but must not be enforced against a person not a party to the proceeding except with leave of the court.

Application for leave

(4) An application for leave under subrule (3) must be served on the person against whom the applicant seeks to enforce the order, and the person served with the application for leave may dispute liability to have the order enforced against him or her.

[. . .]

Part 21 — Special Rules for Certain Proceedings

Rule 21-8 — Jurisdictional Disputes

Disputed jurisdiction

(1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a ***jurisdictional response*** in Form 108,

(a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,

(b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or

(c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

Order declining jurisdiction may be sought

(2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

Disputed pleading or service

(3) If a party who has been served with an originating pleading or petition in a proceeding, whether served in or outside British Columbia, alleges that the notice of civil claim, counterclaim, third party notice or petition is invalid or has expired or that the purported service of the notice of civil claim, counterclaim, third party notice or petition was invalid, the party may, after filing a ***jurisdictional response*** in Form 108, apply for one or both of the following:

(a) an order setting aside the notice of civil claim, counterclaim, third party notice or petition;

(b) an order setting aside service of the notice of civil claim, counterclaim, third party notice or petition.

Powers of court pending resolution

(4) *[. . .]*

Party does not submit to jurisdiction

(5) If, within 30 days after filing a ***jurisdictional response*** in a proceeding, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1) (c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:

(i) the jurisdictional response;

(ii) a pleading or a response to petition under subrule (1) (c);

(iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the proceeding on its merits.

Rule 21-9 — Negligence Act Claims

Contribution or indemnity claimed under the *Negligence Act*

(1) A defendant who claims ***contribution or indemnity*** under the ***Negligence Act*** *[i.e. under section 4]* from a person must do so,

(a) if the person against whom the claim is to be made is a plaintiff, by counterclaim, or

(b) in any other case, whether or not the person against whom the claim is to be made is a party to the action, by third party notice.

Apportionment of liability claimed under the *Negligence Act*

(2) A defendant who does not claim contribution or indemnity under the ***Negligence Act*** but who does claim an ***apportionment*** of liability under that Act *[i.e. under section 1]* must claim that apportionment in the response to civil claim.

PART 22 — GENERAL

RULE 22-1 — CHAMBERS PROCEEDINGS

Definition

(1) In this rule, **"chambers proceeding"** includes the following:

(a) a petition proceeding;

(b) a requisition proceeding that has been set for hearing under Rule 17-1 (5) (b);

(c) an ***application***, including, without limitation, the following:

(i) an application to change or set aside a judgment;

(ii) a matter that is ordered to be disposed of other than at trial;

(d) an ***appeal*** from, or an application to confirm, change or set aside, an order, a report, a certificate or a recommendation of a master, registrar, special referee or other officer of the court;

(e) an action that has, or issues in an action that have, been ordered to be proceeded with by affidavit or on documents before the court, and stated cases, special cases and hearings on a point of law;

(f) an application for judgment under Rule 3-8, 7-7 (6), 9-6 or 9-7.

Failure of party to attend

(2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

Evidence on an application

(4) On a chambers proceeding, evidence ***must*** be given by ***affidavit***, but the court may

(a) order the attendance for ***cross-examination*** of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

(b) order the ***examination*** of a party or witness, either before the court or before another person as the court directs,

(c) give directions required for the discovery, inspection or production of a document or copy of that document,

(d) order an inquiry, assessment or accounting under Rule 18-1, and

(e) receive ***other forms of evidence***. *[See **MTU Maintenance Canada v Kuehne & Nagel Int'l** at p 147]*

[. . .]

Power of the court

(7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may

(a) grant or refuse the relief claimed in whole or in part, or ***dispose of any question arising*** *[but see **Bache Halsey Stuart Shields Inc v Charles**]* on the chambers proceeding,

(b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,

(c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and

(d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding. *[See **Southpaw Credit v Asian Coast Development (Canada) Ltd**]*

Powers of court if notice not given

(8) If it appears to the court that notice of a chambers proceeding ought to have been but was not served on a person, the court may

(a) dismiss the chambers proceeding or dismiss it only against that person,

(b) adjourn the chambers proceeding and direct that service be effected on that person or that notice be given in some alternate manner to that person, or

(c) direct that any order made, together with any other documents the court may order, be served on that person.

Urgent chambers proceeding

(9) Rules 8-4 and 8-5 apply to chambers proceedings.

Adjournment

(10) The hearing of a chambers proceeding may be adjourned from time to time by a registrar.

Notes of applications

(11) A registrar must

(a) attend at and keep notes of the hearings of all chambers proceedings, and

(b) include, in the notes kept under paragraph (a) in relation to the hearing of a chambers proceeding, a short statement of the questions or points decided or orders made at the hearing.

RULE 22-2 — AFFIDAVITS

Affidavit to be filed

(1) An affidavit used in a proceeding must be filed.

Form and content of affidavit

(2) An affidavit

(a) must be expressed ***in the first person*** and show the name, address and occupation of the person swearing or affirming the affidavit,

(b) if the person swearing or affirming the affidavit is a party or the lawyer, agent, director, officer or employee of a party, must state that fact,

(c) must be divided into paragraphs numbered consecutively, and

(d) may be in Form 109.

Identifying affidavits

(3) There must be set out in the top right hand corner of the first page of an affidavit, other than an affidavit of service,

(a) the name of the person swearing or affirming the affidavit,

(b) the sequential number of the affidavit made by that person in the same proceeding, and

(c) the date on which the affidavit was made.

Making affidavit

(4) An affidavit is made when

(a) the affidavit is sworn or affirmed by the person swearing or affirming the affidavit,

(b) the person swearing or affirming the affidavit

(i) signs the affidavit, or

(ii) if the person swearing or affirming the affidavit is unable to sign the affidavit, places his or her mark on it, and

(c) the person before whom the affidavit is sworn or affirmed completes and signs a statement in accordance with subrule (5) and identifies each exhibit, if any, to the affidavit in accordance with subrule (8).

[. . .]

Statement if person swearing or affirming the affidavit unable to read

(6) If it appears to the person before whom an affidavit is sworn or affirmed that the person swearing or affirming the affidavit is unable to read it, the person before whom it is sworn or affirmed must certify in the statement signed under subrule (5) that the affidavit was read in his or her presence to the person swearing or affirming the affidavit who seemed to understand it.

Interpretation to person swearing or affirming the affidavit who does not understand English

(7) If it appears to the person before whom an affidavit is to be sworn or affirmed that the person swearing or affirming the affidavit does not understand the English language, the affidavit must be interpreted to the person swearing or affirming the affidavit by a competent interpreter who must certify on the affidavit, by endorsement in Form 109, that he or she has interpreted the affidavit to the person swearing or affirming the affidavit.

Exhibit to be marked

(8) The person before whom an affidavit is sworn or affirmed must identify each exhibit referred to in the affidavit by signing a certificate placed on the exhibit in the following form:This is Exhibit ..... referred to in the affidavit of ..... sworn (or affirmed) before me on .....[*dd/mmm/yyyy*]..... .

[. . .]

Alterations to be initialled

(11) The person before whom an affidavit is sworn or affirmed must initial all alterations in the affidavit and, unless so initialled, the affidavit must not be used in a proceeding without leave of the court.

Limitation on contents of affidavit

(12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial. *[See **Haughian v Jiwa**]*

Exception

(13) An affidavit may contain statements as to the ***information and belief*** of the person swearing or affirming the affidavit, if

(a) the source of the ***information and belief*** is given *[see **Tate v Hennessey**]*, and

(b) the affidavit is made

(i) in respect of an application that does not seek a final order, or

(ii) by leave of the court under Rule 12-5 (71) (a) or 22-1 (4) (e).

Use of defective affidavit

(14) With leave of the court, an affidavit may be used in evidence despite an irregularity in its form.

[. . .]

RULE 22-4 — TIME

Computation of time

(1) Unless a contrary intention otherwise appears, if a period of ***less than 7 days*** is set out by these Supreme Court Civil Rules or in an order of the court, holidays *[as defined in **Interpretation Act** s 29 at p 251]* are not counted.

Extending or shortening time

(2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired. *[**Director of Civil Forfeiture v Doe (No. 1)**]*

Extending or shortening time respecting pleadings

(3) The period fixed by these Supreme Court Civil Rules or an order for serving, filing or amending a pleading or other document may be extended by consent.

Notice of intention to proceed after delay of one year

(4) In a proceeding in which judgment has not been pronounced and no step has been taken for one year, a party must not proceed until

(a) the expiration of 28 days after service, on ***all*** parties of record, of notice in Form 44 of that party's intention to proceed, and

(b) a copy of the notice of intention to proceed and proof of its service has been filed.

Want of prosecution

(5) Despite this rule, a defendant or respondent may apply to have a proceeding dismissed for want of prosecution without serving a notice of intention to proceed in Form 44.

Attendance

(6) Attendance on an appointment before an official reporter within ½ hour following the time fixed for the appointment is a sufficient attendance.

Rule 22-5 — Multiple Claims and Parties

Multiple claims

(1) Subject to subrule (6), a person, whether claiming in the same or different capacities, may join several claims in the same proceeding.

Multiple parties

(2) Subject to subrule (6), a proceeding may be started by or against 2 or more persons in any of the following circumstances:

(a) if separate proceedings were brought by or against each of those persons, a common question of law or fact would arise in all the proceedings;

(b) a right to relief claimed in the proceedings, whether it is joint, several or alternative, is in respect of or arises out of the same transaction or series of transactions;

(c) the court grants leave to do so.

Joining persons jointly entitled to relief

(3) Subject to any enactment or these Supreme Court Civil Rules or unless the court otherwise orders, a plaintiff or petitioner who claims relief to which any other person is jointly entitled must join as parties to the proceeding all persons so entitled, and any of them who do not consent to be joined as a plaintiff or petitioner must be made a defendant or respondent.

If persons are jointly liable

(4) If relief is claimed against a person who is jointly liable with some other person, the other person need not be made a party to the proceeding, but if persons may be jointly, but not severally, liable and relief is claimed against some but not all of those persons in a proceeding, the court may stay the proceeding until the other persons who may be liable are added as parties.

Party need not be interested in all relief

(5) It is not necessary that every party be interested in all the relief sought in a proceeding, but the court may order that a party be compensated for being required to attend, or be relieved from attending, a part of a trial or hearing in which that party has no interest.

Separation

(6) If a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it considers will further the object of these Supreme Court Civil Rules.

Separating counterclaim or third party claim

(7) If a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the court may so order.

Consolidation

(8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

Misjoinder or nonjoinder of parties

(9) A proceeding must not be defeated by reason of the misjoinder or nonjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it.

Rule 22-7 — Effect of Non-compliance

Non-compliance with rules

(1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify

(a) a proceeding,

(b) a step taken in the proceeding, or

(c) any document or order made in the proceeding.

[Except that an order based on a failure to comply amounting to a breach of natural justice is a nullity: Bache Halsey Stuart Shields Inc v Charles]

Powers of court

(2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

(a) set aside a proceeding, either wholly or in part,

(b) set aside any step taken in the proceeding, or a document or order made in the proceeding,

(c) allow an amendment to be made under Rule 6-1,

(d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or

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

[. . .]

Part 23 — Court and Registry Matters

Rule 23-6 — Masters, Registrars and Special Referees

Powers of a master

(1) Without limiting any other powers of a master under these Supreme Court Civil Rules, a master hearing an application has the powers of the court set out in Rules 8-5 (6) to (8) and 22-1 (2) to (8).

Master as registrar

(2) A master has the powers and jurisdiction of a registrar under these Supreme Court Civil Rules.

Powers of a master in estates

(3) A master has the powers of the court to dispose of all non-contentious business in the administration of estates.

[. . .]

(b) **Reference by master to judge**

(6) If a matter appears to a master to be proper for the decision of a judge, the master may refer it to a judge, and the judge may either dispose of the matter or refer it back to the master with directions.

[. . .]

Appeal from master, registrar or special referee

(8) A person affected by an order or decision of a master, registrar or special referee may ***appeal*** the order or the decision to the court. *[Mode and standard of review on an appeal from the decision of a master is given by Abermin Corp v Granges Exploration, but see also Ralph's Auto Supply (BC) Ltd v Ken Ransford Holding]*

Form of appeal

(9) The appeal must be made by filing a notice of appeal in Form 121 within ***14 days*** after the order or decision complained of.

Notice

(10) Unless otherwise ordered, there must be at least ***3 days*** between the service of the ***notice of appeal*** and the hearing.

Appeal not to act as stay

(11) An appeal from the decision of a master or registrar is not a stay of proceeding unless so ordered by the court or the master.

Supreme Court Civil Practice Directions

PD-34 — Master's Jurisdiction

Summary

This Practice Direction has two parts. Part A of the Practice Direction sets out a direction of the Chief Justice pursuant to Section 11(7) of the *Supreme Court Act*, RSBC 1996, c 443, as to the matters in respect of which a master is not to exercise jurisdiction. Part B of the Practice Direction sets out guidelines for the assistance of the profession and the public as to the matters in respect of which a master has jurisdiction.

Part A: Direction

Restrictions on masters' jurisdiction

1 Section 11(7) of the Supreme Court Act provides:

> *A master has, subject to the limitations of section 96 of the Constitution Act, 1867, the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that a master is not to exercise that jurisdiction.*

2 Pursuant to section 11(7) of the *Supreme Court Act*, the Chief Justice directs that a master is not to exercise jurisdiction:

(a) to grant relief where the power to do so is conferred expressly on a judge by a statute or rule
(b) to dispose of an ***appeal***, or an application in the nature of an appeal, on the merits
(c) to pronounce judgment by consent where any party in a proceedings is under a ***legal disability***
(d) to grant court approval of a settlement, compromise, payment or acceptance of money into court on behalf of a person under a ***legal disability***, or court approval of a sale of assets of a person under a ***legal disability***
(e) *[. . .]*
(f) to make an order holding any person or entity in ***contempt***
(g) to grant ***injunctive relief***, other than as identified under paragraph 5 of this direction
(h) to make an order under the *Judicial Review Procedure Act* or for a prerogative writ
(i) to ***set aside, vary or amend an order of a judge***, other than:
    (i) to abridge or extend a time prescribed by an order, provided that the original order, if made by a judge, was one that a master would have had the jurisdiction to make, and
    (ii) to vary the interim orders identified under paragraph 1 of this direction

(j) to grant a stay of proceedings where there is an arbitration
(k) *[. . .]*
(l) to remove a suspension from the practice of a profession.

PART B: GUIDELINES

Matters within a master's jurisdiction:

3 Paragraphs 4- 7 set out guidelines as to the matters that are generally considered to fall within the jurisdiction of a master. These guidelines are for the assistance of the profession and the public and are not intended to be exhaustive.

Interlocutory Applications

4 Subject to constitutional limitations and to the direction set out in paragraph 2, a master has jurisdiction to hear interlocutory applications under the Rules of Court, including applications for approval of sale in foreclosure proceedings.

Interim orders in family law cases

5 *[. . .]*

Final orders

6 Subject to constitutional limitations and to the direction set out in paragraph 2, a master has jurisdiction to make the following final orders:

(a) orders by ***consent*** *[see Pye v Pye]*
(b) orders under Supreme Court Civil Rule 22-7 *[. . .]*
(c) orders for summary judgment under Rule 9-6 where there is no triable issue
(d) orders striking out pleadings under Rule 9-5(1) provided there is no determination of a question of law relating to issues in the action
(e) orders granting judgment in ***default***
(f) *[. . .]*

[. . .]

Enforcement of orders

7 Subject to constitutional limitations and to the direction set out in paragraph 2, a master has jurisdiction to enforce orders under Rule 13-4, the *Court Order Enforcement Act*, the *Family Maintenance Enforcement Act*, and any statute which requires an application to the court to enforce under the Rules of Court an order made by a statutory board, statutory decision maker or tribunal.

Supreme Court Act

Masters

11 (7) A master has, subject to the limitations of section 96 of the *Constitution Act, 1867*, the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that a master is not to exercise that jurisdiction.

COURT OF APPEAL

Court of Appeal Rules

Limited appeal orders

2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act *[on page 247]*:

(a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the *Supreme Court Civil Rules*:
(i) Part 5 *[Case Planning]*;
(ii) Part 7 *[Procedures for Ascertaining Facts]*, other than Rule 7-7 (6) *[application for order on admissions]*;

(iii) Rule 9-7(11), (12), (17) or (18) *[adjournment or dismissal, preliminary orders, orders and right to vary or set aside order]*;
(iv) Part 10 *[Property and Injunctions]*;
(v) Part 11 *[Experts]*;
(vi) Rule 12-2 *[trial management conference]*;
(vii) Rule 21-7 *[foreclosure and cancellation]*;

(b) *[. . .]*;
(c) *[. . .]*;
(d) *[. . .]*;
(e) an order granting or refusing an adjournment or an extension or a shortening of time;
(f) an order granting or refusing costs, or granting or refusing security for costs, if the only matter being appealed is that grant or refusal.

Court of Appeal Act

Appellate jurisdiction

6 (1) An appeal lies to the court
(a) from an ***order*** of the Supreme Court or an ***order*** of a judge of that court *[on the meaning of "order", see* ***Rahmatian v HFH Video Biz****]*, and
(b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
(2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

Leave to appeal

7 (1) In this section, **"limited appeal order"** means an order prescribed under the rules as a limited appeal order. *[See s 2.1 of the Court of Appeal Rules, on page 246]*
(2) Despite section 6(1) of this Act, ***an appeal does not lie*** to the court from a ***limited appeal order*** without ***leave*** being granted by a justice. *[See* ***Power Consolidated (China) Pulp v BC Resources Investment Corp****]*
(3) In an order granting leave to appeal under this or any other Act, a justice may limit the grounds of appeal.

MISCELLANEOUS ENACTMENTS

Business Corporations Act

Service of records in legal proceedings

9 (1) Without limiting any other enactment, a record may be served on a company
(a) unless the company's registered office has been eliminated under section 40, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the registered office of the company in the corporate register,
(b) if the company's registered office has been eliminated under section 40, in the manner ordered by the court under section 40(4)(b), or
(c) in any case, by serving any director, senior officer, liquidator or receiver manager of the company.
(2) Without limiting any other enactment, a record may be served on an extraprovincial company
(a) by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the head office of the extraprovincial company in the corporate register if that head office is in British Columbia, or
(b) by serving any attorney for the extraprovincial company or, without limiting this, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for any attorney for the extraprovincial company in the corporate register.

[Note that an "attorney" is not a lawyer. It has a very specific definition in s 386 of the Act and is not likely to come up on an exam.]

[. . .]

Court may order security for costs

236 If a corporation is the ***plaintiff*** in a legal proceeding brought before the court, and if it appears that the corporation will be ***unable to pay the costs of the defendant*** if the defendant is successful in the defence, the court ***may*** require ***security*** to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

Class Proceedings Act

Class certification

4 (1) The court ***must*** certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise ***common issues***, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the ***preferable procedure*** for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the ***preferable procedure*** for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Court Jurisdiction and Proceedings Transfer Act

Real and substantial connection

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

- (a) is brought to enforce, assert, declare or determine ***proprietary*** or ***possessory*** rights or a security interest in ***property*** in British Columbia that is immovable or movable property,
- (b) *[. . .]*
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, ***contract*** or other instrument in relation to
  - (i) property in British Columbia that is immovable or movable property, or
  - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,
- (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;
(ii) that trustee is ordinarily resident in British Columbia;
(iii) the administration of the trust is principally carried on in British Columbia;
(iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

(e) concerns ***contractual obligations***, and
(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
(ii) by its express terms, the contract is governed by the law of British Columbia, or
(iii) the contract
(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
(B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
(g) concerns a ***tort*** committed in British Columbia,
(h) concerns a ***business*** carried on in British Columbia,
(i) is a claim for an ***injunction*** ordering a party to do or refrain from doing anything
(i) in British Columbia, or
(ii) in relation to property in British Columbia that is immovable or movable property,
(j) *[. . .]*,
(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or
(l) *[. . .]*.

[See MTU Maintenance Canada v Kuehne & Nagel Int'l for some limits on the kinds of evidence permitted to establish a real and substantial connection. . .]

Court Order Enforcement Act

Attachment procedures and exemptions

3 (1) In this section:

"action" includes *[. . .]* any proceeding brought by the filing of a counterclaim;

"debt due" and **"debts due"** include debts, obligations and liabilities owing, payable or accruing due and wages that would in the ordinary course of employment become owing, payable or due within 7 days after the date on which an affidavit has been sworn under subsection (2) or subsection (3);

[. . .]

"defendant" includes *[. . .]* any person against whom a counterclaim is brought in any proceeding;

"plaintiff" includes *[. . .]* any person by whom a counterclaim is brought in any proceeding;

(2) A judge or a registrar may, on an application made ***without notice*** to any person by
(a) a plaintiff in an action, or
(b) a judgment creditor or person entitled to enforce a judgment or order for the payment of money,

on ***affidavit*** by himself or herself or his or her solicitor or some other person aware of the facts, stating,
(c) if a judgment has been recovered or an order made,
(i) that it has been recovered or made, and
(ii) the amount unsatisfied, or
(d) if a ***judgment has not been recovered***,
(i) that an action is pending,
(ii) the time of its commencement,
(iii) the ***nature of the cause of action***, *[see Knowles v Peter]*
(iv) the ***actual amount*** of the debt, claim or demand, *[it must be a liquidated amount; Silver Standard Resources v Joint Stock Co Geolog]* and

(v) that it is justly due and owing, after making all just discounts,

and stating in either case

(e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and

(f) with reasonable certainty, the place of residence of the garnishee,

order that all debts due from the garnishee to the defendant, judgment debtor or person liable to satisfy the judgment or order, as the case may be, is ***attached*** to the extent necessary to answer the judgment recovered ***or to be recovered***, or the order made, as the case may be.

(3) *[. . .]*

(4) An order ***must not be made*** under this Part for the attachment of a debt due to an employee ***for the employee's salary or wages*** before a judgment or order for the payment of money has been obtained against the employee in the proceeding.

[. . .]

[. . .]

Payment by installments

5 (1) If a garnishing order is made against a ***defendant*** or judgment debtor, he or she may apply to the registrar or to the court in which the order is made ***for a release of the garnishment***, and if a judgment has been entered against him or her, for payment of the judgment by installments.

(2) If, under subsection (1), the registrar or judge considers it ***just in all the circumstances***, he or she may make an order releasing all or part of the garnishment *[. . .]*. *[While the chambers judge has discretion to consider a broad range of factors when deciding if it is just in all the circumstances to set aside a garnishment order, the trial judge erred in lifting the order on the basis of the same reasons that led him to set aside the Mareva Injunction:* ***Silver Standard Resources v Joint Stock Co Geolog****]*

(3) An order under subsection (2) may be made ***without notice to any person*** *[. . .]*.

[. . .]

Debts bound from time of service of order

9 (1) ***Service*** of a copy of an order that states that debts, obligations or liabilities owing, payable or accruing due to the defendant, judgment debtor or person liable to satisfy the judgment or order are attached or notice of it to the garnishee in a manner the judge or registrar directs, binds the debts, obligations or liabilities in the garnishee's hands ***from the time of service*** or notice.

(2) A copy of the garnishing order must be served at once, or within a time allowed by the judge or registrar by memorandum endorsed on the order, on the defendant, judgment debtor or person liable to satisfy the judgment or order.

(3) *[. . .]*

Amount attached limited to amount due and reasonable costs

10 In the garnishing order, the amount attached is limited to the amount due or claimed to be due by the defendant, judgment debtor or person liable to satisfy the judgment or order, along with a reasonable sum for costs.

When judge may order payment by garnishee with costs

11 If the garnishee does not

(a) at once pay into court the amounts payable for the debts, obligations and liabilities attached or the amount limited by the garnishing order, and does not dispute the debts, obligations and liabilities, or one or more of them claimed to be due, owing or payable from the garnishee to the defendant, judgment debtor or person liable under the judgment or order for the payment of money, or

(b) appear on notice to the garnishee,

then a judge may order the garnishee

(c) to pay into court the amount appearing due from the garnishee, or as much of it as may be sufficient to satisfy the principal judgment or order and the costs of the garnishing proceedings, or an amount estimated to be sufficient to satisfy the judgment expected to be recovered and costs, and also the costs of the garnishing proceedings, or

(d) if judgment has been recovered or an order for the payment of money made, to pay to the person entitled the amount appearing due from the garnishee, or sufficient of it to satisfy the principal judgment or order, and the costs of the garnishing proceedings.

[. . .]

Interpretation Act

Calculation of time or age

25 (1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.

(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.

(3) If the time for doing an act in a business office falls or expires on a day when the office is not open during ***regular business hours***, the time is extended to the next day that the office is open.

(4) In the calculation of time expressed as ***clear days***, weeks, months or years, or as "***at least***" or "***not less than***" a number of days, weeks, months or years, the first and last days must be excluded.

(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

(6) If, under this section, the calculation of time ends on a day in a month that has no date corresponding to the first day of the period of time, the time ends on the last day of that month.

(7) *[. . .]*

(8) *[. . .]*

[. . .]

29 In an enactment:

"holiday" includes

(a) Sunday, Christmas Day, Good Friday and Easter Monday,

(b) Canada Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day, Family Day and New Year's Day,

(c) December 26, and

(d) a day set by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer or mourning, a day of public rejoicing or thanksgiving, a day for celebrating the birthday of the reigning Sovereign, or as a public holiday;

Limitation Act (old)

CONTENTS

ACT

Definitions

1 In this Act:

"action" includes any proceeding in a court and any exercise of a self help remedy;

[. . .]

"local judgment" means the following:

(a) a judgment, order or award of

(i) the Supreme Court of Canada relating to an appeal from a British Columbia court,

(ii) the British Columbia Court of Appeal,

(iii) the Supreme Court of British Columbia,

(iv) the Provincial Court of British Columbia, and

(v) an arbitration under the *Commercial Arbitration Act*;

(b) an arbitral award to which the *Foreign Arbitral Awards Act* or the *International Commercial Arbitration Act* applies;

[. . .]

Application of Act

2 Nothing in this Act interferes with any of the following:

(a) a rule of equity that refuses relief, on the ground of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) a rule of equity that refuses relief, on the ground of inexcusable delay, to a person who claims equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act;

(c) any rule or law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers.

Limitation periods

3 (1) *[. . .]*

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

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

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

(c) for ***defamation***;

(d) for false imprisonment;

(e) for malicious prosecution;

(f) for tort under the *Privacy Act*;

(g) under the *Family Compensation Act*;

(h) for seduction;

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

(3) After the expiration of ***10 years*** after the date on which the right to do so arose a person may not bring any of the following actions:

(a) against the personal representatives of a deceased person for a share of the estate;

(b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;

(c) against a trustee for the conversion of trust property to the trustee's own use;

(d) to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;

(f) on a local judgment for the payment of money or the return of personal property.

(4) The following actions are ***not governed by a limitation period*** and may be brought at any time:

(a) for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass;

(b) for possession of land by a life tenant or person entitled to the remainder of an estate;
(c) on a local judgment for the possession of land;
(d) *[. . .]*;
(e) *[. . .]*;
(f) by a landlord to recover possession of land from a tenant who is in default or over holding;
(g) relating to the enforcement of an injunction or a restraining order;
(h) to enforce an easement, restrictive covenant or profit à prendre;
(i) *[. . .]*;
(j) for the title to property or for a declaration about the title to property by any person in possession of that property;
(k) for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,
(i) where the misconduct occurred while the person was a minor, and
(ii) whether or not the person's right to bring the action was at any time governed by a limitation period;
(l) for a cause of action based on ***sexual assault*** *[see:* ***Rumley v British Columbia****]*, whether or not the person's right to bring the action was at any time governed by a limitation period.

(4.1) A person must not bring an action on an extraprovincial judgment for the payment of money or the return of personal property
(a) after the time for enforcement has expired in the jurisdiction where that judgment was made, or
(b) later than 10 years after the judgment became enforceable in the jurisdiction where the judgment was made.

(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

(6) Without limiting subsection (5) and despite subsections (2) and (4), after the expiration of 6 years after the date on which right to do so arose an action may not be brought:
(a) *[. . .]*;
(b) *[. . .]*;
(c) for damages for conversion or detention of goods;
(d) for the recovery of goods wrongfully taken or detained;
(e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;
(f) for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate.

(7) *[. . .]*.

Counterclaim or other claim or proceeding

4 (1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
(b) third party proceedings,
(c) claims by way of set off, or
(d) adding or substituting a new party as plaintiff or defendant,
under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person if a claim by that other person
(a) against the first mentioned person, and
(b) relating to or connected with the subject matter of the action,
is or will be defeated by pleading a provision of this Act as a defence by the first mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court ***may*** allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time. *[This applies equally to statutory and to contractual limitation periods:* ***Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd****]*

Effect of confirming a cause of action

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

(2) For the purposes of this section,

(a) a person confirms a cause of action only if the person

(i) ***acknowledges*** a cause of action, right or title of another, or

(ii) makes a payment in respect of a cause of action, right or title of another,

(b) an acknowledgment of a judgment or debt has effect

(i) whether or not a promise to pay can be implied from it, and

(ii) whether or not it is accompanied by a refusal to pay,

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money, and

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same account.

(3) *[. . .]*

(4) *[. . .]*

(5) For the purposes of this section, an ***acknowledgment*** must ***be in writing and signed by the maker***.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation

(a) is made to the person or to a person through whom the person claims, or

(b) is made in the course of proceedings or a transaction purporting to be under the *Bankruptcy Act* (Canada).

(7) For the purposes of this section, a person is bound by a confirmation only if any of the following applies:

(a) the person made the confirmation;

(b) after the confirmation is made, the person becomes, in relation to the cause of action, a successor of the person who made the confirmation;

(c) the person who made the confirmation is, at the time of the confirmation, a trustee, and the first mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the person who made the confirmation is a trustee;

(d) the person is bound under subsection (8).

(8) *[. . .]*

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) *[. . .]*.

Running of time postponed

6 (1) The running of time with respect to the limitation period set by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,

is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.

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

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

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

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

(g) brought under the *Family Compensation Act*;

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

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

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

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

(5) For the purpose of subsection (4),

(a) **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) **"facts"** include

(i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

(c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and

(d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

(7) Subsections (3) and (4) do not operate to the detriment of a purchaser in good faith for value.

(8) The limitation period set by this Act with respect to an action relating to a future interest in trust property does not begin to run against a beneficiary until the interest becomes a present interest.

If a person is a minor or incapable

7 (1) For the purposes of this section,

(a) a person is under a disability while the person

(i) is a minor, or

(ii) is in fact incapable of or substantially impeded in managing his or her affairs, and

(b) **"guardian"** means a parent or guardian who has actual care and control of a minor or a committee appointed under the *Patients Property Act*.

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

(4) If the running of time against a person with respect to a cause of action has been postponed by subsection (2) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of the following:
  (a) the period that the person would have had to bring the action had that person not been under a disability, running from the time the cause of action arose;
  (b) the period running from the time the disability ceased, but in no case does that period extend more than 6 years beyond the cessation of disability.

(5) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person who has a cause of action comes under a disability, the running of time against that person is suspended so long as that person is under a disability.

(6) If the running of time against a person with respect to a cause of action has been suspended by subsection (4) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of the following:
  (a) the length of time remaining to bring an action at the time the person came under the disability;
  (b) one year from the time that the disability ceased.

(7) Despite subsections (2) and (4), if a person under a disability has a guardian and anyone against whom that person may have a cause of action has a notice to proceed delivered to the guardian and to the Public Guardian and Trustee in accordance with this section, time begins to run against that person as if that person had ceased to be under a disability on the date the notice is delivered.

(8) A notice to proceed delivered under this section must meet all of the following requirements:
  (a) it must be in writing;
  (b) it must be addressed to the guardian and to the Public Guardian and Trustee;
  (c) it must specify the name of the person under a disability;
  (d) it must specify the circumstances out of which the cause of action may arise or may be claimed to arise with as much particularity as is necessary to enable the guardian to investigate whether the person under a disability has the cause of action;
  (e) it must give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;
  (f) it must specify the name of the person on whose behalf the notice is delivered;
  (g) it must be signed by the person delivering the notice, or the person's solicitor.

(9) Subsection (6) operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(10) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

(11) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(12) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed.

Ultimate limitation

8 (1) Subject to section 3 (4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11 (2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought
  (a) against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on negligence, after the expiration of 6 years from the date on which the right to do so arose,
  (b) against a medical practitioner, based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose, or
  (c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.

(2) Subject to section 7 (6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

(3) Subject to subsection (1), the effect of sections 6 and 7 and subsection (2) of this section is cumulative.

Cause of action extinguished

9 (1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

(2) *[. . .]*

[. . .]

Negligence Act

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[. . .]

Liability and right of contribution

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are ***jointly and severally liable*** to the ***person suffering the damage*** or loss, and

(b) ***as between themselves***, in the absence of a contract express or implied, they are ***liable to contribute to and indemnify*** each other in the degree to which they are respectively found to have been at fault.

ETHICS

Barrister's and Solicitor's Oath

Do you sincerely promise and swear (or affirm) that you will diligently, faithfully, and to the best of your ability execute the offices of Barrister and Solicitor; that you will ***not promote suits upon frivolous pretences***; that you will ***not pervert the law to favour or prejudice anyone***; but in all things conduct yourselves truly and with integrity; and that you will uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia?

Professional Conduct Handbook

CHAPTER 1 — CANONS OF LEGAL ETHICS

4 Duties to Other Lawyers

(1) A lawyer's conduct toward other lawyers should be characterized by ***courtesy*** and ***good faith***. . .

(2) *[. . .]*

(3) A lawyer should ***avoid all sharp practice*** and should take ***no paltry advantage*** when an opponent has made a ***slip*** or overlooked some ***technical matter***. A lawyer should accede to reasonable requests which do not prejudice the rights of the client or the interests of justice.

CHAPTER 8 — THE LAWYER AS ADVOCATE

Prohibited Conduct

1 A lawyer must not:

(a) abuse the process of a court or tribunal by instituting or prosecuting proceedings that, although legal in themselves, are ***clearly*** motivated by ***malice*** on the part of the client and are brought ***solely*** for the purpose of injuring another party,

(b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable *[see also: **Myers v Elman**]*,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that may reasonably be perceived to affect the officer's impartiality,

(d) attempt or acquiesce in anyone else attempting, directly or indirectly, to influence the decision or actions of a court or tribunal or any of its officials by any means except open persuasion as an advocate,

(e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,

(e.1) make suggestions to a witness recklessly or that the lawyer knows to be false,

(f) deliberately refrain from informing the court or tribunal of any pertinent authority ***directly*** on point that has not been mentioned by an opponent,

(g) dissuade a material witness from giving evidence, or advise such a witness to be absent *[see also 12.3(b), at p 259]*,

(h) knowingly permit a party or a witness to be presented in a false way, or to impersonate another person, or

(i) appear before a court or tribunal while impaired by alcohol or a drug.

Offering to Give False Testimony

2 When a client advises a lawyer that the client intends to offer false testimony in a proceeding, the lawyer must explain to the client the lawyer's professional duty to withdraw if the client insists on offering, or in fact does offer, false testimony.

3 When a client who has been counselled in accordance with Rule 2 advises the lawyer that the client intends to offer false testimony in a proceeding, the lawyer must withdraw from representing the client in that matter, in accordance with Chapter 10.

4 A lawyer who withdraws under Rule 3 must not disclose to the court or tribunal, or to any other person, the fact that the withdrawal was occasioned by the client's insistence on offering false testimony.

5 A lawyer must not call as a witness in a proceeding a person who has advised the lawyer that the witness intends to offer false testimony.

Inconsistent Statements or Testimony

6 Mere inconsistency in a client's or witness's statements or testimony, or between two proffered defences, is insufficient to support the conclusion that the person will offer or has offered false testimony. However, when such inconsistency exists, the lawyer must explore the inconsistency with the client or witness at the first available opportunity. If, based on that enquiry, the lawyer is certain that the client or witness intends to offer false testimony, the lawyer must comply with Rules 2 to 5. Otherwise, the lawyer is entitled to proceed, leaving it to the court or tribunal to assess the truth or otherwise of the client's or witness's statements or testimony.

Duty to Withdraw

7 When a client wishes to adopt a course prohibited by this Chapter, the lawyer must do everything reasonably possible to prevent it.

8 If, despite the lawyer's actions under Rule 7, the client does anything prohibited under this Chapter, the lawyer must withdraw from representing the client, subject to Rules 2 to 5 and in accordance with Chapter 10.

*[With respect to Rules 8:7–8, see **Myers v Elman**]*.

The Lawyer As Witness

9 A lawyer who gives *viva voce* or affidavit evidence in a proceeding must not continue to act as counsel in that proceeding unless

(a) the evidence relates to a purely formal or uncontroverted matter, or

(b) it is necessary in the interests of justice.

10 A lawyer who was a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, when the lawyer's evidence may reasonably be expected to be an issue on the appeal.

Interviewing Witnesses

11 *[. . .]*

12 There is no property in a witness, and a lawyer may properly seek information from any potential witness, whether or not the witness is under subpoena.

This Rule is subject to Rules 12.1 to 17 when the lawyer has an interest in the proceeding or represents a client who has an interest in the proceeding. [Note Rule 17]

12.1 If a lawyer knows that a potential witness is represented in the proceeding by another lawyer, the lawyer must:

(a) ***notify*** the other lawyer before contacting the potential witness *[note it says "notify", not get permission]*, and

(b) if the potential witness is a ***party*** to the proceeding, make no contact ***except*** through or with the ***consent*** of the other lawyer.

12.2 A lawyer must ***disclose*** to a potential witness the lawyer's ***interest*** in the proceeding before seeking any information from him or her. *[BG says you "can't be sneaky", "can't not say who you are", and "can't pretend to be someone else"; see 2010 exam Q7, but not that this is not the only ethical issue arising in that question!]*

12.3 In contacting a potential witness, a lawyer must take care not to:

(a) subvert or suppress any evidence, or

(b) procure the witness to stay out of the way *[see also 1(g), at p 258]*

[BG says: you can't contravene this rule by implication either]

13 A lawyer must not advise a person, who is a potential witness on behalf of the lawyer's client, that the person must not communicate with an opposing party or with that party's counsel.

Contacting an Opponent's Expert

14 A lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional privilege, unless the privilege has been waived.

15 Before contacting an opposing party's expert, the lawyer must notify the opposing party's counsel of the lawyer's intention to do so.

16 When a lawyer contacts an opposing party's expert in accordance with Rules 14 and 15, the lawyer must, at the outset:

(a) state clearly for whom the lawyer is acting, and that the lawyer is not acting for the party who has retained the expert, and

(b) raise with the expert whether the lawyer is accepting responsibility for payment of any fee charged by the expert arising out of the lawyer's contact with the expert.

17 In Rules 14 to 16, "lawyer" includes a lawyer's agent. *[See Rule 12: this applies to Rule 12 and 12.1–12.3 as well]*

Duties of Prosecutor

18 *[. . .]*

Judicial Interim Release

19 *[. . .]*

Representation of an Accused on Guilty Plea

20 *[. . .]*

Role in without Notice Proceedings

21 In ***without notice*** proceedings, a lawyer must inform the court or tribunal of all ***material facts*** known to the lawyer that will enable the court or tribunal to make an informed decision, even if the facts are ***adverse*** to the interests of the lawyer's client.

Former Judge or Master

22 A lawyer who has served as a judge or master in any court must not use any judicial title or otherwise allude to the lawyer's former status in addressing any court as counsel.

Public Representations

23 A lawyer must not:

(a) comment publicly on the validity, worth or probable outcome of a legal proceeding in which the lawyer acts, or

(b) state publicly that the lawyer speaks on behalf of the legal profession unless the lawyer has been expressly authorized to state the official position of the legal profession.

24 Before making a public statement concerning a client's affairs, a lawyer must be satisfied that any communication is in the best interests of the client and made with the client's consent.

CHAPTER 11 — RESPONSIBILITY TO OTHER LAWYERS

[. . .]

Fulfilling Professional Commitments

5 A lawyer must be punctual in fulfilling all professional commitments.

Responding to Correspondence from Other Lawyers

6 A lawyer must reply reasonably promptly to any communication from another lawyer that requires a response. *[Note how easily this could be inserted into an exam!]*

Undertakings and Trust Conditions

7 A lawyer must

(a) not give an undertaking that cannot be fulfilled,

(b) fulfil every undertaking given, and

(c) scrupulously honour any trust condition once accepted.

8.1 Undertakings and trust conditions should be

(a) written, or confirmed in writing, and

(b) unambiguous in their terms.

Trust Cheques

8 *[. . .]*

Real Estate Transactions

8.1 *[. . .]*

Conditional Undertakings

9 If a lawyer gives an undertaking conditional on something else happening or in respect of which the lawyer does not intend to accept personal responsibility, this must be stated clearly in the undertaking itself.

Imposed Undertakings

10 A lawyer must not impose on other lawyers impossible, impractical or manifestly unfair conditions of trust.

11 *[. . .]*

Proceeding in Default

12 A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice. *[Note that BG's slide 20 from Lecture 2 adds the **qualifier**: unless instructed by the client to the contrary, in which case this instruction should be communicated at the outset of the matter. It is not clear in what text, if any, this qualifying language is sourced.]*

Acting against another Lawyer

13 A lawyer must avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

Tape Recording and Monitoring Conversations

14 Even if it is lawful to do so, a lawyer must not:

(a) use, or permit another person to use, a tape recorder or other device to record, or

(b) permit anyone to listen to,

the statements of another lawyer with whom the lawyer is having a conversation, without first informing the other lawyer of the intention to do so.

14.1 Rule 14 does not apply if the lawyer has reasonable grounds to believe that, during the conversation, the other lawyer will commit or indicate an intention to commit a criminal offence.

Threatening to Report another Lawyer

15 A lawyer must not threaten to report another lawyer's past illegal or unprofessional conduct to the Law Society.

[. . .]

APPENDIX 1 — AFFIDAVITS, SOLEMN DECLARATIONS, AND OFFICER CERTIFICATIONS

Affidavits and Solemn Declarations

1 A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:

(a) is physically present before the lawyer,

(b) acknowledges that he or she is the deponent,

(c) understands or appears to understand the statement contained in the document,

(d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,

(e) *[. . .]*, and

(f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

[. . .]

Code of Professional Conduct

The following is excerpted from the new *Code of Professional Ethics* which replaces the ***Professional Conduct Handbook*** as of 1 January 2013.

4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;

(b) the matter is purely formal or uncontroverted; or

(c) it is necessary in the interests of justice for the lawyer to give evidence.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

4.02 (2) A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

13. Index of Cases

Case	Juris.	P	Subject	Keywords
Iabs Construction Ltd v Callahan	1991 BC/SC	140	Rule 9-3	Hypothetical point of law
Jerry Rose Jr v The University of British Columbia	2008 BC/SC	140	Rule 9-5(1)	Invasive Brain Computer Interface Technology, boulder thrown at dog
Jones v Donaghey	2011 BC/CA	141	Rule 7-6(1); 3-1(2)(a)	Is mental condition in issue, or isn't it?
Kaladjian v Jose	2012 BC/SC	141	Rule 7-1(18); 1-3(2)	MSP report, two-tier disclosure process
Keefer Laundry v Pellerin Milnor Corp	2006 BC/SC	142	Rule 7-1(20)	All kinds of privilege
Kendall v Sun Life Assurance Co of Canada	2010 BC/SC	143	Rule 7-2(2)(a); (3); (17–18); (25)	Defendant's counsel objected so much examining counsel walked out of XFD.
Knowles v Peter	1954 BC/SC	144	*Court Order Enforcement Act* s 3(2)	For debt on chattel mortgage ≠ c.o.a.
Laidar Holdings Ltd v Lindt and Sprungli (Canada) Inc	2012 BC/CA	144	Rule 3-5(1); 3-5(4)	Third party: DTZ; fourth party: Blakes
Leung v Hanna	1999 BC/SC	145	Rule 7-1(7); 7-1(20)	Description of privileged documents
Luu v Wang	2011 BC/SC	146	Rule 4-4	Evading, diligent search, impracticable
McNaughton v Baker	1988 BC/CA	146	Rule 3-5(1); 3-5(8)	Third party, distinguishes *Adams*
MTU Maintenance Canada v Kuehne & Nagel Int'l	2007 BC/CA	147	Rule 22-1(4)(e)	Counsel's statements no good to establish real and substantial connection.
Myers v Elman	1940 Eng/HL	147	Ethics & document disclosure	False affidavit of documents in fraud case
National Leasing Group v Top West Ventures	2001 BC/SC	148	Rule 3-4; Rule 9-5(1)(a)	Idiosyncratic approach to English grammar
Orazio v Ciulla	1966 BC/SC	148	Rule 4-3(2)	Leaving originating documents
Parti v Pokorny	2011 BC/SC	149	Rule 5-2(7)	Transcript of CPC, purpose of CPC
Piso v Thompson	2010 BC/SC	149	Rule 7-7(5)(b); 1-3(1); 1-3(2)	Notice to admit *everything* withdrawn
Power Consolidated (China) Pulp v BC Resources Investment Corp	1988 BC/CA	150	*Court of Appeal Act* s 7(2)	Test for leave to appeal
Pve v Pve	2006 BC/CA	150	PD-34; *Supreme Court Act* s 11(7)	Master has jurisdiction to do final order
Rahmatian v HFH Video Biz	1991 BC/CA	151	*Court of Appeal Act* s 6(1)(a)	Nonsuit motion is not an order
Rainbow Industrial Caterers v Canadian National Railways	1986 BC/SC	151	Rule 7-2(5)	P wanted to XFD a junior CNR employee who was not well-informed.
Ralph's Auto Supply (BC) Ltd v Ken Ransford Holding	2011 BC/SC	152	Rule 23-6(8)	Mode and standard of review on appeal from master
Reynolds v Harmanis	1995 BC/SC	152	Rule 10-4; Mareva Injunction	Worldwide *Mareva* injunction, sweeping
Roitman v Chan	1994 BC/SC	153	Rule 7-3(8)	Interrogatories to medical defendants
Rumley v British Columbia	1999 BC/CA	153	*Class Proceedings Act* s 4	Sexual abuse, standard of care
Shaughnessy Golf & Country Club v Uniguard Services	1986 BC/CA	154	Litigation Privilege	Fire, insurance, subrogation, each claim of privileged assessed individually
Silver Standard Resources v Joint Stock Co Geolog	1999 BC/CA	155	Rule 10-4; Mareva Injunction; *Court Order Enforcement Act* s 5(2)	Another Russian co: Dukat, ordinary course of business, relax, garnishing order
Sinclair v March	2001 BC/SC	156	Rule 7-5(1); 7-5(3)(c)	Non-retained expert can provide opinion
Southpaw Credit v Asian Coast Development (Canada) Ltd	2012 BC/SC	156	Rule 22-1(7)(d)	Fail to convince court to convert oppression petition into an action.
Stockbrugger v Bigney	2011 BC/SC	157	Rule 5-3(3); 1-3(1); 1-3(2)	Consent case planning order w/o CPC
Surrey Credit Union v Wilson	1990 BC/SC	157	Rule 11-6	200 pages, professional auditing standards
Swetlishnoff v Swetlishnoff	2011 BC/SC	158	Rule 3-2(1)	Renewal, *Bearhead*,prejudice, ill health
Tate v Hennessey	1900 BC/CA	159	Rule 22-2(13)	Source of hearsay not stated in affidavit
Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd	1996 BC/CA	159	Rule 6-1(1)(b)	Roof collapse, limitation period in insurance policy
Tiemstra v ICBC	1997 BC/CA	160	*Class Proceedings Act* s 4	$500 claims, common issue is useless
TJA v RKM	2011 BC/SC	160	Rule 6-1(1)(b)(i); Rule 1-3(1)	Defamation: amend to add new defence
Tucker v Asleson	1993 BC/CA	161	*Negligence Act* s 4	Joint vs several tortfeasors, settlement
Turpin v Manufacturers Life Insurance Co	2011 BC/SC	161	Rule 11-2(1); 11-6(1)(a–b); 11-6(1)(f)(iii); 11-6(2)	Bold and italic typefaces, internal medicine, travel insurance policy, &c
Vancouver Community College v Phillips, Barratt	1988 BC/SC	162	Rule 11-2(1)	Substantial revision of substance, argument, hopelessly partisan and unfair
Vieweger Construction v Rush & Tompkins Construction	1964 CA/SC	162	Rule 10-4(5)	Undertaking as to damages, what are "special circumstances"?
Wang v Wang	2012 BC/SC	163	Rule 4-3(2)	Too drunk, windshield wipers

Case	Juris.	P	Subject	Keywords
Ward v Klaus	2012 BC/SC	163	Rule 9-1(5-6)	Careful assessment, broad discretion
Weldon v Agrium Inc	2012 BC/CA	164	Rule 3-2(1)	Renewal, bound to fail, evidence
Westcoast Transmission v Interprovincial Steel	1984 BC/SC	164	Rule 7-2(5)	P wanted to XFD a third rep of D because earlier XFDs were "unsatisfactory".
Western Delta Lands v 3557537 Canada Inc	2000 BC/SC	165	Rule 9-7(11)	Dispute over ongoing partnership is urgent, deserves consideration ASAP
William v British Columbia	2004 BC/SC	166	Rule 9-3(2)	Court ordered stated case fails
Yewdale v ICBC	1995 BC/SC	166	Rule 11-6	Reports of no assistance to the court
Zecher v Josh	2011 BC/SC	167	Rule 8-1(4); 8-1(15)(c)(iii)	Deficient application materials

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