Law 270B-001; Fall 2011

Civ Pro: Greenberg & Francis

by Liam Bath

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# I.) Principles and Professional Obligations

## A.) Principles

### **Rule 1-3:** OBject of the Rules

* (1) Secure the **just, speedy and inexpensive** determination of every proceeding **on its merits**

###### Proportionality:

* (2) This includes conducting a proceeding in ways **PROPORTIONATE** to the
  + (a) **amount involved in the proceeding**
  + (b) the **importance of the issues**  in dispute
  + (c) the **complexity** of the proceeding

Just, Speedy & Inexpensive

* The litigation process must balance
  + The search for **truth** and a **just result** *against*
  + The practical realities of **cost** and **timeliness**

**Rule 22-7(1) -** Decision on the Merits

* 22-7(1): Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and **does not nullify a proceeding**, a step taken or any document or order made in the proceeding.

Speech of the Chief Justice

###### Litigation must balance: (Search for truth and justice) VS. (practicalities of cost and timeliness)

* Some rules are designed to obtain perfect justice, but is perfect justice available to a limited group of litigating public worth its cost?
* We cannot carry on delivering a Mercedes or Lexus judicial product litigated to the last warehouse of documents, countless experts, long cross-exams, and unlimited new causes of action
* **When cases become so complex that they take an unreasonable time to try, and are prohibitively expensive for all but the wealthy or the well funded, the law should respond with rules of procedure that limit, rather than extend, the time required for trials to be completed**
* Specific issues:
  + Voir dires are interminable
  + Expert evidence is too readily accepted
  + The Hearsay Rule relaxation means each piece of hearsay must be analyzed
  + Preliminary determination of issues adds to time and expense
  + Civil Charter cases allow persons to use the courts as forums for the public discussion of contemporary issues, which takes up judicial time
  + The Peruvian Guano rule re: discovery of documents is outdated.
  + The old rules made it hard to strike out pleadings that disclosed no cause of action

## B.) Ethical & Professional Obligations

Sources:

* Barristers’ and Solicitors’ Oaths
* Professional Conduct Handbook
* Common Law
* Good Conscience
* Best Practices

### Barristers & Solicitors Oath

* Do not promote **suits on frivolous pretenses** 
  + (frivolous is a high standard- you can bring hard cases)
* Do not **pervert the law to favour or prejudice** anyone
* Act in all things **truly** and **with integrity**

### Professional Conduct Handbook

###### S. 1: Prohibited Conduct includes:

* + (a) **ABUSE OF PROCESS** by instituting proceedings that, although legal in themselves, are ***clearly* motivated by malice** on the part of the client and **brought *solely* to injure another party**.
  + (b) Knowingly **ASSIST OR ACQUIESCE** in client doing anything **dishonest or dishonorable**
  + (e) Knowingly assert something for which there is **NO REASONABLE BASIS IN EVIDENCE**, or the admissibility of which must first be established
  + (f) **Refrain from informing the court of any PERTINENT AUTHORITY** directly on point not mentioned by an opponent
  + (g) **DISSUADE A MATERIAL WITNESS from giving evidence**, or advising such a witness to be absent

###### Offering to give false testimony

* + S. 2: If a client advises a lawyer that he intends to offer, or in fact offers, to give false testimony, the lawyer must **explain it is his professional duty to withdraw.**
  + S. 3: If a client advises that he intends to offer false testimony, **the lawyer must withdraw**
  + S. 4: **The lawyer cannot** **disclose** to the court or tribunal or any other person **why he withdrew**

###### Interviewing Witnesses

* + 12: **No property in a witness**, and may seek info from any witness, whether or not they are under subpoena (or witness for the other side)
  + 12.1: **If the witness is a party** and is represented, you cannot contact them except with **their lawyer’s consent**
  + 12.1: If you know a witness is represented by another lawyer, and they are **not party to the proceeding**, you must **let the other lawyer know**. (consent not necessary)
  + 13: **Must not** advise your witness **not to talk** to the other side
* If you speak with a witness, you MUST:
  + 12.2: Must **advise the witness of your role** in the proceeding
  + 12.3: Must **not** do anything that effectively **suppresses the witness**

###### Ex Parte Proceedings

* + 21: The lawyer must inform the court or tribunal of **ALL MATERIAL FACT**S known to the lawyer that will enable the court to tribunal to make an informed decision, **EVEN IF THE FACTS ARE ADVERSE TO THE INTERESTS OF THE LAWYER’S CLIENT**.

###### Dealing with Other Lawyers

* + 6: Must **reply reasonably promptly** to communication from another lawyer that requires a response
  + Duty to treat other lawyers respectfully

###### Undertakings

* + Definition: Solemn promises made **as counsel** to do or not to do something
  + 7(a): must **not give an undertaking that cannot be fulfilled**
  + 7(b) Must **fulfill every undertaking** given
  + 7(c): Must **scrupulously honour any trust condition** once accepted
  + 10: Must not **impose impossible, impractical, or manifestly unfair** conditions of trust or undertakings

###### Default Proceedings

* + 12: Must not proceed by default if you know that **another lawyer has been consulted without inquiry and reasonable notice**
    - **\*unless-** the client expressly instructs you to do so, in which case those instructions should be communicated at the outset of the matter.

# II.) Commencing Proceedings

## A.) Notice of Civil Claim

### **Rule 3-1:** Notice of Civil Claim

* (2) Notice of Civil Claim must do the following:
  + (a) Concise statement of **material facts**
  + (b) **relief sought**  by P against each D
  + (c) Summary of the **legal basis** for the relief sought
  + (d) the proposed **place of trial**
  + (e) if P sues in a representative capacity, in what capacity the P sues
  + (f) Provide the data collection info

### **Rule 2-1:** Choosing the Correct Form of Proceeding 🡪 NoCC is DEFAULT!!

* (1): Unless otherwise provided for, every proceeding **must be started** by filing a notice of civil claim (**NoCC is the default**)

## B.) Petitions

### **Rule 2-1:** When to use a petition?

* (2) Use a petition in these circumstances, or if authorized by statute or the rules:
  + (a) **No person** against whom relief is sought
  + (c) question is one of **construction** of an enactment, will, deed, oral or written K, or other document
  + (d) Relief relates to the administration of an **ESTATE** of a deceased person, execution of a **TRUST**, or performance of an act by a person in their capacity as executor, administrator or trustee
  + (e) Relates to the maintenance, guardianship, or property of **INFANTS** or persons under a **DISABILITY**
  + (f) Relief sought is for payment of funds into or out of court
  + (g) Relief relates to **land** and is for a declaration of a beneficial interest or charge on land; declaration settling priority btw interests and charges; an order canceling a certificate of title; or an order of partition or sale
  + (h) Relates to the determination of a claim of solicitor/client **privilege**

### **Rule 16-1:** Filing Petitions

* (2) Must file a petition in Form 66 and **each affidavit in support**
* (3) The filed petition and each filed affidavit must be **served by personal service** on all those whose **interests may be affected** by the order sought

### Why petitions exist

* Follow a different process that generally doesn’t lead to a trial- evidence is based on affidavit evidence
* **Faster than actions** brought by notice of civil claim:
  + pretrial processes (discovery, etc) are only available in *actions,* defined in Rule 1(1) as “proceedings commenced by NoCC.” (NOT petition)

### **Rule 22-1:** Power of The Court to change petition to action

* (7): On the hearing of a chambers proceeding (petition), the court retains the discretion to order a trial of the chambers proceeding, pleadings to be filed, and give directions for the conduct of the trial
  + **INTERPRETATION: A judge retains the discretion to have a petition transformed into an action**

## C.) Limitation Periods

### ***Limitation Act***: Limitation Periods

Almost everything brought before court is subject to SOME limitation period

Default is **SIX YEARS** 🡪 can be extended by a CONFIRMATION or a POSTPONEMENT

* L.A. Applies in the absence of a specific statute establishing a limitation period
* S. 3(2): **2 year limit** for claims for:
  + **injury to person or property;**
  + torts such as **trespass, defamation, malicious prosecution, false imprisonment;**
  + breach of the ***Privacy Act*;**
  + claims under the ***Family Compensation Act***
* S. 3(4): No limitation date for **sexual misconduct;** and some other exceptions
* S. 3(5): **Default** limitation period is **6 years**

### ***Limitation Act***: Confirmation

* S. 5(1): If, before the limitation period expires, the **person against whom the action lies confirms the cause of action**, then the **period up to the confirmation does not count** in the limitation period.
  + Process:

1. Act applies against OP
2. OP confirms

🡺 **THEN:** Period up to confirmation doesn’t count towards limitation period

* S. 5(2): Can confirm by acknowledging in writing the cause of action, or **making a payment in respect of** the cause of action.

### ***Limitation Act***: Postponement

For: **FRAUD** or recovery of **TRUST** property

* S.6(1): Running of the limitation act is **postponed** for an **action based on fraud** or fraudulent breach of **trust** until the **beneficiary becomes fully aware** of the fraud, breach, conversion or other act.

Willful concealment/fraud for Torts

* S.6(3) & (4): Running of a limitation period is postponed for personal injury; damage to property; professional negligence; where material facts are willfully concealed, etc, until the identity of the defendant or respondent is known to the P, and the facts are such that a reasonable person would regard the facts as showing the cause of action. (Subjective/objective test for postponement; not on exam)
  + (3) tells when (4) will apply
  + (4) is a convoluted subjective/objective test for postponement

# III.) Service and Delivery of Documents

## A.) General Service

### **Rule 4-3**: requirement of Personal Service

* WHAT: (1) **NoCC, petitions**, counterclaims on non-party of record; third party notice on non-party of record; etc, must be **effected by personal service**
* HOW: (2)
  + For an: **INDIVIDUAL**, leave the document with him or her.
  + For a **COMPANY**, leave a copy with the president, chair, mayor or other chief officer, manager, cashier, superintendent, treasurer, secretary, clerk, etc. ;
    - OR in accordance with the *Business Corporations Act* (s. 9, BCBCA- by registered mail to the registered office).

### **Rule 4-2:** Ordinary Service 🡪 how personal service accomplished

* WHEN: After formal initial personal service
* HOW: (2): Leaving at the address for service; mailing to the address for service; faxing to a fax number or emailing to an email address provided as part of the address for service.
* WHERE: Address for service must a lawyer’s address; an accessible address within 30km of the registry, or an accessible BC address/fax/email
  + 4-1 requires every party of record to provide an address for service

#### Orazio v. Ciulla

* **F:** D’s usual lawyer shared office space with P’s lawyer. P issues a writ. D’s usual counsel took over negotiation with P’s counsel trying to reach a settlement. D came to see usual lawyer about another matter. Usual lawyer advised D about the writ, explained what it was, and gave him a copy. D handed it back, but did not tell his current lawyer.
* **I:** was service effective? 🡪 **YES**
* **R:** Object of the rules of service is to give notice, and ensure that people served are aware of what is sought against them.
  + **TEST:**
    - **ESSENTIAL INGREDIENT: delivery enables court to conclude that he KNEW or OUGHT REASONABLY to have known what the document was**
      * All that need be done has been done if the court is “perfectly confident” that notice has been given.
      * **Mere delivery of a document, without notice of its nature and the nature of the claim it records, is not service**.
* **HERE:** D knew document was a writ issued against him, who it was issued by, and the general nature of the claim. Service = effective despite writ not being left with the D.

## B.) Substitutional & Ex Juris Service

### **Rule 4-4**: Alternate Methods of Service

###### WHEN:

* (1): An order for alternative service is OK where:
  + it is **impracticable to serve by personal service**;
  + the **person cannot be found** after a diligent search; OR
  + is **evading service**
* (2): The order re: substitutional service must be served with the document to be served (unless the court orders otherwise, or it’s service by advertisement)
* \* Court has discretion to choose the manner, including:
  + Posting at the courthouse
  + Posting on the door of a residence
  + Publishing notice in the newspaper
  + Serving on someone else in contact with the person

#### Credit Foncier Franco Canadien v. McGuire (1979, BCSC) – TEST FOR SUBST. SERVICE ORDER

* **F:** Petitioner had a process server attend at the Respondent’s house. He spoke to a lady through the door and verified through the neighbours that the Respondents lived at the address
* **I:** Was substituted service available? 🡪 NO
* **R:** 
  + **TEST for Substitutional Service Order**
    - **AVAILABILITY** of substituted service:
      * personal service **cannot be usefully effected; OR**
      * will involve **great cost**.
    - **PROOF REQUIRED** by applicant:

1. reasonable **steps taken to locate**; AND
2. if located, reasonable **steps made to effect personal service**
   * + - What is reasonable depends on the circumstances, including:
         * the type of relief claimed
         * the amount involved
         * the avenues explored to locate; AND
         * the steps taken to effect service.
       - Servee not **required to co-operate with server**, so opinion that a party is evading must be supported by facts. No automatic right to this remedy if there is delay or difficulty locating a party.
   * **HERE:** not enough supporting evidence to justify

### **Rule 4-5** Service Outside british columbia (ex juris) **Without** Leave

\* Service w/in BC is as of right

* (1): May effect service for a BC action outside of BC if you fall within s.10 of the *Court Jurisdiction and Proceedings Transfer Act*
* (2): Originating Pleading or petition served outside of BC without leave must state by endorsement the grounds (can state more than one) on which service is based.

### ***Court Proceedings transfer act***

* S. 10: **Grounds for service ex juris without leave** (Rule 4-5(1))include actions relating to:
  + a proprietary interest in BC property;
  + a contract to be performed in BC or subject to BC laws;
  + a tort committed in BC; **OR**
  + an injunction against doing something in BC
    - **NOTE**- these ensure there will be **sufficient connection to the jurisdiction** to proceed here (rather than elsewhere)

### **Rule 4-5:** Service Outside BC (ex Juris) **With** Leave

* (3): May effect service for a BC action outside of BC **with leave of the court**

### **Rule 3-3(3)**: (NoCC) & **Rule 16-1(4)**: (Petitions): Time to Respond to Service Ex Juris

* Resides in Canada- 21 days
* Resides in USA- 35 days
* Resides elsewhere- 49 days

### **Rule 4-5**: Manner of Service Ex Juris

###### (10) How to serve EX JURIS:

* In a manner provided for in accordance with **our rules**
* In accordance with the **law of the place service is made**
* Pursuant to the **Hague Convention** (if the state is a signatory)

## C.) Challenging Jurisdiction

### **Rule 21-8:** Jurisdictional Disputes

* (1) May dispute jurisdiction by filing a “jurisdictional response” form (“JRF”)
* (2) Parties may apply for the court to decline jurisdiction after filing the jurisdictional response form
* (3) Party may challenge service after filing the jurisdictional response form
* (5) If a party brings an application or files a pleading challenging jurisdiction within 30 days of filing the court’s jurisdiction, they have not attorned to the jurisdiction of the court.
  + They may then defend the case on its merits without attorning, pending a determination of the disputed jurisdiction.
    - **NOTE:** the importance of filing a jurisdiction response form before taking any steps in the action so that you don’t accidentally attorn
  + **Any steps taken OTHER THAN filing a JRF prior to disputing MAY RESULT IN ATTORNMENT** to the jurisdiction of the court, and loss of the ability to claim lack of jurisdiction
    - **If in doubt, file a JRF**

## D.) Renewal

### **Rule 3-2:** Serving and Renewing the Notice of Civil Claim

* (1) Original notice of civil claim remains in force for **only 12 months**

###### If original not served:

* (1) If a D has not been served, the court, on application made **before or after the expiration of the 12 months**, may order the original NoCC be renewed for a period of **not more that 12 months**

###### If renewed NOCC not served (but original has):

* (2) if a **renewed NoCC** has not been served, on an application **during the currency** of the renewed writ or notice, the court may order the renewal for a further period of **not more than 12 months**

Difference: NO ORIGINAL 🡪 during **or after** currency ; RENEWED 🡪 **only during** currency

* (4) Renewed NoCC prevents operation of statutory limitation period (obviously)

#### Lowe v. Christensen (1984, BCCA) – test for renewal

* **F:** P involved in MVA Feb 1979; hires lawyer that issues writ in July 1980; Writ not served and lawyer’s membership suspended in Nov. 1981. Lawyer had commenced settlement negotiations prior to disbarring. New lawyer retained and wanted to continue negotiations. Insurer says that Ds were never served, and P is out of time. New lawyer advises he will apply to renew the writ. One year later, application to renew ex parte
* **I:** Can they renew the writ? 🡪 YES
* **R:** Court should be concerned with the rights of litigants and not with the conduct of solicitors.
  + **TEST**: **what is necessary TO SEE THAT JUSTICE IS DONE, with a view to all the circumstances.** 
    - If injustice to P, and no injustice to D, then renew
      * **even if** only reason for non-service is negligence, inattention or inaction of solicitors and notwithstanding a limitation defence would have otherwise become available.
      * **Don’t punish litigants for lawyers’ fuck ups**
    - Non compliance with the Rule re: service w/in 12 months is an irregularity.
* **HERE:** Client thought that everything was proceeding normally; was badly served by the profession, did everything he could to present his case. Brought an action against the negligent solicitor. Would have lost his cause of action, no substantial injustice to D as they knew through insurer that the claim was being presented. They have not been prejudiced regarding evidence or otherwise. **Granting renewal is necessary to see that justice is done.**
  + **Summary**: failure fault of lawyer, not P. No prejudice to D 🡪 therefore should allow renewal

**NOTE:** Contrast with *Minter v. Reeves:* Death of witnesses; P not pressing ahead with the matter for years; and appellants lack of knowledge of claim for 5 years means no renewal.

#### Seeliger v. Eagle Ridge Hospital (2007, BCCA) – renewal and merits

* **F:** Medical negligence; writ not served within one year and expired. D unaware of action and claims until served with application to renew. Chambers judge had regard to the merits of the claim, and said the claim was “tenuous, at best,” & therefore refused the application.
* **I:** To what degree should a court consider the merits of the claim when deciding whether to renew?
* **R:** Renewal happens early, before discovery & investigation of the merits of the claim.
  + P must ONLY demonstrate that the pleadings **DISCLOSE A CAUSE OF ACTION** that is not **BOUND TO FAIL**
    - **NO EVIDENCE** supporting allegations should normally be required from P
    - If D contends it is plain and obvious the action is bound to fail, then **SOME limited** **evidence may be required** on that issue. **BURDEN ON D** to prove unequivocally that the action is hopeless.
  + Otherwise, discretion should be exercised on other relevant factors.
    - **Delay will not normally equate with prejudice**
      * UNLESS it imperils the D’s ability to mount a defence.
  + Fault of a solicitor not to be visited upon an innocent P.
* **HERE:** Chambers judge erred in his consideration of the merits. Application came w/in days of the expiration; brought promptly. Such short delay, there was no prejudice to D. It is not obvious the claim will fail. Renewal ordered.

# IV.) Pleadings & parties

## A.) The Pleadings

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

### **Rule 1-1(1):** Definition of Pleadings

* Pleadings Means:
  + Notice of Civil Claim
  + Response to Civil Claim
  + Reply
  + Counterclaim
  + Response to a counterclaim
  + Third Party notice
  + Response to a third party notice

### **Rule 3-1:** Notice of Civil Claim

* (1) To start a proceeding, a person must file a NoCC in Form 1
* (2) NoCC must contain:
  + (a) Concise statement of **material facts**
  + (b) Set out the **relief sought** against each named D
  + (c) Set out a concise statement of the **legal basis** for the relief sought
  + (d) Set out the proposed **place of trial**
  + (e) If the P sues/ D is sued in a representative capacity, show in what capacity the P sues/ D is sued
  + (f) Provide the **data collection** information
  + (g) Otherwise comply with rule **3-7**

### **Rule 3-3:** Response to Civil Claim

* (1) To respond to a NoCC, must file a RtCC and serve it on the P
* **Response to NoCC:**
  + (2)(a) (i) **each** allegation of fact in a NoCC must be **admitted, denied OR** stated to be **outside the knowledge**  of the D
  + (8) If a fact is not responded to, it is deemed to be outside the D’s knowledge.
    - Note comparison with notice to admit, where failure to respond is deemed admittance
  + (2)(a)(ii) each denied fact, D must prove their version of the fact; and (iii) add any additional facts
  + (2)(a)(b) D must indicate whether they **consent, oppose, or take not position** on the granting of the **relief sought** against that D in the NoCC
  + (2)(c) If opposed the **legal basis for opposing the relief sought** must be concisely stated.
* **Timing for RtCC**
  + (3) Unless court orders, must file & serve within
    - (a)(i) If in Canada, within 21 days
    - (a)(ii) If in USA, within 35 days
    - (a)(iii) If elsewhere, within 49 days after person is served

### Counterclaims vs Setoffs

SET OFF [3-7(11)]: a DEFENCE, where a claim is made back against the P that is intrinsically tied to P’s claim

* “sets off” the D’s liability against that of the P under this claim
* Example: contract claim for failure to pay – claim goods decreased in value due to P’s late delivery

COUNTERCLAIM [3-4]: standalone claim against the P. Not intrinsically tied to P’s claim.

* Example: claim for damages due to P’s failure to deliver on time as an independent breach by P

###### Difference:

* Set Off is dismissed with P’s claim
* Counterclaim is not dismissed with P’s claim, as it is an independent claim

### **Rule 3-4** Counterclaims

* (1) For D to file an action back against the P, must file a counterclaim
* (2) If Counterclaim raises questions between the D and a person other than the P, the **D may join that other person as a party against whom the CC is brought.**
* (3) P against whom the CC is brought must be called a “P”; Each D against whom the CC is brought must be IDed as “D”; any other person must be IDed as “D by way of counterclaim”
* (4) Must **file and serve on all parties** of record in accordance with timing for RtCC;
  + If CC is brought against someone other than a party, then personal service of CC, NoCC is necessary.
* (5) & (6)- RTCC is governed by the same Rules as responding to NoCC- file & serve response
* (7) D’s **counterclaim in an action proceeds even though a P’s claim is stayed, discontinued, or dismissed.** 🡪 b/c it’s an independent claim…

## B.) Pleadings Generally

### **Rule 3-7** Pleadings Generally

**note**- applies to all pleadings generally, as defined in Rule 1-1

* (1) Pleading must **not contain evidence** by which facts will be proved
* (2) The **effect of a document/conversatio**n referred to in a pleading must be stated briefly; **precise words of the document or conversation must not be stated** unless those words are material.
  + Words may be material if the issue is misrepresentation or libel
* (6) **Must not plead** an allegation of fact or a new ground or claim **inconsistent** with previous pleadings (ie. can’t plead inconsistent facts / grounds). HOWEVER…
* (7**) Pleadings in the alternative are OK,** despite (6)
* (8) May raise an **objection in law** to a pleading (EX- expiration of a limitation period)
* (9) May plead a conclusion of law **if the material facts are pleaded**
* (12) In a pleading after the NoCC, a party must **specifically plead** any matter of fact OR law that:
  + (a) the party alleges makes a claim or defence by the other side not maintainable
  + (b) if not specifically pleaded, might take the other party by surprise;
  + (c) Raises issues of fact not arising out of the preceding pleading
    - **EX-** Even if NoCC didn’t raise estoppel, if you plan to use it, you must plead it.
* (15) If a party in a pleading denies an allegation, they may not do so evasively. Must answer the point denied
* (16) **If you plead a bare denial of a K**, the K itself is denied, not the legality, terms or sufficiency of the K.

## C.) Particulars

###### Purpose of particulars:

* ensure the other party knows the case to meet
* prevents surprise
* enables the other party to know the evidence it ought to marshall
* limits the generality of the pleadings
* limits and defines the issues to be tried, and for which discovery is required
* ties the hands of the party, so that it cannot extend the matter beyond that actually pleaded

### **Rule 3-7:** Particulars

* (18) Pleading particulars (including dates & items if applicable) is **MANDATORY** for claims in:
  + misrepresentation;
  + fraud;
  + breach of trust;
  + willful default; OR
  + undue influence.
* (20)(a) Ongoing independent requirement to provide particulars as they become known
* (20)(b) Further particulars to be served within 10 days after a demand is made in writing
* (22) Court may order a party to serve further and better particulars
* (23) Demand must be made in writing before applying for further and better particulars
* (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 or stay on the grounds that they cannot answer the originating pleading until particulars are provided.

#### GWL Provperties v. W.R. Grace & Co (1993, BCSC)

* **F:** Owners allege G was negligent in manufacturing insulation product (asbestos). Grace denies. P says that they need a more complete statement of facts material to the defences in order to prepare for trial. G says the demand for particulars only seeks evidence and the mode by which facts pleaded would be proven. D said the Ps knew or ought to have known that asbestos was harmful themselves. P seeks the magazine articles, who gave advice, etc- essentially the “means of knowledge.”
* **I:** Are the particulars sought facts or evidence?
* **R:**  **NOTORIOUSLY DIFFICULT** to draw the line between **what is a matter of fact** and **what is evidence**.
* **R: Function of particulars =**
  + To inform other side of the nature of the **case they have to meet**
  + **Prevent surprise** at trial
  + Allow other side to **know what evidence they ought to be prepared with** and to **prepare for trial.**
  + **Limit the generality** of the pleadings
  + **Limit and define the issues** to be tried and for which discovery is required.
  + Tie the hands of the party so that the **matter cannot be extended beyond** that actually pleaded
* **R:** May demand particulars to delineate the issues between the parties, **but NOT TO DEMAND how the case will be proven.**
* **HERE:** To establish its defence, D would have to prove what advice was given, when, and by whom
  + They **do not seek the evidence** by which those facts will be proven (testimony to be given by the persons who gave the advice, ie, the mode of proof).
  + Mode of proof may be obvious from the particulars given**, but that is not a reason** to refuse particulars so long as what is sought is facts that are intended, and will serve, to delineate the issues. **D had to provide:**
    - Advice given, the dates, those involved;
    - The titles source and dates of published material
    - Possible effects on health that were the subject of publicity and common knowledge
    - Projects that were publicly known to use asbestos-free products.

## D.) Set-Offs & Counterclaims

### Set-Offs v. Counterclaims

* **Set-Off:** Defence in which a claim back against the P is made that is intrinsically tied to the P’s original claim. If P’s claim is dismissed or discontinued, the set-off falls away. Can be within the responsive pleading.
  + **EX-** K case; vendor claims failure to pay. Purchaser could plead a set-off on the basis that because of late delivery the goods were worth less and the damages should be reduced by the value of the set-off
* **Counterclaim:** Similar, but it is a **stand-alone claim.** Does not fall away if claim ends; needs the separate pleading.
  + **EX-** In the same K dispute, D brings a counterclaim for damages for late delivery as an independent breach of K.

### **Rule 3-7**: Set-Offs & Counterclaims

* (11) D may set-off or set up by counterclaim (they are authorized) so that they can be dealt with in the same claim.

## E.) Parties

### **Rule 22-5:** Multiple Claims & Parties

* (1)- P can join several claims in the same proceeding
* (2) P can name 2 or more Ds in a single law suit so long as
  + there is a **Common question of law or fact;**
  + There is **common relief sought** arising out of the same transaction; OR
  + The **court grants leave** to do so.
* (6) Party can **apply to separate trials** or hearings if joining **unduly complicates or delays** the trial or hearing of the proceeding, or is **otherwise inconvenient**.
* (7) Court **may order a separate proceeding** if a counterclaim or third party proceeding **ought to be disposed of by a separate proceeding**.
  + (ie. if joining unduly complicates proceedings)
* (8) **Proceeding may be consolidated by court order**, or may be tried at the same time or on the same day

### **Part 20**- Special rules for certain parties

* Includes partnerships, those under a disability, and representative proceedings.

### **20-1:** partnerships as parties

* (1) Partners can sue or be sued in the name of the firm
* (2) Service is effected by **leaving the document with a partner**, **or at the partnership office** with someone who **appears** to manage or control the partnership business there.
* (3) Response to pleading must **be filed in the name of the partnership**, **but individual Ps may file their own response and defend in their own name** (even if not named individually in the original pleading)
* (4) if a partnership is a party, any other party may serve a notice requiring an **affidavit setting out the names and addresses of all persons who were partners** when the alleged right or liability arose. Response due in 10 days.
* (7) If an order is made against a firm, **execution may issue against any person who**
  + (a) **filed a responding pleading** or response in their own name as a partner
  + (b) Was **served as a partner** but did not appear
  + (c) **admitted in a pleading or affidavit that they were a partner**
  + (d) was **ruled to be a partner**

### **Rule 20-2:** Persons under a disability (INCLUDES infants)

* (2) If under a disability (including infants), must be **started or defended by a litigation guardian**
* (4) A **litigation guardian** must **act through a lawyer** unless the guardian is the public guardian & trustee
* (10) If party **becomes incompetent**, the court must **appoint a litigation guardian**
* (11) The **court can remove, appoint or substitute** a litigation guardian
* (12) On attaining the age of majority, the **party may take over conduct of a matter** if there is no other legal disability
* (14) **No default** **judgment** against a person under a disability **without leave** of the court
* (17) the court must **approve settlements** on behalf of persons under a disability

## F.) Default Proceedings

### Professional Obligations- Professional Conduct Handbook

* Default Proceedings
  + 12: Must not proceed by default if you know that **another lawyer has been consulted, without inquiry and reasonable notice**
    - **\*unless-** the client expressly instructs you to do so, in which case those instructions should be communicated at the outset of the matter.

### **Rule 3-8**- Default Judgment

Applies where P (or counterclaimant) has filed, but the D has not responded in time

* (1) May proceed in default **if a D hasn’t filed/served a response to civil claim** and the **period for filing and serving has expired**
* (2) Must file**:**
  + **proof of service of the claim** on the D;
  + **Proof of failure to deliver a response**;
  + Requisition from the registrar that **no response has been filed**; AND
  + a **draft default judgment**
* (3) If a default judgment is obtained**, if the claim is for a specific ascertainable amount, the P may take judgment for that amount**
* (12) & (13)- If the claim for damages must be assessed, **the P may take judgment and have damages assessed by trial** or summary application.
* (11) The **court may vary or set aside any judgment granted under the rule**

#### Austin v. Rescon (BCSC in Chambers, 1986) – test for setting aside a default judgment

* **F:** P’s counsel left voicemails about the statement of defence, but D’s counsel didn’t respond. Took default judgment on January 9, 1986. D brought an application to set aside default judgment on January 17, 1986.
* **I:** Should the default judgment be set aside? YES
* **R:** **Miracle Feeds Test:** To set aside default judgment, the applicant must show:
  + **(1)** that he did not willfully or deliberately fail to enter an appearance of file a defence to the P’s claim;
  + **(2)** the he made his application to set aside the judgment as soon as reasonably possible after learning of the default judgment, or explain any delay in bringing the application; **AND**
  + **(3)** that he has a meritorious defence, or at least a defence worthy of investigation.
* **HERE:** There was miscommunication/misunderstanding leading the D’s counsel to think he had an extension of time, so there was no deliberate failure to file; seems there’s a meritorious defence to advance b/c they filed a form of statement of defence in support of the application; they reacted within a week. Therefore, sets aside judgment. However, the D has to pay costs thrown away as a result of the default judgment/application

#### Bank of Montreal v. Erickson (BCCA, 1984) – motion to set aside fails in CA

* **F:** Bank claims in January 1982; Commenced action in 1983. Appearance filed, but no defence. February 1983, a default judgment issued. Nothing happened until bank sought to execute this judgment. D filed motion to set aside came in September 1983; granted. Reason for waiting to set aside was “reached the limit of enduring legal harassment,” hoped going along with the bank would preserve the relationship; and that there was no need to waste time or money since they were bankrupt; and they believed that the bank had no moral right to claim on the guarantee. Didn’t dispute that they owed the money, relied only on the fact they couldn’t pay.
* **I:** Should the default judgment be set aside? 🡪 NO
* **R:** Applied miracle feeds test- (No intentional failure to respond; Meritorious defence; brought application promptly.)
  + **HERE: None of the above-** reasons showed intentionally didn’t respond; no defence (just inability to pay); waited to bring application. 🡪 therefore default judgment restored

#### Schmid v. Lacey (BCCA, 1991) – meritorious defence requires more than bald assertions

* **F:** Trespass & logging action. P serves writ, D chose not to respond to it. Judgment taken in default of appearance. D applied promptly to have the default judgment set aside. Said he didn’t respond b/c he thought they reached a settlement; and that he had hired another person to log and they did the claim without knowledge, consent, or authority. Application dismissed; appeals.
* **I:** Set aside default judgment? 🡪 NO
* **R:** Here, there are insufficient particulars to show a viable defence. **A meritorious defence requires more than bald assertions**- Must prove sufficient details to enable the judge to correctly exercise his mind upon whether there is indeed such a defence.
  + **HERE,** Explanation was set out in barest possible terms, containing no particulars of the alleged settlement (therefore affidavit was deficient); didn’t respond to fact that the P said she had brought the trespass to the D’s attention.
    - Therefore D did not meet requirement of showing meritorious defence:
      * **Meritorious defence requires more than bald assertions.** Sufficient detail required to allow a judge to determine whether there is a valid defence.

## G.) Defective Pleadings- Refer Forward to Striking Pleadings

#### National Leasing Group Inc. v. Top West Ventures LTd. (BCSC 2001) only need a “glimmer of defence”

* **F:** D files a statement of defence and counterclaim. 97 paras over 26 pages. “Idiosyncratic approach to English grammar.” Garbled mess of words. P applies to strike out the pleadings. Court dissects the language of the pleadings.
* **I:** Strike the pleadings for being defective?
* **R:** Several paragraphs show a glimmer of a defence;
  + if fleshed out with particulars, might conceivably amount to a defence against the P’s claim.
  + However, even with any imaginable particulars, they could not possibly form the basis for a claim against the defendant by way of counterclaim.
    - Strikes the counterclaim and invites the D to amend the Statement of Claim in a comprehensible manner

#### Rose v. RCMP (BCSC 2009)

* **F:** P claims numerous defendants conducted brain computer interface technology in his head.
* **I:** Strike the pleadings? YES
* **R:** Discloses a potential cause of action in assault, Battery, & trespass b/c facts are assumed to be true (whoa!).
  + However, the allegations are not particularized so it is plain and obvious the claim will fail
    - Do not set out who did what, where, when, or how. 🡪 therefore defficient
  + SoC is frivolous & vexatious and Embarrassing & prolix (tedious; excessively lengthy). Relief bore no relationship to the allegations of act.

## H.) Amendments to Pleadings

Two main rules:

R 6-1 is GENERAL amendment rule

R 6-2 allows for a change in parties to the action

### **Rule 6-1:** General Amendment rule

* (1): May amend the whole or any part of a pleading
  + (a) **Once without leave** before the earlier of:
    - date of **service of the notice of trial;** OR
    - date a **case planning conference** is held
  + (b) At **any other time with:**
    - **leave** of the court, OR
    - with **consent** of **ALL** parties.
* (2) & (3): To amend a pleading, you include in the amended pleading when the original pleading was filed; **show any deleted words as struck out** and any **added words as underlined**; **then file and serve** the amended pleading.

###### (4) to (7): service/response rules for changes

* (5) & (7): The other side has the **right to make responsive amendments** (must be responsive & related directly to the amendments made)
* (8) May **amend pleadings** AT TRIAL

### **Rule 6-2:** Changing the Parties in the Suit

* **NOTE** with this you **ALWAYS HAVE TO APPLY** - **no one free amendment**
* (1) to (5) : deals with change of parties in an action due to changes in circumstances
* (7) [MOST COMMONLY INVOKED]: On application to the court at any stage of proceedings, the court may order that
  + (a) any person cease to be party
  + (b) any person be added or substituted as a party
    - …where necessary to ensure all matters can be adjudicated
  + (c) a person be added where there is a question relating to that person and the subject matter of the proceeding or relief claimed, **SO LONG AS IT IS JUST AND CONVENIENT TO DO SO**
* (8) deals with practical issues when adding parties

#### Langret Investments v. McDonnell (BCCA, 1996) – must demonstrate ACTUAL prejudice

* **F:** Bankruptcy act has specific rules about amending petitions. Petition originally pleaded that the bankrupt resided in Vancouver; Respondent disputed the Petition and claimed to be a resident of Ireland. Chambers judge refused amendment.
* **I:** Does the practice of the court in civil actions apply to a motion to amend a petition in light of Rule 4 of the Bankruptcy Rules?
* **R:** Rules of court apply to the extent they do not conflict with the statute
* **I:** When are amendments to pleadings allowed?
* **R:** **Amendments are allowed unless the opposing party can demonstrate ACTUAL prejudice, or the amendment would be useless**.
  + **GUIDING PHILOSOPHY:** ensure matters are decided on their merits
    - Amendments are allowed to **enable the real issues to be determined** (just, speedy, inexpensive determination on the merits).
    - The merits of the change are to be adjudicated in the trial or hearing, and **NOT** when determining whether the change should be granted
  + **Potential prejudice is not enough because this could allow too much determination on technical merits**
    - almost any amendment can be regarded as being potentially prejudicial. If prejudice is of the type that could be compensated by costs, then there’s no prejudice.
  + **Here-** no evidence of actual prejudice.

#### Teal Cedar Products v. Dale Intermediaries (1977, BCCA) – factors to consider

* **F:** P had a portion of the roof of its plant collapse. Brought claims, including claims against its insurers. It brought a claim in misrepresentation against one insurer, but did not claim for coverage based on legal advice that such a claim would likely not succeed. Contractual limitation period of one year in the insurance agreement. Lawyer then changed opinion after the limitation period expired. Original opinion was based on the misrepresented information.
* **I:** Should the amendment be allowed? 🡪 YES
* **R: Leave to add a new cause of action should not be refused solely because the P’s conduct was a deliberate decision or was voluntarily dilatory.** 
  + **An honest but mistaken decision not to sue, or allege a certain cause of action within a limitation period, is unlikely to be made for the purposes of gaining time.** 
    - This is a discretionary power, but must be exercised judicially. This means that the words “just and convenient” that appear in 6-2 ought to be read into this provision.
  + **Judge should consider:** 
    - * Delay, and the reasons for delay;
      * prejudice to the respondents;
      * expiration of a limitation period;
      * extent of the connection between existing claims and the proposed new cause of action; AND
      * what is just & convenient in the circumstances.
    - **No one factor should be accorded overriding importance** in the absence of a clear evidentiary basis for doing so.
  + Under R 15 (now 6-2) **Judge has broad discretion** to allow addition of new parties EVEN WHERE a limitation period has expired due to dilatoriness
    - Dilatoriness and limitation defences are important considerations, but NOT determinativve
* **HERE:** The P was not dilatory as he acted based on legal advice on a complicated legal question. Shouldn’t be punished for this. Amendment allowed even though K limitation period had expired.

**NOTE:** Now, proportionality will also likely be a consideration (!)

#### Broom v. The Royal Centre (BCSC 2005) – intentional misnomers (ie John Doe defendants)

* **F:** P slipped and fell in a mall. The P’s counsel could not determine who was responsible for maintenance before the limitation period was to expire. The P undertook the usual course of naming “John Doe” and described that party as responsible for maintenance of the rug on which the P tripped.
* **I:** Was the P amending pleadings & therefore allowed to amend without leave? Or was the P changing a party and therefore needed an order to amend? 🡪 Misnomer doesn’t require leave
* **R: Court distinguishes between a MISNOMER and an actual CHANGE OF PARTY**
  + **MISNOMER** occurs where someone **deliberately misnames** a party, but describes that party in **sufficient detail** to indicate who the party truly is.
    - Substitution of a specific defendant for a misnomer such as “John Doe” does not give rise to any limitation question and **may be done without leave PROVIDED THAT** John Doe is sufficiently described in the pleadings as an identifiable person or corporation, although not by name.
    - **Ask whether the party would have known who was to be sued.**
      * Additional safeguard that the party must be served with the amendment even when an order isn’t required, the party can apply to have the amendment struck if they are considered to be inappropriate without leave.

# V.) Class Actions

### History/General

* Legislation allowed for an action to be brought on behalf of numerous plaintiffs
* Facilitates bringing small, but numerous related claims in one action
* Introduced in BC through this. Previously, representative plaintiffs were allowed
* Threshold question = certification- anyone can commence a class proceeding, but must pass the certification test.

Anyone can start a class action, but must obtain an order certifying it as a class proceeding to continue

### ***Class PRoceedings Act:*** Certification

###### Requirements:

* S. 4(1): Court must certify a proceeding as a class proceeding if **ALL** of the **following requirements** are met:
  + (a) the pleadings **disclose a cause of action;**
  + (b) There is an **identifiable class;**
  + (c) The claims of the class members raise **common issues**, whether or not they 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 (TEST under 4(2)); **AND**
  + (e) There is a **Representative plaintiff** who:
    - (i) can **fairly and adequately represent** the interests of the class
    - (ii) has **a workable plan** for the proceeding;
    - (iii) and is **not in a conflict** of interest.

###### Test:

* S. 4(2): In determining **whether a class proceeding is preferable**, the court must consider all relevant matters including:
  + (a) Whether **common issues predominate over the individual** questions
  + (b) Whether a significant number of **class members have an interest in individually controlling their own actions.**
  + (c) Do the class proceedings involve claims that are the **subject of other proceedings**
  + (d) Whether **other means** of resolving the claims are **less practical or less efficient**
  + (e) Whether class proceeding would create **greater difficulties** than there would be otherwise.

#### Tiemstra v. ICBC (1997, BCCA)

* **F:** ICBC policy of automatically rejecting claims for physiotherapy, travel or other expenses if there was minimal or no damage to the automobile, and no objective evidence of injury. P brings class action, saying this policy led to potential claims of around $500, which were not worthwhile for any one P to pursue solo. Certification rejected; appealed.
* **I:** Certify as a class proceeding? 🡪 NO
* **R:** Common issue was whether ICBC could arbitrarily reject the claims, or should have considered each case on the merits. **The best the common Ps could get is a declaration, and then they would have to litigate solo.**
  + Would accomplish no more for the members of the class than a declaratory action pursued as a test case, but it would be much more complex.
  + **The common issue does not settle an important element in the dispute. Contrasts with cases where certification is granted because it would dispose of a significant feature of the litigation.** No point pursing a complicated procedure for little or no benefit.
  + **THEREFORE:** not the most efficient means of dealing with the issue

#### Rumley v. BC (1999, BCCA)

* **F:** An ombudsman’s investigation of Jericho Hill School (residential school for the deaf) concluded that students had been abused over a lengthy period of time by staff & other students at the school. The P’s brought an action on behalf of abused students and “secondary abuse victims.” (Common issue = whether the school was negligent by vailing to have processes in place to prevent abuse.
* **I:** Certification?
* **R:**
  + re: students:
    - form an identifiable class; one or more can represent.
      * Duty of the school to protect students is clear and immutable.
        + **The issues related to sexual assault are standard of care issues which was a significant common issue.**

even though each student would have to prove their own abuse, class action would dispose of significant part of each litigant’s claim

* + - * The duty is common because of the students’ communication barriers; issues related to the schools’ policies will have common elements; would be needlessly expensive to adduce evidence of school’s history and background in separate proceedings; there is no limitation period for any of the claims. Class proceedings good for sexual assault because there is no limitation period.
      * Students’ claims will proceed
  + Re: secondary victims:
    - Claim that abuse inflicted at the school caused them to abuse others. **Hard to identify a common class because of proximity btw the gov’t and a given P; limits on the class because of intergenerational abuse; and whether the acts constitute abuse of behaviour within the norm of sexual development**.
    - Therefore: Highly individual and don’t lend themselves to a class.

# VI.) Third Party Proceedings

### General

* Allow a party other than the P to assert a claim against someone else for that party’s liability
* A third party claim can be independent upon the cause of action between the P and D, but there must be some connection to the underlying action.

###### Why use?

* Important to avoid a multiplicity of actions about the same subject matter:
  + Avoids inconsistent findings of fact
  + Limits inefficiencies
* Allows a third party to participate in defence of the underlying matter
* Ensures issues are decided in proximity temporally so no party has the advantage of early judgment.

### **Rule 3-5** Third Party Claims

* (1) A party that is not the P may pursue a third party claim against any person if they allege
  + (a) the party is entitled to **contribution or indemnity** from that person in relation to the relief sought in the action;
  + (b) is entitled to relief against the person and that relief: **relates to OR is connected with** the subject matter of the action;
  + (c) The question or issue relating to or connected with the relief claimed in the action or the subject matter is **substantially the same as the question or issue** between the party and third party and should be determined in the action. (note- this is less common b/c if this applies, usually one of the others does too)
* (2) Third party claim can be **brought whether the person is already a party to the action or not**.
* (3) Bring the claim by **filing a third party notice**
* (9) A response to a third party claim is **filed & served similar to a response to a notice of civil claim**
* (4) May **file a third party notice:** 
  + **at any time with leave**; OR
  + **without** leave within **42 days of** being served with a NoCC or counterclaim.
* (7) Must **serve those named in the notice within 60 days of filing the third party notice** itself, and all other pleadings (if they weren’t previously a party); and “promptly” after the date of filing to all other parties.
* (8) Court **can set aside a third party notice**
* (16) & (17) If the time for filing a response to a third party notice is expired, **the party who filed the third party claim may execute default proceedings.**
* (12) **Third party can file a response to the notice of civil claim as well**, and may raise any defence open to a defendant.

###### Service/response:

* Must serve within 60 days:
  + Third party notice itself
  + If not previously a party, all other pleadings delivered by ANY party
* Must serve on ALL OTHER PARTIES
  + A copy of the third party notice
* (9) third party responds just like a D, unless (10) applies
* (11) rules apply as if it were a claim and response

### **Rule 21-9:** Third party Claims & the Negligence Act

* (1) If a D claims **contribution or indemnity** under the negligence act, they must do so
  + (a) If the person against whom that claim is made is a **P,** **then by counterclaim**
  + (b) **In any other case**, whether or not the person is a party to the action, **by third party notice**.
* (2) A D who does not claim contribution or indemnity, but seeks **apportionment of liability**, must set out that claim in the **response to civil claim**.

### **s. 4** of ***Negligence Act***

* where loss is caused by MORE THAN ONE party, the degree of fault is to be allocated between them
* where 2+ parties found at fault, they are all jointly and severally liable to P for the full amount
  + each wrongdoer can seek indemnification from others in accordance with apportioned liability
* claims for contribution or indemnity under the negligence act are brought by Third Party Notice, except as against a P
  + against a P, included in the response as a claim of contributory negligence

#### Adams v. Thompson (1987, BCCA) – can’t bring a third party claim that is really a defence

* **F:** Ps developing land on Bowen Island and hired engineers to plan the subdivision. Two problems arose- health department revoked permits for sewage disposal fields, and some of the lots did not meet the set-back requirements. Caused delays, and the market declined meaning the property values dropped. Ps claimed against engineers for negligent design leading to the delays. Engineers issued third party notice against the P’s solicitors claiming the solicitors should have advised the Ps of steps to take to avoid the losses. Solicitors applied to strike the third party notice.
* **I:** Appropriate to file a third party? 🡪 NO
* **R:** **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 P by way of defence**.
  + Thus, if the only negligence alleged against the third party is ATTRIBUTABLE TO THE PLAINTIFF, there is NO NEED FOR THIRD PARTY PROCEEDINGS.
    - A claim for “contribution & indemnity” is only available where section 4 of the negligence act is applicable.
* **HERE:** the solicitors were acting as the P’s agents, so a wrong by an agent of the P should be brought by way of defence.
  + Mitigation is the P’s obligation, so there is no need for a third party claim because failure to mitigate can be pleaded as a defence. Advice about set-backs *may* have been a proper third party claim, but did not cause the loss

**Note Rationale:** No need to expand the proceedings to third parties where full relief can be obtained against the P.

#### Aylsworth v. Richardson Greenshields (BCSC 1987)

* **F:** P’s were trustees of US based mutual funds. Claimed against the Ds in fraud for perpetrating a stock scam. Also claimed against the ER of the scammers. ER defendant third partied seeking contribution & indemnity from P’s investment advisors; the companies that were used in the scam; other brokers; and insurers. **At pre trial conference, 35 counsel present.**
* **I:** Are the third party claims appropriate? 🡪 no (except as against investment advisors)
* **R:** Rule 22(12) and (13) (now rules 3-5(14 & 15) allow imposition of terms on third party procedure and trial of third party per court’s directions. Court uses that here.
  + **Third party proceedings** (except as against investment advisors) **will complicate and add to the length of trial. Severance would limit the length of trial significantly**.
    - Would prejudice P by unnecessarily delaying the prosecution of their claim
    - The trial of the **third party proceedings must be tried separately**, after the trial of the issues between the Ps and Ds. Even though the D may have had an advantage by having everything tried together, there’s no unfair prejudice BECAUSE:
      * (1) the Ds will still be entitled to a reduction of damages by any amount the third parties are liable for;
      * (2) Risk of inconsistent findings limited by having same judge preside;
      * (3) remote possibility of trying the same issues because litigants will do what they can to reduce redundancy or risk costs;
      * (4) The original judgment can be stayed if necessary to reduce prejudice of execution against the Ds.
      * However, third parties will not be bound by results of the original trial so they have a chance to mount their own defence.
      * NOTE: R 22-5(7) is the authority under current rules for this order

#### Tucker c. Aselson (BCCA, 1992) – Concurrent tortfeasors: settling w/ one doesn’t release all

* **F:** Infant P is badly injured in a car accident when the car slides over the line and collides with another car. Liability attributed 1/3 to mother driving one care; 1/3 to Crown for not sanding the roads; 1/3 to driver struck while driving on his own side of the highway. P settled with her mother (and her insurer). On appeal, the second driver’s liability is overturned, leaving the crown with 2/3 fault. Crown says that the settlement severed the joint and several liability provided for in the Negligence Act. This is because they would have been on the hook for the full amount of damages, less whatever the settlement was, with a right of indemnity.
* **I:** Did other tortfeasor’s settlement release D’s liability? 🡪 NO
* **R:**
  + JOINT vs CONCURRENT tortfeasors:
    - Joint tortfeasors: (truly act in concert with common purpose; principle/vicarious liability; or jointly have a duty, ie. joint conspirators), settling with one releases the other.
    - concurrent tortfeasors: parties whose acts concurred to produce the same damage (ie. drivers of different cars in an accident)
      * Parties here are concurrent, not joint
        + the concurrent tortfeasor is liable to the P for the whole amount of the loss, subject to a deduction for amounts received.
        + The tortfeasor is left with a right to seek indemnity from the other tortfeasors even if one has settled with the P.
        + ie. D owes: (FULL AMOUNT – SETTLEMENT AMOUNT) \* liability portion
* **NOTE:** Based on this case, there would be no advantage to coming to a settlement in multi-party litigation. If the other defendant “third parties” you, then you can still be on the hook after settling with the P. Gives rise to BC Ferries.

#### BC Ferry Corp v. T&N PLC et al (BCSC in Chambers, 1993)

* **F:** solution to the problem of settling multi-party litigation. The P’s ferries were found to contain asbestos. P claimed against the manufacturer, who claimed against the installers seeking contribution & indemnity. Third party sought to have the third party notice struck out because the P had released it in a settlement. In the settlement, the P agreed not to seek to recover any portion of the loss attributable to the third party from the defendants, and to advise the court that it waived any amount from the D attributed to the third party.
* **I**: Third party proceeding against the installers appropriate? 🡪 NO
* **R**: A D may claim for that part of the P’s damage it did not cause yet was compelled to pay. **If the P elects only to claim from one D that portion of the loss that the one D caused, that D can have no right to ask the third party to contribute b/c the D is only called upon to pay that part of the damage that it caused and no more.** Principle in Tucker isn’t violated here because the P only seeks the part of its loss actually caused by the D.
  + Because P can only sue D for its contribution to the loss, it could never be found liable of any amount attributable to third party
  + Only way that third party would have to pay any amounts owing after this case is by D shifting its liability to it 🡪 not allowed

# VII.) Case Planning

### General

* Expanded case planning is one of the major changes in the new rules

### **Rule 5-1** Requesting a Case Planning Conference

* (1) parties may **request a case planning conference once the pleading period has expired** (by obtaining a date and time from the registry, and filing a notice of conference in Form 19)
* (2) Court **may also direct that a party request a case planning conference**
* (3) The first case planning conference requires **35 days notice** (a); subsequent to the first conference, a party can request **additional conferences on 7 days notice** (b)
* (5) Prior to the first case planning conference, the **P must file and serve a case plan proposal within 14 days of the notice**; then **each party of record must file their own case plan proposal** and serve it within 14 days of receipt.
* (6) A case plan proposal must provide the parties’ suggestions for:
  + (a) Doc discovery
  + (b) XFD
  + (c) Dispute resolution procedures
  + (d) expert witnesses
  + (e) witness lists
  + (f) trial type, estimated length, and preferred periods for trial date.

### **Rule 5-2** Conduct of Case Planning Conference

* (1) Conduced by judge or master
* (2) Each lawyer must attend; plus the party if the party is self-represented, or is ordered to attend

Must attend first conference in person. Subsequent can be by phone/video conference

### **Rule 5-3** Case Planning Conference Orders

* (1) **Broad list of orders** the judge or master may make, **including “any other orders considers will further the object of the rules”**
* (2) Court **CANNOT!!**
  + (a) **hear an application supported by affidavit evidence**
  + (b) **make any order for final judgment**
* (3) The decision of the court re: process are expressed in a case plan order at the end of the conference.

###### Noncompliance:

* (6) non compliance with a case plan order may lead to dismissing the claim or defence (under R 22-7) (a); and/or an order as to costs.

### **Rule 5-4** Applications to amend case plan orders

* (1) Case plan orders can be amended by consent or by written application
* (3) The court can amend, deny the amendment, or require a further case planning conference

\*Note: a case plan order can also now be filed by consent (*Stockbrugger v. Bigney* 2011 BCSC 785)

# VIII.) Discovery & Inspection of Documents

## A.) General Disclosure Requirements

### General

* Purpose is to bring out the truth so that the real issues are litigated; avoid “trial by ambush”/surprises; learn the case they have to meet

\*Note: area of significant change from previous rules

### **Rule 7-1:** List of documents – Stage one Document disclosure

* (1) (a) **Within 35 days** of the end of the pleading period, each party of record must **prepare a list of docs** 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**;
  + (ii) and **all other documents** to which the party **intends to refer at trial**;
  + Note: used to be ALL POTENTIALLY RELEVANT documents
* (1) (b) and **serve** the list on all parties of record.
  + **Note** old rule was all documents that are potentially relevant (*Peruvian Guano*)
  + **Note** Front-loads planning and cost, which may result in more costs to clients (as more detailed work will be done up front, costing clients more)
* (2) List must include a description of each listed document
* (3) & (4) **Must include** in the list to the other side
  + **any insurance policy** under which an insurer may be liable to pay,
  + **BUT not to the court at trial unless it is relevant to an issue** in the action
  + **note-** You would disclose to the court if you are suing for coverage- then it’s relevant to an issue in the action. Otherwise, it is merely intended to inform the other side as it may persuade them to settle.

###### Priviledge:

* Must be claimed in the lists with:
  1. Sufficient detail to allow the other party to assess the claim, but…
  2. WITHOUT disclosing anything actually priviledged (R7-1 (6) and (7))

### **Rule 7-1:** Stage One Omissions (obligation to supplement)

###### Obligation to supplement

* (9)- If, after a list is served under the rule, the party **learns that the list is inaccurate or incomplete, or a new documents comes into their possession or control**, the party must **promptly amend the list of docs** and **serve** the amended list.
* (10) A party can demand disclosure of documents that it says ought to have been included in the stage one disclosure list
* (8) Court can order party to swear an affidavit verifying its list of documents

#### GWL Properties v. W.R. Grace (1992, BCSC) – Adequate List; Intentional Witholding

* **Facts:** 
  + Asbestos litigation: D manufactured/installed asbestos in P’s tower
  + P applied to strike the defence of Grace, alleging D:
    - Misled court while resisting appl’n by P for better/++ list of documents
    - Concealed documents it should have produced
  + Grace claimed in excess of one million discoverable documents, with three lists:
    - First : 621 docs itemized by date and brief description
    - Second : 460 boxes of docs (1mm+ documents) **with little to no description**
      * *P sent team to inspect, and doc organization was in “unworkable” condition*
    - Third: 372 docs itemized by date and brief description (like first)
  + D – no list for Second exists, and prohibitive to produce ; P – list does exist, D concealed
    - There was a 25,000 page list of 12 mil. Docs and a list of 40,000 privileged documents; plus an incomplete source index, index of some docs at G’s law firm, and an index to one category of documents. P said they purposely concealed those lists.
* **Issue #1:** **Has G deliberately misled the court, or concealed producible documents** (such that it should be denied its right to defend the action?) 🡪 **NO**
  + P was trying to have a statement of defence struck out
  + There was no specific list of the 1 million docs in the 460 boxes, therefore no DELIBERATE attempt to mislead/deceive court
    - Therefore motion to strike denied
    - Instead, order that D produce 4/5 lists to P for inspection at Vancouver & in Boston. Production must be kept confidential (t.b. challenged if useful).
* **Issue #2:** **Should P get a further and better list of documents?** **🡪 YES**
  + D ordered to list all relevant documents, and provide an affidavit verifying the list
    - Court: onerous, but not impossible. Evidence shows no undue hardship for D to produce.
  + **The Rule requires an ordered enumeration and some description of all relevant documents.**
    - There is flexibility in that rule, including grouping documents
      * Usually documents will be listed singly and numbered.
      * If there are voluminous documents, they may be listed in groups with sufficient detail to enable to the other party to understand:
        + A) generally what they CONTAIN
        + B) WHERE and WHEN they originated
        + C) NUMBER of pieces in group
  + **Relevance** must be **decided by COUNSEL,** not the client.
    - **TEST**: The list must provide a meaningful, reliable, and complete disclosure and effective aid to retrieving the documents on inspection. (*Visa International*)
      * How that is best achieved will depend on the nature of the documentation that must be described. Had to provide a list and provide an affidavit verifying the list.
      * Generally, party giving discovery is in best position to decide

### **Rule 7-1**- Stage Two Disclosure

###### DEMAND

* (11) If a party who has received a list believes that the list should include documents or classes of documents that are **within the listing party’s possession, power or control**; **relate to any or all matters** in question; and are **additional to the documents** **already required**, they may make a written demand:
  1. **identifying the docs with reasonable specificity;** AND
  2. **indicating the reason why** they should be disclosed
  + May allow for greater *Peruvian Guano* style disclosure, provided you can justify why you need it. You may need, for example, financial records for the past 10 years to assess damages or to investigate the case further.

###### REPLY

* (12) In reply to a stage-two demand, the party **must, within 35 days**, do one of the following:
  + (a) **Comply** with the demand (and make a supplementary list)
  + (b) **Comply partly**, and in relation to the balance of demanded docs, **indicate why the amended list wasn’t prepared and why they docs are not being made available; OR**
  + (c) Indicate why the amended list is not being prepared and served, and why they are not being made available

###### Non-compliance

* (13) If there is non-compliance with the demand, the demanding party may apply for an order requiring the listing party to comply

#### Compagnie Financiere v. Peruvian Guano Company (1882, CA)- Stage 2 Disclosure Test (provided reason is given)

* **F:** P made an affidavit of documents & disclosed the company’s minute book; a letter & telegrams, some other letters and things. D took out a summons for further affidavit documents of things referred to in the minute book
* **I:** Further disclosure of documents?
* **R:** 
  + **TEST:** A document must be disclosed where it relates to a matter in question which **may** either **directly or indirectly** enable a party to advance its own case or damage the other side’s case.
    - A document may relate indirectly if it **may** lead to a train of inquiry that **may** permit the party to **advance its case or damage the other side**

**NOTE:** extremely broad test; the classic old test**. May still be relevant in respect of Stage 2 disclosure** issues, non-party disclosure issues, and XFD

#### Peter Kiewit v. BC Hydro (BCSC, 1982)- Stage 2 disclosure test (maybe)

* **F:** P sues BC Hydro re: certain contracts. Hydro disclosed 30,000 documents and advised of a 12 page list of further documents. Hydro objected to disclosing huge numbers of docs that related to other phases of the contract and other contracts.
* **I:** Disclose the documents? NO
* **R:** A literal reading of the rule and *Peruvian Guano* would require disclosure.
  + However, the **RULES OF COURT ARE OUR SERVANTS, NOT OUR MASTERS.** 
    - Declined to follow the case & rule in a case where thousands or hundreds of thousands of documents of only possible relevance are in question. **In a case where thousands of documents of only possible relevance are in question, it is unreasonable for a party to incur enormous expense in what may be a futile search**. Affidavit evidence should show the costs of a further search and the likelihood of its utility.
      * Court leaves it up to parties to find solution. Suggestions:
        + P may have to pay for an extensive search;
        + the demanding party may be required to post security for costs of the search;
        + try some issues before disclosure obligations are concluded in accordance with the rule (ie- do damages/discovery for damages later); OR
        + reduce the scope of discovery and establish PF relevance.
  + **Time has come for the court to become concerned with the cost of litigation subject to the right of any party to the court’s assistance in the reasonable preparation of his claim or defence.**

### **Rule 7-1** Production & Inspection of Documents

* (15) A party who has served a list of documents **must allow the other side to inspect and copy the listed documents** in normal business hours and at the location specified in the list (except those docs that the listing party objects to producing- ie- privilege)
* (16) The listing party must, on request of the party entitled to inspection and on receiving payment in advance, **serve the parties with copies of the documents**.
  + In practice, will usually not require payment in advance- just invoice later.

### **Rule 7-1** Miscelanious – third party discovery / failure to comply with discovery

###### Third Party Discovery

* (18) If a document is in the **possession or control of a person who is not a party of record** may apply under rule 8-1 **brought on notice to the person and the parties of record**, make an order for production, inspection & copying of documents

###### Failure to comply

* (21) If a party **fails to make discovery of or produce for inspection or copying documents**, the party **may not put the document in evidence in the proceeding** or **use it for examination** or cross-examination.
* Rule 7-7- Failure to comply with the rules could lead to dismissal of the case.

#### Dufault v. Stevens & Stevens (BCCA 1978) – Third Party Disclosure

* **F:** P seeks third party disclosure of her own medical records. D didn’t oppose but wanted the same rights. Chambers judge ordered P had rights to production and inspection and obtaining of copies of hospital records, but didn’t include an order that D could have the same rights. Appealed.
* **I:** Should D get the same rights? YES
* **R:** Third party disclosure rule is intended to provide a party with the means of obtaining the production and inspection of a document if the applicant can satisfy the judge that the document contains information that may relate to a matter in issue (*Peruvian Guano*) and of obtaining a copy of the doc to use in lieu of the original in the event that a doc does contain information that may relate to a matter in issue. No party has priority to an order over any other party nor any paramount right to an order. Must satisfy the court that the application is not in the nature of a “fishing expedition.”
  + **TEST:** If the party satisfies the judge that the doc or info in the doc **may relate to a matter in issue**, the Judge should make the order **unless there are compelling reasons why he should not** make it (privilege or grounds exist for refusing in the interest of persons, *not parties to the action*, who might be embarrassed or affected adversely by an order for production.
    - * If court holds that production **may embarrass/adversely affect the 3rd party,** it must:
        + Weigh probative value of the document VS. the negative affect on the non-party; AND
        + Determin whether it is MORE JUST to require production or not.
  + **HERE-** D should have production b/c there is no claim the hospital (3rd party) may be embarrassed by production. Only potential embarrassment is the P’s and this is not a basis for refusing production as she is a party. Records relevant b/c it’s personal injury.

## B.) Legal Ethics

#### Myers v. Elman (1940, HL) – Professional & Ethical obligations of counsel re: Doc Disclosure

* **F:** Client swore a false affidavit of docs; solicitor was guilty of professional misconduct for allowing such an affidavit to be sworn.
* **I:** What consequences for not disclosing all the docs?
* **R:** The swearing of an untrue affidavit is the most obvious example of conduct that a solicitor cannot knowingly permit. He must assist and advise his client as to their duty. **If the client persists in omitting relevant documents, the solicitor should decline to act for him any further.** If he has no reason to believe the affidavit is untrue, he has nothing to do at that time. If he learns that the original affidavit was untrue, then the solicitor must inform his client that he must inform the plaintiff’s solicitor of the omitted docs, and if this is not assented to he must cease to act for the client. Not to do so would be a fraud and defeat the ends of justice.
  + **A client left to himself could not know what is relevant, so the solicitor cannot simply allow the client to make his own documents.** 
    - **Solicitor has a duty as an officer of the court: must investigate & supervise and as far as possible ensure that document disclosure is properly provided.**
    - **He does not discharge his duty by requesting the client to make a proper affidavit and then filing whatever the client sees fit to swear to.**
  + **HERE**: didn’t matter if it was evident on the face of the affidavit that the documents hadn’t been disclosed, as the solicitor never reviewed it
    - **Client cannot be expected to realize the scope of document disclosure obligations on his own**

**PRACTICE NOTE:** Most solicitors provide a standard form explanation of the duty to disclose so they can show they have fulfilled the duty. They also likely have a standard form list of questions to investigate further. With the new narrower test, it may be tougher to explain to the client. May be worth asking for anything potentially relevant (*Peruvian Guano*) and then the solicitor decide what is material under the new rule.

**NEW RULES:** Counsel has an ethical obligation under both Stage 1 and 2 disclosure to ensure that all relevant documents are disclosed.

### Legal Ethics in Michael Clayton

* Consider up-the-ladder reporting (to the client) if you learn of professional/unethical behaviour by a solicitor. Otherwise the unethical behaviour may never come to light if the solicitor simply withdraws.

#### Hunt v. T & N plc (1995, BCCA) – Implied Undertaking not to disclose

* **F:** Asbestos litigation. Hunt brought an action via subrogation to the WCB. Plaintiff admits he is cooperating with and benefiting from associations with other asbestors counsel in the USA. He intends to send the docs discovered from other side to the USA or anywhere else as he sees fit. D would only provide docs on the condition that they only be used for litigation in BC. Previous law had allowed use of the documents for whatever purposes it sees fit. D appealed.
* **I:** Can you share disclosed documents? NO
* **R:** **PF, a party obtaining production of docs is under a general obligation to keep such documents CONFIDENTIAL, whether or not they disclose private or confidential material.** It would be anomalous to recognize a right of privacy and an obligation to use discovery docs only in the proceedings in which they are produced, but then require the owner to take steps to prevent a breach of that obligation. Parties will not know whether there is an intention to maintain privacy. This will also encourage broader disclosure.
* **General obligation upon a party obtaining discovery means they must obtain:** 
  + - **owner’s permission or**
    - **the court’s leave**
  + **to use to documents other than in the proceedings in which they were produced.**
    - “in the proceedings” includes showing to witnesses, advisors, expert witnesses, etc.
    - Implied undertaking of confidentiality over documents disclosed in litigation

## C.) Privilege

### **Rule 7-1-** Privilege in list of documents

* (6) If you **claim privilege** in a document, you must **make the claim in the list of documents** with a **statement of the grounds for privilege;** and
* (7) you must give **enough information to allow them to assess the grounds** for privilege, but must **not reveal any privileged information**
* (8) Court may order a party of record to serve an affidavit verifying a list of documents
  + **Note-** usually happens when it’s been shown that relevant docs were omitted to confirm that the party has now complied with the rule.

### General

* Principal exception to the obligation to disclose material documents.
* Sub-classes of Privilege:
  + Solicitor-client communications- Discussions for the purpose of legal advice
  + Litigation Privilege- Docs created for predominant purpose of litigation
  + Solicitor Brief Privilege- Docs that counsel create or discover/select and put it in your file

#### Hodgkinson v. Simms (1988, BCCA) – Solicitor’s brief privilege

* **F:** P’s solicitors conducted investigations in the course of which they obtained photocopies of numerous documents relevant to the issues in the action. P says D could find the docs for themselves, but D said they’re entitled to see the docs the solicitor “ingathered” into his brief as they are not privileged. P resisted, as documents would provide insight into P’s litigation strategy.
* **I:** Are photocopies of documents from third parties included in the brief privileged even though the original docs were not created for the purpose of litigation?
* **R:** Full disclosure is important to prevent ambush and foster settlement.
  + Can be no concern of ambush here where the D could just as easily make their own inquiries to obtain the documents.
  + Purpose of solicitor’s brief privilege is to ensure clients can communicate fully without the concern that the other side will pry into those cmns, & is therefore part of all embracing cmns privilege. The need for full disclosure will rarely displace privilege.
  + **TEST: Whether document was brought into existence for the dominant purpose to obtain legal advice, or aid in the conduct of litigation.**
    - Where a lawyer exercised legal knowledge, skill, judgment, and industry in assembling a collection of relevant copy documents for his brief for the dominant purpose of advising on, or conducting, anticipated or pending litigation.
      * he is then entitled (and required unless client consents) to claim privilege for such collection and to refuse production.
    - Copies of documents created for the **dominant purpose of obtaining/providing legal advice, or aiding in the conduct of litigation** may be privileged even though, in some cases, the originals are not. 🡪 privilege arises from the selection process
  + **HERE: documents needed to be fully described, requiring further list. However still prob. Covered.**
  + **Dissent:**
    - R 1(5) [now R 1-3(1)] requires matters to be decided on their merits
      * Only with full disclosure and limited privilege can this be realized
      * ALSO: if original documents not privileged, copies ought not be. D might indeed be taken by surprise by documents (contrary to maj opinion)

#### Shaughnessy Golf & Country Club v. Uniguard Srvices LTd. and Chahal (1996, BCCA) – Litigation Privilege requires actual litigation

* **F:** Fire burned down golf course clubhouse resulting from a party by a security guard employed by one D. Insurers had conduct of the litigation. P claimed litigation privilege over a number of adjuster reports. D says the reports were not created for litigation, but were prepared in the ordinary course of business whether litigation was contemplated or not.
* **I:** Prepared for the dominant purpose of litigation?
* **R:** Cross-examination on affidavits shows some reports had a dominant purpose other than preparation for litigation, although the nature of those purposes and the reports affected by them were not established with any precision. Investigations would happen as a matter of course to ascertain whether in the circumstances he policy provided coverage, or whether there might be any applicable exclusion or ground of defence such as arson.
  + **Existence of suspicious circumstances not enough to cover all reports with litigation privilege**
* It would in each case be important to determine the extent of the insured’s entitlement to recover. **Where privilege is claimed for a large number of related documents, the proper approach is to establish the grounds for privilege in respect of each one.** 
  + Court considered the **true purpose of each individual report** and applied the test to each document. **The fact that litigation is a reasonable prospect after an event, and the fact that the prospect is one of the predominant reasons for the creation of the reports is not enough.**
  + **Must establish privilege with regards to specific litigation against a specific party.**
    - Privilege begins to attach once the specific litigation is in mind.

#### Keefer Laundry v. Pellerin (BCSC 2006) – canvasses various forms of privilege

* **F:** P operated commercial laundry facility. Keefer alleges equipment provided by other side wrecked clothes. Milnor claimed privilege over docs on the basis of all three of the distinct types of privilege- legal advice; litigation; and lawyers brief.
* **I:** Have they established privilege over the docs?
* **R:** Party asserting privilege bears the onus of establishing privilege.
  + **“Legal Advice” Privilege:** Highest privilege. CMNS btw lawyers and clients are essential to the effective operation of he adversarial system. Clients must be able to cmn with lawyers without fear of disclosure.
    - **TEST: Is the document** 
      * **(1) a communication btw a lawyer and a client**
      * **(2) that entails the seeking or giving of legal advice and**
      * **(3) that is intended to be confidential by the parties**.
      * Doesn’t extend to physical objects or neutral facts; casual discussions not privileged, nor in-house counsel business advice. “CC” on e-mails; public convos may not be privileged. Not limited to in advance of litigation.
      * **NOTE:** litigation need not be contemplated, but not every communication will be covered
    - **HERE:** Descriptions don’t give enough info to establish whether there’s privilege. Court may review documents**; preferable to resolve on basis of affidavits** to ensure the process is open, not secret, and the parties can understand the basis for the decision. Resort to review when cannot provide info required to establish privilege without disclosing.
      * + Review = appropriate here, but still reluctant. Couldn’t tell in any event, so invited affidavits explaining why they are privileged.
  + **Litigation Privilege:** Protects docs & cmns
    - **TEST:** 
      * **1) litigation was ongoing**, or reasonably contemplated, when document created; **AND**
      * **2) dominant purpose of the document was litigation**, based on an examination of all the surrounding circumstances, and all evidence filed in support of the claim.
        + Again, affidavit evidence should be filed in support of the claim.
        + Document can be created by third parties
      * Operates with litigation brief to create a “zone-of-privacy” around anticipated litigation. Thrust is proper functioning of adversarial system. Overlaps with litigation brief.
    - **HERE:** Couldn’t tell. Appropriate to file an affidavit from the creator setting out the circumstances and purpose of the creation of the doc.
  + **Lawyer’s Brief Privilege:** Protects the lawyer’s work product, including any notes and information or reports collected to prepare for litigation or to give legal advice. Unprivileged docs can become privileged.
    - **TEST: There must be an exercise of the lawyer’s professional skill & judgment in assembling the allegedly privileged information**.
      * Meant to protect strategy
    - **HERE:** Should have provided an affidavit explaining again. Hasn’t proven lawyer’s brief privilege.

#### Leung v. Hanna (BCSC 1999) – Appropriate description of privileged docs

* **F:** P applied for an order that the D produce a further & better list of docs. Submits that part 3 of the list was insufficient and inadequate and not in compliance with the rule. Alleged there was insufficient particularity to form an opinion on whether there is a valid claim for privilege. Said “Privileged is claimed for items 3-10 on the basis that they were obtained or created for the dominant purpose of anticipated or pending litigation”- “Document parked P3-P10, the same having been initialed by the handling solicitor”
* **I:** Was the description of the document sufficient? 🡪 YES
* **R:** **Can’t give away privileged info in the list**.
  + Maintaining privilege is the **RIGHT** of the client and the **RESPONSIBILITY** of the lawyer
    - Dates of documents **may** be privileged, so no general requirement that dates be set out.
    - Same goes for sender of the document; ID of recipient, nature of the letter/doc, so then it would be inappropriate and improper to use any of that info to describe that which was listed.
      * R 7-1 (7) limits description required to that which would not reveal privileged information.
    - If other side is concerned, can seek review of doc by the courtunder new rule 7-1(20) [then rule 26(12)].
    - Court should **err on the side of maintaining privilege.**
  + **HERE**, although the descriptions do not assist the P, the overriding requirement is not to reveal information that is privileged.

# IX.) Other Discovery methods

## A.) Examination for Discovery

XFD: oral examination under oath, of a party by another party with adverse interests

### Purposes of XFD

One of the central means for gathering information (in conjunction with document discovery)

* Understand other side’s case to know case you have to meet (discover facts, strengths, weaknesses)
* Tie down the other side and avoid surprises at trial
* Obtain admissions of fact which can be used as evidence at trial
* Assess the effectiveness and believability of your own client & the other side
* Eliminate & narrow issues
* Facilitate settlement

### Uses of XFD

* To **Read in** evidence- If otherwise admissible, it can be tendered in evidence at trial by any party adverse in interest unless the court otherwise orders, but it’s only admissible as against that adverse party (Rule 12-5(46))
* **Impeachment /** preparation for cross examination
* In **summary trials** (See Rule 9-7(5))

### **Rule 7-2:** Examinations for Discovery

* (4): XFD = oral examination on oath

###### Who can be examined

* (1) All **parties of record** must make themselves available to **parties adverse in interest**

###### Time limits

* (2) **XFDs must not exceed 7 hours** or any greater period to which the examined party consents, without a court order.
  + **NOTE**- **Fast Track litigation 15-1(11)**- unless other side consents or court orders, limit is **two hours**
  + **NOTE:** if XFD lasts one day, counsel MAY NOT DISCUSS anything at all with the client during the break.
    - **However** if XFD spans multiple days, may discuss anything between those days **IF** he/she informed other counsel of intention to do so in advance
* (3) On application for additional time, the court must consider:
  + (a) **Conduct of a party being examined** (including unresponsiveness, failure to provide complete answers, or provision of evasive, irrelevant, unduly lengthy, or unresponsive answers)
  + (b) **Refusal to admit** matters that should have been admitted
  + (c) Conduct of the **examining party**
  + (d) Whether or not it was **reasonably practicable to complete the XFD in the time provided** for
  + (e) The **number of parties** and XFD and the proximity of their interests
  + **NOTE** – Court will also probably consider proportionality because it underlies all the rules now

###### Examining Corporations

* (5) If a party is not an individual,
  + (a) the examining party may examine one representative.
    - See *Westcoast*
  + (b) The party to be examined must nominate a representative an individual knowledgeable concerning the matters in question in the action and
  + (c) the examining party may examine that representative or any other person the examining party considers appropriate who has been a D, Officer, EE, agent, or external auditor.
    - Note: *Rainbow Industrial*

###### Other

* (11) XFD takes place at a location w/in 30 km of the registry that is nearest to the place where the person to be examined resides (in practice, in a lawyer’s boardroom)
* (12) Conducted before an official reporter empowered to administer the oath
* (17) In the nature of cross-examination.
* (18) **SCOPE:** Person must answer any question **within his or her knowledge or means of knowledge** regarding any matter, not privileged, relating to **a matter in question in the action**
  + **Note-** relevance defined by the pleadings (*Allarco*); broader relevance than document discovery 🡪 scope of XFD is governed by the issues raised in the pleadings at the time discussions held

###### Duty to inform oneself

* (22) Party being examined has a **duty to inform himself** and the XFD can be adjourned for that purpose.
  + Illustrates importance of choosing the right person to examine
* (23) Response to duty to inform oneself can be given by way of letter
  + NOTE- not within your power to demand the letter. Only way to compel answers is to reconvene the XFD.
* (24) If that response comes by letter, the letter is deemed to be provided under oath, and the examining party may continue the XFD (provided there’s still time left)

###### Objections

* (25) If a party **objects** to providing an answer, the objection must be taken down by the official reporter and the court may decide the validity of the objection and order the person to submit to further XFD if necessary.
  + Objections may be for relevance; privilege; questions of law; opinions; confusing questions; asking the ultimate issue; vagueness; misstatement of earlier evidence; speculation) (*Alaarco?)*
  + Avoid too many objections- Forecasts that you’re worried; may have to answer anyhow; your objections could be read in court; costs orders

#### Allarco Braodcasting v. Duke (BCSC, 1981) – Scope & Objections

* **F:** Motion for various parties to compel witnesses to answer questions which they refused to answer. Corporation. Founders had unhappy differences & 2 Ps were oused from the Board. Shares offered for sale and were acquired by other P. P’s complained that the Ds were trying to operate the companies in breach of some agreements or something like that.
* **I:**
* **R: XFD enhances litigation by removing surprise, defining & clarifying issues, simplifying proof of many matters. Scope of discovery is governed by the issues raised in the pleadings at the time the discoveries are held**.
  + Not to be in the nature of a fishing expedition. Amendment of pleadings doesn’t allow renewed XFD. When questioning, not required to attack the fortress in a frontal assault- may disguise the purpose.
  + Overly-sensitive objections may be irresponsible and professionally improper.

#### Rainbow Industrial Caterers v. Canadian National Railways (1986, BCSC in Chambers)- Final Choice of party to be examined

* **F:** D applies to substitute their choice of representative to be examined by the plaintiff. Said that the person **P selected was in a junior position**, and is not sufficiently informed to be able to answer the questions or bind the company with his answers. Their option was responsible for the contracts giving rise to the allegations, and they were concerned they would be prejudiced if the Ps choice was used because he would have to inform himself of everything, which is costly, inefficient, time-consuming, and totally unsatisfactory.
* **I:** Substitute representative? 🡪 YES
* **R:** **An examiner has the right of choice in the first instance. However, the rule is relaxed to balance the interests SO THAT JUSTICE CAN BE ACHIEVED as far as that is possible.**
  + Where serious allegations of fraud, & clear P’s choice not knowledgeable, grant other rep.
* **HERE**, Examinee would be seriously prejudiced if the allegations could not be canvassed through the person having the greatest knowledge in the most senior position. Examiner showed no evidence of prejudice. Application granted

**NOTE:** Rule no longer expressly allows applications to substitute. But probably still OK under case planning rules.

#### Westcoast Transmission Co v. Interprovincial Steel & Pipe Corp

* **F:** Negligence action re: piping. Parties agreed there would be 2 exams- one of the sales person who knew of the Ks, and one who was a more technical person that had knowledge of the manufacturing process (nominated by the other side). **P applies for a further XFD** because the second witness didn’t have knowledge of the facts they wanted and he had to inform himself.
* **I:** Entitled to further XFD? 🡪 NO
* **R:**
  + **TEST:** Whether officer was the nominee of the party examined or examiner is irrelevant to determining whether a further XFD ought to be ordered. **The question is** **whether ADEQUATE or SATISFACTORY discovery has been or could be obtained from the representative put forward.** Objective, not subjective test.
    - * Also irrelevant whether there’s been proper cross-exam b/c of interruptions so the party can go inform themselves.
      * **When examinee has to inform themselves, the answers they give will bind the parties even if it’s hearsay**—safest to ask if the party adopts the hearsay answer as truthful.
    - **IMPORTANT:** To show an XFD has been unsatisfactory so as to entitle a party to a further examination, it is necessary to demonstrate that **the questions asked have not been answered, or that answers given are incomplete, unresponsive, or ambiguous, or that follow-up questions have similarly not been answered in a clear, complete and responsive way.**
* **HERE-** P knew of another party that could have been better, and chose to take the nominee. There was effective discovery here.

#### Blue Line Hockey v. Orca Bay Hockey (BCSC 2007) – Not entitled to examine EVERYONE

* **F:** Sale of the canucks, GM place and the assets. Claimed that Aquilini group was part of a partnership with the Ps, and that the Aquilinis acquired their interest to the exclusion of the Ps- corporate opportunities case. Sued for specific performance. Orca bay had personal D, plus 4 corporate Ds. Aquilinis 7 corporate defendants. P had done 3 discoveries of Orca Bay, & wanted a fourth. Applied for it. P claimed there was a right to discover each of the seven members.
* **I:** Entitled to discover any more peeps? 🡪 NO
* **R: The court is not bound to permit every named P to examine every named party adverse in interest.**
  + Where there is a **commonality of interests between defendants**, it may be appropriate to limit the number of parties that may be examined. Rights of parties on discovery must, as a matter of common sense and fairness be congruent rights.
  + Reality is that individuals often use variety of corporate entities to achieve corporate purposes**.**
  + **The Ds here have an ID of interest both in fact and as pleaded.** 
    - P will not suffer prejudice because they could have gotten the info from someone else. Evidence will be admissible as against all parties.
  + **HERE**: P limited to a single discovery for the four Orca Bay D’s with commonality of identity and interest (both factually and as pleaded)
* **GOOD LAW?**: Yes, probably, because court made the decision not by reference to the language in the rules (“may examine”—now changed to “must make available”), but based on general discretion to control its own processes. New Rule has a discretion to limit discovery processes (5-3(1)(g)- case planning judge can make orders re XFD, can limit expand or otherwise deal with them). Orca Bay will survive.

#### Fraser river Pile v. Can-Dive Services Ltd (BCSC 1992)

* **F:** During the course of XFD, party admitted he was to make the final decision concerning the towing of a barge to safety. Counsel for the D requested an immediate adjournment to discuss that evidence. Over objections of counsel for the P, counsel for the D discussed that evidence during the adjournment.
* **I:** Are there limits on the right of attending counsel in a civil oral discovery to discuss with his witness, during an adjournment of the ongoing discovery? 🡪YES
* **R:** Important to prohibit counsel from telling his W what he or she should say. Must also be appearance that there is no such improper conduct. However, when discoveries are long, it may be impractical to prohibit counsel from having any discussions with his or her witness or to limit the discussion to issues not related to the evidence given or to be given.
  + **Discovery less than one day-** no discussions with W, including over lunch or at the recess
  + **Discovery longer than one day-** may discuss issues relating to the case, including evidence, at the conclusion of the day provided counsel has advised the other side of his or her intention to do so in advance
  + **NEVER seek an adjournment during XFD to discuss evidence given by the W.** Wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-exam.

## B.) Interrogatories

**What:** form of written discovery 🡪 answers by affidavit

**When available:** not available as a right 🡪 requires permission, or leave of the court

**General Principle**: Practicality: law should encourage selection of tool with the BEST RESULT for the LEAST EFFORT AND COST See *Roitman*

### **Rule 7-3:** Interrogatories

* (1) May serve with consent or leave of the court
* (3) Court can impose terms on the interrogatories
* (4) Answer w/in 21 days
* Use Form 24 (NOTE: R 22-3 applies to all forms)

#### Roitman V. Chan (BCSC IN CHAMBERS, 1994) – Practicality principle

* **F:** Medical malpractice. Issue of whether certain physicians were involved in Mr. R’s care. Counsel for P drafter interrogatories . Objective was to establish exactly who did what in the days preceding the death. Wanted both a chronology and a narrative
* **I:** interrogatories OK?
* **R:** Court will consider the practicality of the procedure in the case. **The law should encourage the selection of the discovery tool which is likely to achieve the best result for the least effort and cost. Have regard to proportionality.**
  + - Should ask which discovery method will ensure the most just and inexpensive determination of the case on its merits, having regard to proportionality
  + **HERE-** chronology is appropriate through interrogatories. It can then provide a base for XFD. However, the narrative was best addressed through XFD instead.
* **R:** PROPER INTERROGATORIES: *Tse-Ching*
  + **Relevant to a matter in issue in the action**
  + **Not in the nature of cross examination**
  + **Should not include demand for doc discovery**
  + **Should not duplicate particulars**
  + **Should not be used to obtain the names of witnesses**
  + **Narrower in scope than XFD**
  + **Purpose is to enable a party delivering them to obtain admissions of fact to establish his case and provide a foundation for XFD.**

## C.) Pre-Trial Examination of Witnesses

**What:** examination on oath of non-party witnesses

**Purpose:** informational; to permit examination of non-cooperative witnesses; **NOT** to record evidence or provide admissions

**Test**: 7-5(1)

* Person:
  + Has material evidence, and:
    - REFUSED/NEGLECTED to give a responsive statement WRT knowledge in a question; OR
    - Has given CONFLICTING evidence

**Use at trial:** solely to impeach. Not available for read ins

**Impeach**: call into question the integrity or validity of (a practice)

**Scope:** same as XFD: may extend to matters of opinion in appropriate cases

### **Rule 7-5** Pre-trial Examination of Witness

* (1) If a person who is not a party **may have material evidence re: a matter in question in an action**, the court may **order that they be examined on oath**, and order that **the examining party pay reasonable lawyer’s costs** of the person
* (2) An **expert retained or employed by another party cannot be examined under this rule** unless the party seeking the exam **can’t obtain facts and opinions on the same subject** by other matters.
* (3) Must support application with an affidavit showing
  + (a) The mater in question on which the W may give evidence
  + (b) If W is an expert, why they can’t get the info by other means AND
  + **(c) W has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the maters OR Has given conflicting statements.**
* (9) Must not exceed 3 hours

### General

* Purely informational- cannot be used to record evidence or provide admissions.
* Scope is wider than on discovery- not limited to the pleadings but includes all that is generally relevant between all parties. Extends to both fact and opinion.

#### Sinclair v. March (BCSC 2001) – no expectation for out-of-court preparation/research

* **F:** Application by P for pre-trial examination in a medical negligence case of a physician who provided post-op care, both as to complications dealt with by the physician but also re: his opinion about the surgery which was the subject matter of the action. Doctor didn’t want to become an expert witness.
* **I:** Compelled to answer? YES in part
* **R: The scope of inquiry is not limited to the issues between the parties as defined in the pleadings, but includes all that is generally relevant between the parties.**
  + **HERE**- Physician has material evidence to give, none of the parties retained him as a witness, and the physician was not responsive to questions asked about his knowledge about matters at hand.
    - Application allowed to the extent the physician could respond to questions posed without new research; the physician is an actor with information obtained otherwise than in anticipation of litigation; the P is entitled to know the facts and opinions formed by the physician during his treatment of her.
    - Reasonable compensation to be paid.
      * BUT can’t compel the Dr. to be an expert through this rule- **an expert not retained by any party who has material evidence to the litigation may be examined as to facts and opinions.**
      * **The examination is limited to previously formed opinions and knowledge without expectation of engagement in out-of-court preparation or research except for review.**

#### Delgamuukw v. BC (BCSC 1988)

* **F:** Province (D) applies for an order that HH, a genealogist who had done extensive investigation into the genealogy of the Gitksan people, be examined. She had provided an expert report that would be relied on at trial. Specifically retained. Therefore had to show that there was no other way of getting the info.
* **I:** Examination? YES
* **R:** D were unable to obtain facts and opinions on the same subject by other means b/c **she had a unique position within the community**. Only real issue was whether she had been responsive. She provided answers to parts of 29 of 110 questions. Not sufficiently responsive because they only partly assist in the search for information. The questions re: her methodology were necessary to understand her report. She **must disclose the underlying facts known to her upon which her report is based, for without that info, the D would not be able to use the rule for the information gathering purposes for which it is intended.**

## D.) Depositions

**What**: oral examination on oath

**Purpose:** to take sworn evidence in order that the deposition is available to be tendered at trial

**When:** before/during trial

**Where available:** by consent or order

**Facts for consideration:** See 7-8(3)

### **Rule 7-8**: Depositions

* (1) By consent or court order, 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.

###### TEST

* (3) when considering whether to exercise its discretion, the court must take into account:
  + (a) **Convenience of the person sought to be examined**
  + (b) Possibility they may be **unavailable to testify at the trial** b/c of **death, infirmity, sickness, or absence**
  + (c) Possibility that the person will be **beyond the jurisdiction for the court** at the time of trial
  + (d) The possibility and desirability of having the person testify at trial by **video conferencing** or other electronic means
  + (e) The **expense of bringing the person to trial**.

#### Groves v. Liboirin (1998, BCSC)

* **F:** P seeks award for future income loss as part of personal injury claim. Moved to Manitoba to get a job. On social assistance and can’t afford to bring the company official from Winnipeg to testify with respect to the employment offer. Company official also advised he was too busy to come to the province to testify, although he would provide a deposition.
* **I:** Allow a deposition? YES
* **R:** Considered the factors. ER who makes a job offer wouldn’t expect to fly across the country to testify. Future income loss would be a significant issue at trial, & the job was circumspect & credibility of the offeror was best weighed in viva voce testimony. Deposition seems like the best choice here.

**NOTE:** Now, with video-conferencing, that would probably be the option the court would go for.

## E.) Physical Examinations

**Purpose**: provides for physical examination / inspection of property (or person) to ensure that all litigants obtain access to all relevant evidence

**When available:** not available as a right

Court’s discretion to be exercised sparingly, having regard to the respective interests of the parties and the circumstances of the case.

### **Rule 7-6:** Physical Examinations

###### Person

* (1) If the physical or mental condition of a person is in issue, the **court may order that the person submit to an examination by a medical practitioner or other qualified person**, and may also make an **order respecting expenses** connected to the exam, and an order that the **result be put in writing and copies be made available to interested parties of record**.

###### Property

* (2) If court considers it necessary or expedient for the purpose of obtaining full information r evidence, **it may order the production, inspection & preservation of property, or experiments to be conducted on or with the property.**

#### Stainer v. ICBC (BCCA, 2001)

* F**:** Third party appeals court order for the P to attend three medical exams by specified practitioners. Three conditions- Third party may request reports from one or more of the doctors. IF so, they may be received by P too. If he third party doesn’t request the report, they shall within 45 days obtain a copy from that doctor of all documents generated y, or on behalf of that doctor relating to that defence & deliver it to the P. Third party denied its liability to indemnify the D plaza. Third party says the judge erred by imposing conditions in the paragraphs because they do not achieve the goal of putting the parties on an equal footing re: the medical evidence.
* **I:** are the terms inappropriate?
* **R:** Purpose of the rule is to put the parties on an equal footing re: medical evidence. What steps are necessary is a matter of discretion for the chambers judge to asses in the circumstances of each case. The court may impose as a condition a requirement that the P produce all reports in its possession, whether or not they intend to rely upon them. It can also be a condition of ordering an independent medical exam that the examining dr deliver to the P any notes of any history given to him on examination, his observations & findings. It is unusual to go further and order to Dr to produce his confidential opinions or advice to the lawyer who requested the examination—these could be the subject of litigation privilege.

## F.) Admissions

**Purpose**: - to narrow and define the issues  
 - serves as the basis for an order dismissing the claim, or granting judgment

**How made:**  - in response to a notice to admit; OR  
 - failure to respond in pleadings or discovery, by way of affidavit, etc.

**Effect:** to bind the party for the purposes of the action

**When Available:** ONLY in an action, and once pleadings have been exchanged

### Purpose

* Narrow issues & dispense with proof.
* Usually play a limited role and are dealt with on uncontroversial matters in the weeks leading up to trial.

### **Rule 7-7:** Admissions (scope of notice to admit; failure to respond; withdrawal)

* (1): In an action **in which a RtCC has been filed** (\*only in an action), 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**.
* (4) **UNREASONABLE** denial or refusal may result in **costs** of proving the truth of the fact or authenticity, and may award additional costs or deprive of costs as a penalty if appropriate.
* (6) an application for judgment may be made to the court using as evidence admissions made in a notice to admit
* NOTICE TO ADMIT: Form 26 [R 7-7(11)]

###### Withdrawal

* (5) **A party is not entitled to withdraw admissions** made in
  + - (a) a **notice to admit**,
    - (b) a **deemed admission**,
    - (c) or **an admission made in a pleading, petition, or response to petition**
  + **Except** by CONSENT or WITH LEAVE of the court.
  + Consideration:
    - Admission made inadvertently, hastily, or without knowledge of the facts
    - Whether fact was in the knowledge of the person making the admission
    - Whether the fact admitted was actually true
    - Whether the fact admitted was of mixed fact & law
    - Whether the withdrawal would prejudice a party
    - Whether there’s been delay applying to withdraw

###### Deemed admissions

* (2) After **14 days**, the truth of a fact or authenticity of a doc specified in the notice to admit is deemed to be admitted **UNLESS:**
  + the party serves a written statatement that
    - (a) **SPECIFICALLY denies** the truth of a fact or authenticity;
    - (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 fact or authenticity of doc is **made on the grounds of PRIVILEGE or IRRELEVANCY or that the request is otherwise improper**, AND sets on in detail the reasons for the refusal.

#### Skillings v. Seasons Development Corp- 1 of 2 (BCSC 1992) – Deemed Admission unless comply with 7-7(2)

* **F:** P alleges they suffered dmg b/c of the withdrawal of lateral support to their land following excavation on an adjoining parcel owned by D. P also claimed against engineers. Sent notices to admit to the Ds. Very detailed, seeking 24 admissions, and 5 authenticity of docs admissions. Response said “Unable to admit the requested facts at this time. We will be reviewing that position and will advise of any change.” P’s solicitor responded saying that they took the position it wasn’t a specific denial in accordance with the rule. Said they would proceed. No reply was made within 14 days.
* **I:** Summary judgment on basis that the rule wasn’t complied with? YES
* **R:** **Response does not comply with the rule by specifically denying any facts or explaining why.** It simply suggests a detailed response might be made. That is not a proper response to a notice to admit. The facts set out, if admitted or deemed to be so, would constitute proof of the claim in negligence. **As facts are deemed admitted, no choice but to hold the engineers as negligent. P entitled to summary judgment.**

#### Skillings v. Seasons Development Corp - 2 of 2 (BCSC 1992) – withdrawal by right if triable case

* **F:** Summary judgment had issued against the engineers on the basis on deemed admissions. Applied to withdraw the admissions.
* **I:** Application to withdraw admissions allowed? YES
* **R:** **TEST:** An admission should be allowed to be **withdrawn if it is in the interests of justice to do so. The interests of justice generally require a trial on the merits**.
  + Thus, if there is a triable issue, the interests of justice **REQUIRE** that the party be permitted to withdraw an admission.
* **HERE**: whether or not the Ds were negligent or otherwise at fault is a triable issue in this case, and it would be unjust for them to be denied their opportunity to defend the matter on its merits. Therefore in the interests of justice to allow them to withdraw their deemed admissions. Costs thrown away b/c of this proceeding went to P in any event of the cause.
* NOT IN CASE, but Jenny says to consider:
  + Admission made inadvertently, hastily, or without knowledge of the facts
  + Whether fact was in the knowledge of the person making the admission
  + Whether the fact admitted was actually true
  + Whether the fact admitted was of mixed fact & law
  + Whether the withdrawal would prejudice a party
  + Whether there’s been delay applying to withdraw

# X.) Interlocutory Procedures

## A.) Chambers

**Provides a means of**: - disposing of interlocutory issues; AND  
- where appropriate, disposing of all/part of the claims/defences in the action by way of a FINAL ORDER

**Interlocutory**: takes place at interim stage of proceeding; does not result in final disposition of case on merits  
NOT defined exhaustively within act.

### Rule 22-1 Chambers

* (1) Chambers Proceedings Include:
  + (a) **Petition proceedings**
  + (c) All **applications** 
    - (including for summary judgment/trial)
  + (d) **Appeals from**, apps to confirm, change or set aside a **master’s order, report, certificate, or recommendation**
  + (e) action ordered to **proceed by affidavit or on docs before the court**, and stated cases, special cases, and hearings on a point of law.
* (4) All **evidence must be given by affidavit**, but the court may:
  + (a) **order cross-exam on affidavit**;
  + (b) the **examination** of a party or witness; AND
  + (e) **other forms of evidence** (\*general judicial discretion)
* (7) In chambers, the court may:
  + (a) **grant or refuse relief**
  + (a) **Dispose of any question** arising 🡪 see *Bache Hasley v. Charles*
  + (b) **Adjourn** the application
  + (c) Obtain the **assistance of one or more experts**
  + (d) **order a trial**, either generally or on an issue

#### NIchols v. Gray (1978, BCCA) – Evidence in Chambers/Counsel’s statements

* **F:** Appeal from judge in chambers’ decision refusing to make an order dispensing with a jury trial. Judge declined to consider statements of counsel regarding the nature of the evidence likely to be adduced at trial, holding he was restricted to deciding the issues solely be reference to pleadings and affidavits. Because did not consider the statements, the judge concluded there was insufficient material before him upon which to make an order dispensing with the jury.
* **I:** Did the judge-in-chambers err in holding he could not consider much of the material before him, particularly the statements of counsel re: the type of evidence to be adduced? 🡪 NO
* **R:** Pursuant to (new rule) 22-1(4)(e), **a judge in chambers may (in law) consider statements from counsel on evidentiary matters and may give them such weight as is appropriate in the circumstances** (ie- he may decline to give the statements any weight).
  + Onus is on D to satisfy the judge that he should make the order, and **it is for the judge to determine what weight he will give to the evidence, including opinion evidence**. He is not bound to give any weight to expressions of opinion if he thinks that they merit little consideration or weight.
  + PER LAMBERT JA (concurring)- However, it is a **rare case where statements of counsel, standing alone, would justify a finding of fact**. Statements in explanation of affidavit evidence may be of some assistance and an indispensible aid.
  + **HERE:** determined that judge decided he could not take statements of counsel into consideration (in law). Court dealt with the application instead of referring back.

**NOTE:** Best to put counsel’s evidence into affidavit form.

#### MT Maintenance v. Normal (not in readings)- Counsel Evidence in chambers

* **R:** Counsel’s evidentiary statements should be restricted to explaining affidavits. Judges may not base a decision merely on counsel’s statements of evidence.

#### Haagsman v. BC (Forests) (1998, BCSC)- Power to convert to trial (22-1(7)(d))

* **F:** A petition for judicial review and to recover deposits paid under a *Forest Act* regulation that was declared invalid. Respondents argued that the petition was improperly brought under the JRPA and that the petition should be converted to an action, with a full exchange of pleadings and discovery.
* **I:** Can the court convert it to an action? YES
* **R:** This was not properly a claim for mandamus, certiorari, or prohibition; it was a claim for restitution which is **properly dealt with in an action**. Power to convert to a trial under new rule 22-1(7)(d) grants discretion to convert petitions into actions and, when appropriate, treat them as claims for summary trial. **When doing so, consider:**
  + **The undesirability of multiple proceedings**
  + **The desirability of avoiding unnecessary costs and delays**
  + **Whether the particular issues involved require an assessment of demeanour and credibility**
  + **The need for the court to have a full grasp of the evidence, and**
  + **Whether it is in the interests of justice that there be pleadings and discovery in he usual way in order to resolve the dispute.**
  + **NOW will probably have to add proportionality**
* **HERE,** pleadings were necessary. In the interest of clarity that petitioners file a statement of claim, setting out their causes of action, and that the respondents file a defence. Won’t treat them as summary trial applications because the acts relating to the unjust enrichment are relevant and discovery is important.

## B.) Masters

### ***Supreme Court Act***: Masters

* S. 11(7): A master has, subject to the limits in s. 96 of the *Constitution Act*, 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.

### **Rule 23-6?**

* (1) Without limiting any other powers of a master under the 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)

### masters’ Jurisdiction: PD#14

* **KEY POINT:** The common thread running through the restrictions is the **weighing of evidence.** Does the master if have to weigh and decide contested issues of fact and law? If the point requires weighing evidence to make a determination, then the matter is probably not within the masters’ jurisdiction.
* **PART A: para 2- Restrictions-** a master is not to exercise jurisdiction
  + (a) to **grant relief where the power is conferred expressly on a judge by a statute** or rule
  + (b) **Dispose of an appeal**, or application in the nature of an appeal, on the merits
  + (c) to pronounce **judgment by consent where any party in a proceeding is under a legal disability**
  + (d) Grant **court approval of a settlement**, compromise, payment, or acceptance of money on behalf of a person under a **legal disability**, or approval of a sale of a disabled person’s assets
  + (e) in any **criminal proceedings**, or where liberty is at stake, other than uncontested petitions under the patients property act
  + (f) To make an order **holding any person or entity in contempt**
  + (g) To **grant injunctive relief**
  + (h) To make an order under the **Judical Review Procedure Act or for a prerogative writ**
  + (i) to **set aside, vary, or amend a judge’s order**, except to abridge or extend a time prescribed by an order, or vary the interim orders
  + (j) To **grant a stay of proceedings where there is an arbitration**
  + (k) To **make a declaration under the survivorship a**nd presumption of death act
  + (l) to **remove a suspension from the practice of a profession**
  + (m) To **conduct trial management conferences**
* **PART B: Guidelines**
  + 4- A master generally has jurisdiction to hear interlocutory applications, including applications for approval of sale in foreclosure proceedings
  + 5- A master has jurisdiction to make interim orders in family law cases including interim custody orders; interim relief under the Divorce Act; interim restraining orders; orders for exclusive possession of the matrimonial home; and variation of the interim orders described above.
  + 6- A master may make the following **final orders** (subject to the restrictions above):
    - (a) Orders by consent
    - (b) Orders under 22-7 (not complying is an irregularity and not a nullity)
    - (c) Orders for summary judgment where there is no triable issue
    - (d) Orders striking out pleadings if there’s no determination of a question of law relating to issues in the action
    - (e) orders granting judgment in default
    - (f) Orders for foreclosure & cancellation where no matter is contested & there’s no triable issue
    - (g) Orders in respect of the administration of estates
    - (h) Declaratory orders under s.57 of the family relations act where there is no dispute.
  + 7- Subject to limits above, a master has the jurisdiction to enforce orders under court order enforcement act, family maintenance enforcement act, and any statute requiring an application to the court to enforce an order made by a statutory board, decision maker, or tribunal.

#### Pye v. Pye (2006, BCCA) – masters have jurisdiction to make final orders

* **F:** Application for leave to appeal an interlocutory order dismissing an application to set aside a Master’s Order made by consent pertaining to the status of certain property as a family asset.
* **I:** Should the order be set aside on the basis that a Master does not have jurisdiction to make a final order? 🡪 NO
* **R:** masters were designated to have equal power to that of judges, subject to constitutional restrictions. The restrictions have been defined and observed. **Masters may not determine contested disputes or decide appeals by weighing evidence. They do have jurisdiction to make final consent orders, and other final orders subject to constitutional limitations and the restrictions imposed by practice directive.**

## C.) Affidavits

### General

* Affidavit is a written statement of evidence, sworn by the person giving the evidence (deponent) before a person authorized to take affidavits (a lawyer or notary public). A court relies on affidavits in the same way as it relies on oral testimony.

### Professional Obligations & Affidavits

* LSBC Professional Conduct Handbook; Chapter 8:
  + **Rule 9**: A lawyer who gives viva voce or affidavit evidence in a proceeding shall not thereafter ac as counsel in that proceeding unless the evidence is on a purely formal or uncontroversial matter, **or it is necessary in the interests of justice.**
  + **Rule 10:** A lawyer who was a witness in proceedings shall 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.
* **Policy Reasons**: We are officers of the court. Us swearing affidavits puts the court in an uncomfortable position of deciding whether counsel appearing before them are credible or should be believed.
* **Practice Note**: Many lawyers will have their assistants sear affidavits, particularly regarding correspondence.

### **Rule 22-2:** Affidavits

* (12): An affidavit must state **only what a person swearing or affirming the affidavit** (the deponent) **would be permitted to state in evidence at trial**
* (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 & belief** is given
  + (b) and the affidavit is made in respect of an **application that does not seek a final order, or by leave of the court**

#### Tate v. Hennessy (1901, BCCA) – Grounds for Information & Belief not stated

* **F:** Appeal from an order setting aside an order granting the P leave to serve outside BC. Application was based on affidavit given on information and belief, but the grounds for information & belief were not given.
* **I:** Set aside decions b/c affidavits were ineffective? 🡪 YES
* **R:** It was evident that many of the essential points the deponent swore to were necessarily founded on his information and belief only. As the grounds were not stated, the affidavits were inadmissible—they were “worthless and ought not to be received.”
  + **Affidavit based on information and belief MUST identify the GROUNDS for that information/belief**

#### RE: CJOR Ltd (BCSC in Chambers, 1965)

* **F:** Oppression proceeding. Petition was supported by one affidavit sworn by 3 deponents. Deponents swore to have personal knowledge except where the belief was based on information and belief from their solicitor.
* **I:** Affidavit OK? NO
* **R:** Affidavit is defective in that it does not conform with the requirements of the rules.
  + Affidavit did not provide the respondents with any info as to **which of the deponents had what knowledge**, not what parts of the 56 paragraphs contained personal knowledge.
  + It was also impossible to segregate within the affidavit **which facts were within the knowledge of the deponents and which facts have been given to them by their solicitors**.
  + Also, a **final order was sought and hearsay** (information & belief) is not OK in a final order.

## E.) Applications

###### Notice of Application: Form 32: not to exceed 10 pages

Sets out date and time of hearing, and:

Part 1 – order sought  
Part 2 – factual basis  
Part 3 – legal basis  
Part 4 – material to be relied upon\*

\* generally affidavits (R 22-1(4)). MUST serve on EACH party of record AND any other person who may be affected (R 8-1(7)).

###### Application Response: Form 33: not to exceed 10 pages

Part 1 – order(s) consented to  
Part 2 – order(s) opposed  
Part 3 – order(s) on which no position taken  
Part 4 – factual basis  
Part 5 – legal basis  
Part 6 – material relied on

### General

R 8-1: dealt with in chambers, s.t. limited exceptions

* Can be **Final in nature**; or **Interlocutory.** Interlocutory applications are of three types:
  + Compliance or non-compliance with the rules (ie- seeking compliance with doc discovery rules)
  + Seeking leave from the court to take a procedural step (ie- withdrawing admissions)
  + Raising issues of legal substance on an interim basis (ie- seeking an interlocutory injunction)

**Note:** NoA/AR meant to give MEANINGFUL NOTICE, not be pro forma documents

### Applications **not** Dealt With In Chambers

* Consent Applications (Rule 8-3)
  + If court is satisfied the application is consented to and the materials appropriate for the application have been filed, registrar may refer to a judge or master, or enter the order or proceed)
* Applications of which notice is not required (Rule 8-4)
  + Does Not include ex parte interim orders
* Applications by written submissions (Rule 8-6)
  + BRAND NEW – file the docs in support, and an application may be made in the manner provided for in the directions given at a case planning conference.
* Procedure for all- Court will sign off. Draft the order and file it with the registrar. They review, and there’s a consent order. No need to appear in chambers to speak to the application.

### **Rule 8-1:** Procedure for Basic Chambers Applications

###### Summary

1. Applicant files and serves NoA and supporting documents/affidavits **at least 8 business days** before hearing
2. Within **5 days of receipt** the application respondent files and serves AR, and supporting affidavits/documents
3. Applicant may file responding affidavits **by 4pm one full business day** before hearing
4. If application is **opposed**, applicant must provide an **application record** to registry by **4pm one full business day** before hearign

###### Rules

* (3) party wishing to apply **files a NoA & original of every affidavit** and every other document to be referred to by the applicant at the hearing and hasn’t already been filed in the proceeding.
* (4)NoA must not exceed **10 pages in length**. Sets the **date and time of the hearing** and **order sought, factual basis, legal basis, and material to be relied on.** 
  + Evidence will generally be by way of affidavits (Rule 22-1(4))
  + No further argument unless your application is longer than 2 hours (8-1(16))
* (5) Set the date for 9:45 m on a day on which the court hears applications or other time fixed by the registrar
* (6) If it’s longer than a 2 hour app, the registrar must fix the time.
* (7) Serve the NoA, Filed affidavits and docs, and any required 9-7 notice on **each party of record and anyone else who may be affected by the order sought**.
* (8) Applicant must file and serve **at least 8 business days before the date set for hearing** (*9-7 trial- at least 12 days before)*
* (9) **Within 5 business days after service**, the application respondent must file and serve the application response and the affidavits and documents in response. (*9-7 trial- at least 8 days before*)
* (10) Application response must indicate orders consented to; orders opposed; orders on which no position is taken; factual basis; legal basis; and material relied on.
* (13) The applicant may then **file responding affidavits** **no later than 4pm, one full business day** before the date set for hearing.
* (15) Where an application is opposed, **the applicant must provide the** **application record** to the registry **no later than 4 pm, one full business day before** the date set for hearing.
* BUSINESS DAY = day that the registry is open- defined in 1(1)

#### Bache HaLSey v. Charles (BCSC, 1982) -

* **F:** Application for an order that default judgment be pronounced void, or no longer enforceable against him. Argued the court was without jurisdiction to grant judgment because it was not sought in the form of motion. Motion sought an order striking the defence, relying on the rule relating to default judgment. Cited the rule but didn’t seek an order for the P to recover judgment. Judge made the order to recover judgment. Other side took steps to obtain leave to file a new defence based upon merits he has subsequently raise. Attacks the default judgment on the ground that since judgment was not sought against him in the notice of motion, the court was without jurisdiction to make the second part of its order.
* **I:** Default judgment void? 🡪 YES: notice not given
* **R:** **Courts may pronounce on “Any question arising on the application.”** This means they can **pronounce with reference to questions raised by the specific form of the notice of motion and cannot have reference to questions that go substantially beyond the motion.** Default judgment was set aside as a nullity on the basis that notice was not given; **the D ought not be left to guess at the relief that is being sought. IT MUST BE SPECIFICALLY ENUMERATED. Not to have this would be contrary to the rules of natural justice.**

**NOTE:** May have been influences by the fact that the D was self-represented, but who knows? Appears to apply broadly.

## F.) Time

### **Rule 22-4:** Time

* (1) If a **period of less than 7 days is set out by the rules, holidays** (and therefore Sundays) **are not counted**
* (2) **Court may extend or shorten any time period** even if an extension of the order granting the extension is made after the period of time has expired.
* (3) A period fixed by the rules or an order for serving, filing or amending a pleading or other document **may be extended by consent**.

### **Rule 8-1:** Business Day Definition

* Day that the court house is open

### **Rule 4-2 & 4-3:** Rules for service

* 4-2(3): If a document is left at an address **before 4 pm on a day that is not a Saturday or holiday**, it is **deemed to be served on the day of service**; if it is left on a Saturday or holiday or after 4 pm, then it is deemed to be served the next day that is not a Saturday or holiday.
* 4-2(4): A document sent for service by **regular mail** is served **one week later on the same day of the week as the day of mailing**, or on the next day that is not a Saturday or holiday.
* 4-2(5): IF a document to be served **by fax is 30 pages or more** including the cover sheet, it may be **served by fax between 5 pm and 8am, or any other time if the other side agrees**
* 4-2(6): If **served via fax or e-mail**, **if served before 4 pm on a day that is not a Saturday or holiday, it is served that day**. If after 4 or on a Saturday or holiday, served the next day that is not a Saturday or a holiday.
* 4-3(7): A **document served by personal service**- if served **before 4 on a day that is not a Saturday or holiday, it’s served that day**; otherwise on the next day that is not a Saturday or holiday.

### ***Interpretation Act*** and Timing

* s. 29: **“Holiday” includes Sunday**, Christmas Day, Good Friday, and Easter Monday; Canada day; Victoria day; BC day; Labour day; Remembrance day; New Years Day; December 26; and a day fixed by the parliament of Canada or by the legislature or etc 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.
* S. 25(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, the first and last days must be excluded. **(Use this rule re: At least 8 business days before the date set for hearing**)
* S. 25(5): if those words aren’t used, the first day ought to be excluded and the last day included. (**Use this rule re: “respond within 5 business days”**)

## G.) Orders

### **Rule 13-1:** Orders

* (1) Can be drawn up by any party; **must be approved in writing by all parties or their lawyers**; 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**; and, after approval is made, must be **left with the registrar to have the court seal affixed.**
* (3) In standard form
* (8) Takes **effect on the day it is pronounced** (NOT the day it is sealed)
* (17) Court may **correct a clerical mistake or an error arising 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.

**NOTE:** court has inherent jurisdiction to amend orders it has made

# XI.) Applications

Certain Part 9 rules allow a means to dispose of a case on its merits WITHOUT A TRIAL:

* Special case 9-3
* Proceedings on a point of law 9-4
* Applications to strike pleadings 9-5
* Application for summary judgment 9-6
* Application for summary trial 9-7

## A.) Summary Judgment

* Permits speedy disposition of **uncontested / uncontestable actions**
* Reject, promptly and inexpensively, claims and defences **bound to fail at trial**
* Provides a mechanism for determinations of disputes and **issues of LAW ALONE**

### **Rule 9-6:** Summary Judgment

###### Plaintiff

* (2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the respond, **apply under this rule for judgment against the answering party on all or part of the claim.**
* (3) Answering party **may respond by saying that the claiming party’s pleading does not raise a cause of action**. If they want to make any other allegation, they **may not rest on the mere allegations or denials in his or her pleadings**, but must **set out facts showing a genuine issue for trial** in an affidavit.

###### Defendant

* (4) In an action, **an answering party may, after serving a responding pleading, apply under this rule for judgment dismissing all or part of a claim** the an originating pleading.

###### Test See *Progressive* below

* (5) **TEST:** On hearing an application under 9(2) or (4), the court may…
  + (a) If there’s **no genuine issue for trial**, must pronounce judgment or dismiss the claim accordingly (possibly within Master’s jurisdiction if no weighing involved)
  + (b) If the **only genuine issue is as to amount**, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount (Possibly within Master’s jurisdiction, if no weighing involved)
  + (c) If the **only genuine issue is a question of law**, may determine the question and pronounce judgment accordingly (NOT within master’s jurisdiction because it involves weighing law), and
    - **NOTE-** “Only genuine issue” probably implies only one issue of law.
  + (d) make any other order it considers will further the object of the rules.
  + (7) If the applicant gets no relief, **the court may fix the costs of the party responding and fix the period within which those costs must be paid**. (NOTE- extra costs consequences if application is brought in bad faith or for delay purposes- 9-6(9); less consequences if denied relief but application was reasonable (9-6(8))
* **TEST** (*Progressive* and *Hughes v. Sharp*)**:** must be plain and obvious or beyond doubt that the action won’t succeed
* If any doubt there’s a triable issue, application dismissed
* **NOT** function of the court on a 9-6 application to **try disputed questions of fact or law**
  + Only question is whether the facts raise a BONA FIDE TRIABLE ISSUE
  + Concerned with legal merit, NOT FACTUAL MERIT

### Issue of Fact vS. Issue of Law

* **Pure Question of Fact:** Usually clear that it’s all fact
* **Pure Question of Law:** Can be pure questions of interpretation of a contract or legal document
* **Question of Mixed Fact and Law:** Appear to be questions of law, but involve a consideration of facts: Causation in tort is always a question of mixed fact and law.

#### Progressive Construction Ltd. et al. v. Newton et al (BCSC, 1980) – must be plain and obvious

* **F:** P and D had a land development company together. D set out on its own to create its own company. D gets a piece of property. P sues them for taking a corporate opportunity, seeking disgorgement of profits. D applies for summary judgment. Each files an extensive affidavit that set out facts which, if true, meant that P had no claim. P filed no affirmative evidence and relied on cross-examination on affidavits (didn’t have their own deponent).
* **I:** What is the test?
* **R:** On all applications **the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue.** The **onus of establishing there is not such an issue rests upon the applicant**, and must be carried to the point of making it **“manifestly clear,”** which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.
* **I:** What evidence should be before the court on this type of application?
* **R:** Where a D applies for summary judgment there may be circumstances where the plaintiff must file an affidavit as to the merits of his case in reply. **While an applicant for summary judgment should swear positively to the facts, there may be situations where it would be unfair to impose the same rule on the respondent. Cross-examining a defendant applicant on his affidavit is a valid approach to challenging the motion for summary judgment.** So long as the respondent’s evidence can raise a doubt as to whether there’s no issue for trial, there is no need to file affirmative evidence.

**NOTE:** Under the new rules, 9-6(3) says that **the applicant MUST file evidence**. If respondent alleges there’s no CoA, then no need to file evidence. If they say anything beyond that, then they must file affirmative evidence and cannot rely on denials or allegations in one’s own pleadings. Cross-exam on affidavit requires consent or leave, so it’s **unlikely that Progressive would still work out now…** unless the friend agrees, and you file that as your affirmative evidence… but the rules says to set out the facts in an affidavit, so actually probably not.

**Also, *International Taoist Church (2011 BCCA):***“inconceivable to me that a P could overcome a filed defence and obtain summary judgment under new rule in the absence of sworn evidence that proves the claim”  
“Also inconceivable that D could [do the same]”

*Progressive* is thus probably bad law now

#### Hughes v. Sharp (referred to in Progressive)

* **F:** Appeal from summary judgment WRT foreign judgment on a guarantee
* **Held:** litigant must be allowed his day in court. Not deprived unless it is MANIFESTLY CLEAR that he’s without a defence that deserves to be tried
  + **Not place of a judge to try disputed issues of fact/law.** ONLY deciding if bona fide triable issue

#### Western Delta Lands v. 3557537 (BCSC 2000)

* **R:** The problem with 9-6 is that artful pleaders are usually able to set up an arguable claim or defence and any affidavit that raises any contested question of fact or law is enough to defeat a motion for judgment. Often ineffective at avoiding unjust delay or in avoiding unnecessary expense in the determination of many cases
  + **May be less true now** given that points of law can be considered

### Effect of Determination

* The issue is finished between the party; cannot challenge the ruling on a point of law later b/c of Issue Estoppel (refer forward- final decision; same issue; same parties or their privies)

## B.) Summary Trial

**What**: a means of obtaining judgment without a conventional trial.

Can apply A) for judgment; B) “on an issue or generally”.

**When available:**

* available in respect of an action, a petition converted to an action, a third party proceeding or a counterclaim provided that a responding pleading has been filed (Rule 9-7(2))
* must be brought on for hearing at least 42 days before a scheduled trial date (Rule 9-7(3).
* BUT: **not every case is suitable for summary trial**

**Evidence:**

* primarily affidavits but can rely on extracts from XFD’s, interrogatories, admissions, expert opinion
  + **NOT Rule 7-5 evidence** but Rule 7-8 deposition evidence is okay (also possible to obtain order for cross-examination on affidavit (Rule 9-7(12)(b))

1. Bring and respond to application
   * Rule 8-1 governs materials to be provided and applicable time limits
2. Application for preliminary directions
   * before a judge or master: Rule 9-7(13)
   * Rule 9-7(11): challenge to suitability
   * Rule 9-7(12): directions as to evidence and conduct of application
3. Hearing in chambers
   * Before a judge (not within the jurisdiction of a master)
   * Challenge to suitability (either at the hearing, or on a preliminary application). See Rule 9-7(11).
4. Judgment
   * grant judgment on an issue or generally; or
   * decline to grant judgment if the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law or it would be unjust to do so.

**KEY ISSUE: Suitability**

* Are issues raised by STA **suitable** for summary trial?
* Will summary trial **assist efficient resolution** of the proceedings?
* Would it be **just** to render justice by summary trial?

**Question of suitability may arise:**

1. On application by one party under 9-7(11)
   * + On a preliminary application before STA (see *Western Delta Lands*)
     + At same time as the STA
   * Either way: focus is on suitability and efficiency
2. At any other time, **judge retains discretion** to assess appropriateness of summary trial
   * May refuse to give judgment 🡪 see *Chu v. Chen*

### **Rule 9-7**

* (2) A party may apply to the court for judgment, on **either an issue or generally**, in any of the following
  + (a) **an action** in which a RtCC has been filed
  + (b) A proceeding that has been **transferred to the trial list**
  + (d) a **third party proceeding** in which a response to a third party notice has been filed
  + (e) An **action by way of counterclaim** in which a response to counterclaim has been filed
* (3) must be heard **at least 42 days before the scheduled trial** date
* (5) Unless the court otherwise orders, applicant and other parties may tender evidence via:
  + **(a) affidavit**
  + **(b) answer or part of an answer to interrogatories**
  + **(c) XFD or part of XFD**
  + **(d) admissions**
  + **(e) Report setting out the opinion of an expert if it conforms with 11-6(1) or the court otherwise orders it’s admissible.**
* (11) On **application before or at the same times as the 9-7 application**, the court may **adjourn the summary trial application or dismiss the summary trial application** on the ground that the **issues raised are not suitable for disposition under this rule**, or the **summary trial application will not assist the efficient resolution of the proceeding.**
* (15) On the hearing of a summary trial application, the court may
  + (1) **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;
    - (ii) or the court is of the opinion that it would be **unjust to decide the issues**
  + (2) **impose terms respecting enforcement** of the judgment, including a stay of execution and
  + (3) **award costs**
* (17) If the court can’t grant judgment, they **can order a trial of a proceeding generally or on an issue** , as well as case planning, or any other order the court considers will further the object of the rules

#### Inspiration Management v. McDermid (BCCA, 1989)

* **F:** Appeal from an order dismissing an application for 18A (now 9-7) judgment. Chambers judge dismissed the P’s motion because she considered the test for disposition of such an application was that the judgment **shouldn’t** be given unless clear that a trial in the usual way could **not** possibly make any difference in the outcome. There was a serious conflict of evidence about the collateral for a loan that became important.
* **I:** What is the proper application for 9-7? When is it appropriate?
* **R:** 18A added to the rules 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 unless it would be unjust to do so. The urgency of cases and cost of litigation do not always permit the luxury of a full trial with all traditional safeguards.
  + - **9-7 substitutes other safeguards:**
      * **first, 14 days notice of the application;**
      * **(2) chambers judge cannot decide unless they find the facts necessary to decide issues of fact or law;**
      * **(3) even if the judge can find the factual and legal issues, may decline to give judgment if he thinks it would be unjust**.
      * Chambers judges should not be timid in using the rule for the purposes it was created.
    - When deciding whether it’s just to give judgment, the chambers judge must consider
      * **(1) the amount involved,**
      * **(2) the complexity of the matter,**
      * **(3) prejudice that could arise by reason of delay,**
      * **(4) cost of taking it forward to a full trial in relation to the cost involved,**
      * **(5) course of the proceedings,**
      * **(6) whatever else is appropriate.**
    - Caution: “litigating in slices”
      * ST likely not appropriate where other matters must proceed to trial regardless
      * **BUT** will it assist in settlement, if a critical issue is resolved?
    - Not possible to tell whether the result at trial would be the same. Therefore, chambers judge used wrong test.
      * **THE TEST: for 18A is the same as on a trial- upon the facts being found the judge must apply the law and appropriate legal principles**. If satisfied that the claim or D has been maid out according to the appropriate onus of proof, he must give judgment according to law **unless he believes it would be unjust to give that judgment.**
    - When deciding whether the case is an appropriate one for judgment under 9-7, consider all the evidence and whether the evidence is sufficient for adjudication.
    - **Conflicting evidence on 9-7:** Don’t deal with it by preferring one over the other; but other admissible evidence may make it possible to decide. If no other evidence, may adjourn the app and order cross-exam on affidavits, or order cross-exam before him of deponents.
    - OK to resolve complex cases via 18A.
      * **Give judgment after asking whether any party has been denied an opportunity to produce testimony, OR if there is a conflict in the evidence that cannot be readily resolved?**
        + **If yes to either, case is probably not ready for judgment.** Steps that must be taken to prepare it for trail will determine whether it’s best to remit to trial or adjourn, etc.
    - **HERE:** further process was required (cross examination on affidavits), but case was suitable for summary trial
      * **Per Lambert J. :** “unresolved issues of fact are within a sufficiently narrow compass to make [summary trial] a preferred alternative to the trial list.”

#### Orageville Raceway Ltd. v. Wood Gundy Inc (BCCA 1995)- can make finding of credibility in ST

* **F:** P claims against its broker. P alleged D had a duty to disclose that it was acting as principal in the purchase, rather than as P’s agent. Direct evidentiary conflict on main issue requires finding of credibility
* **I:** Can this be decided via 9-7? 🡪 YES
* **R:** Chambers judge based his ruling on confirmation of one party’s evidence in undisputed documentary evidence.
  + **When independent documentary evidence is available to help the judge determine issues of credibility, the judge can choose to rely on that evidence**.
    - It is permissible to resolve conflicts in affidavit evidence by reference to other admissible evidence
    - No error to determine issue of credibility in summary trial

**NOTE:** no challenge to suitability: may have changed outcome of case if raised?

#### Chu v. Chen (BCSC 2002) – abuse of ST process

* **F:** Judicial rant. No one complained this was unsuitable for summary trial. However, that does not bind him from reaching an opposite conclusion. He is entitled to dismiss all of the application if it’s unsuitable for disposition or if it would be unjust to decide the issues.
* **R:** Purpose behind summary trial application-- Courts were often double or triple booked. McE created summary trials to bring parties to trial faster and quicker. Worked well at first, then counsel began to choose this more frequently. A special division exists to hear these applications in Vancouver. These trials are less perfect trials than conventional trials A hearing that takes counsel less time to present does not necessarily result in fewer hours of judicial time. Can be extra expense to the court because they have no greater resources. Judge cannot work at a judgment slower. Much more work left for the reserve time. Judicial schedule needs to change, same with support services;
* **HERE:** too long pleadings, 400 pgs of affidavits; 100 or so pages of discovery material; 75 pages of argument; + case law = 900 pages of written material, which weren’t all mentioned in the 2.5 day hearing. Estimates 20-30 working days to read, absorb, organize and fashion all of the material into an acceptable written judgment for appeal court purposes.
  + Therefore unacceptable for disposition under rule 18A because the summary trial procedure is being used by the P for something other than its intended purpose.
  + The intended purpose was not meant to apply to a dispute involving this amount of material and requiring such a significant amount of judicial out-of-court research and writing time.
  + Application dismissed

**NOTE:** His suggestion was to Limit materials to 75 pages. Hasn’t been accepted or followed. But note the risk in doing a summary trial- be careful with the time estimate and presenting your case to bring the judge to everything they need to decide the case.

#### Western Delta Lands v. 3557537 Canada Inc (2000, BCSC) -

* **F:** Preliminary application as to the suitability of a case for 9-7 took 6 days.
* **R:** Purpose of 9-7: Introduced to expedite the early and economical resolution of appropriate cases in chambers. A motion to dismiss the 9-7 at the early stage of litigation is likely to fail UNLESS:
  + **The litigation is extensive & summary trial hearing itself will take considerable time**
  + **The unsuitability of a summary trial determination of the issues is relatively obvious (ie- credibility is a crucial issue *(and isn’t substantiated- see inspiration mgmt.)***
  + **Summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity**
  + **Issues are not determinative of the litigation and are inextricable interwoven with issues that must be determined at trial**
    - Though this can be remedied by having the same judge preside throughout so there’s no need to re-educate the court on each application, and reduced risk of hampering subsequent judges on findings of fact.
* **HERE:** B/C partnership was ongoing, it was important to decide this quickly; judge agreed to case mg and hear everything, so Ds have not persuaded him that the issues were unsuitable for summary disposition. It was likely resolving even some of the issues would expedite the resolution of litigation generally.

### **9-7** Procedure

* (1) A files notice of application & affidavits (NOTE- no information & belief in these applications- hearsay and this is a final order)- at least 12 days before
* (2) A serves R, who files application response and their affidavits 8 business days later
* (3) Preliminary Hearings:
  + Extensions of time common (b/c R doesn’t have much time)- J or M
  + Further Discovery- J or M
  + Suitability for summary trial- J or M
* (4) Hearing (in chambers before J; NOT M)

## C.) Special Case

**What:** alternative summary procedure by which a question of law or fact or mixed is stated for an opinion of the court

**When:**

* at any time with agreement of parties
* by order of the court in absence of agreement
  + Considerations:
    - Savings of expenses to parties?
    - Savings of time to court?
    - Ought properly be determined in main proceedings?

**Process:** submit signed statement of facts

**Result:**

* Opinion of court
* MAY serve as basis for judgment or relief ONLY with consent of parties: 9-3(5)

### **Rule 9-3**

* (1) Parties 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**
* (2) **court may order** a question or issue arising in a proceeding, whether fact or law or partly of fact & partly of law, and whether raised by the pleading or otherwise, **to be stated in the form of special case**
* (3) Special case **must state the facts and documents necessary to decide the questions stated**, and be signed by the parties & lawyers (IE- **joint statement**)
* (4) On hearing a special case, the court and parties may refer to any document mentioned in the special case, and the court may draw from the stated facts and documents in any inference that might have been drawn from them if proved at a trial or hearing.
* (5) With the **consent** of the parties, on **an opinion being given, the court may grant specific relief or order judgment.**

#### Jabs Construction v. Callahan (BCSC 1991) – Will ruling serve a useful purpose?

* **F:** Partition of property act. Business venture came to an end. Asked the court to determine if, if he invoked s. 6 of the act, could Mr. Callahan invoke section 8? Other side argued this shouldn’t be answered because this was a hypothetical question courts don’t like to decide, and it would amount to the court providing legal advice.
* **I:** Give an opinion? YES
* **R:** Judges are generally adverse to providing advice on hypothetical questions; however, **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.** 
  + **HERE:** petitioner said if s.8 did apply in hypothetical, he would abandon his claim
* **TEST** 
  + **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 may achieve.**
    - Essentially, when a hypothetical question has ties to a real dispute, it is not entirely hypothetical.

**NOTE:** court is required to act judicially, and not in an advisory or consultative capacity 🡪 therefore will generally NOT consider hypotheticals

## D.) Proceedings on Point of Law

### **Rule 9-4** Proceeding on Point of Law

* (1) **A point of law** arising rom the pleadings in an action **may, by consent of the parties or by order of the court, be set down by requisition for hearing** and **disposed of at any time before the trial**
  + must be PURE law, can’t be mixed
  + not available where any facts are contested, or there is a need to weigh evidence
* (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, or defence, set-off or counterclaim, **the court may dismiss the action or make any order it considers will further the object of the rules.**

**NOTE:** different from summary judgment on point of law in that you can do multiple points of law (not ONE point as in 9-6)

**Available:** at any time before trial by CONSENT or by ORDER

**Test:** will decision shorten the trial or result in a substantial decrease in costs?

#### Harfield v. Dominion of Canada (BCSC 1993)

* **F:** P asked for an order to set down a hearing on a point of law on whether her insurance policy excludes coverage for loss caused by a person who was, at the time of the damage, insane in the sense that he was unable to understand the nature and quality of his acts of that his acts were wrong. Wanted it heard at the same time as an 18A app.
* **I:** set down hearing for point of law?
* **R:** 
  + **Point of law must be:** 
    - (1) **raised** and clearly defined **in the pleadings;**
    - (2) a question arises as to whether such allegations raise and **support a claim or a defence** in law;
    - (3) the facts relating to the point of view are not in dispute and the **point of law can be resolved without hearing evidence**
    - (4) discretionary; & **will be decisive of the litigation** or a substantial issue raised in it
    - (5) The court will consider whether the effect will immeasurably shorten the trial or result in cost savings.
  + The purpose 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 an action**.
  + **HERE-** the decision would eliminate a claim insupportable in law and save time and effort. Accordingly, cool to set down a hearing for point of law. But not appropriate to hear the 18A at the same time.

## E.) Striking Pleadings- Yes Master

What:

* rule by which the parties can enforce the rules of pleadings;
* to stop cases from proceeding that ought not to have been commenced.

How: on a 9-5 application, the court is empowered to strike out the whole or any part of a pleading or to order that the pleading be amended, pronounce judgment or stay or dismiss a proceeding

When: available at any stage of a proceeding

Grounds:

1. No reasonable cause of claim or defence;
2. Unnecessary, scandalous, frivolous or vexatious;
3. Prejudicial or embarrassing; or
4. Otherwise an abuse of process

### **Note Overlap**

* Could also bring a 9-6 application for summary judgment for no genuine issue (as opposed to the 9-5 app for no reasonable claim or defence)

### **Rule 9-5-** Striking Pleadings

* (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 doc on the grounds that it
  + (a) discloses no reasonable claim or defence 🡪 must be “plain and obvious”
    - no evidence admissible.
  + (b) It is unnecessary, scandalous, frivolous, or vexatious
  + (c) It may prejudice, embarrass, or delay the fair trial or hearing of the proceeding
  + (d) it is otherwise an abuse of the court’s process
    - ie. deception of the court, proceedings are a mere sham, process being used unfairly or dishonestly, ulterior motive/improper purpose, without foundation or to serve no useful purpose
    - OR: res judicata (adjudicated by another competent court), issue estoppel, collateral attack, another action dealing with same issue exists, pursuit of a civil claim where there is a statutory remedy, etc.
  + 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.
* (2) no evidence admissible for application under (1)(a)

#### National Leasing Group Inc. v. Top West Ventures LTd. (BCSC 2001) only need a “glimmer of defence”

* **F:** D files a statement of defence and counterclaim. 97 paras over 26 pages. “Idiosyncratic approach to English grammar.” Garbled mess of words. P applies to strike out the pleadings. Court dissects the language of the pleadings.
* **I:** Strike the pleadings for being defective?
* **R:** Several paragraphs show a glimmer of a defence;
  + if fleshed out with particulars, might conceivably amount to a defence against the P’s claim.
  + However, even with any imaginable particulars, they could not possibly form the basis for a claim against the defendant by way of counterclaim.
    - Strikes the counterclaim and invites the D to amend the Statement of Claim in a comprehensible manner

#### Rose v. RCMP (BCSC 2009)

* **F:** P claims numerous defendants conducted brain computer interface technology in his head.
* **I:** Strike the pleadings? YES
* **R:** Discloses a potential cause of action in assault, Battery, & trespass b/c facts are assumed to be true (whoa!).
  + **However**, the allegations are not particularized so it is plain and obvious the claim will fail
    - Do not set out who did what, where, when, or how. 🡪 therefore defficient
  + SoC is frivolous & vexatious and Embarrassing & prolix (tedious; excessively lengthy). Relief bore no relationship to the allegations of act.

#### R v. Imperial Tobacco Canada Ltd. (SCC 2011)

* **F**: Two litigations: BC suing tobacco companies to recover healthcare costs, class action against companies over “light” cigs. Imperial tried to third-party Canada into both proceedings. Canada moved to strike, claiming no reasonable cause of action. Chambers agreed to strike, BCCA overruled, Canada appealed.
* **I:** Strike Imperial’s third party claims against Canada? 🡪 YES
* **H:** Claims of tobacco companies bound to fail, STRUCK. 3rd party only liable for contribution under *Negligence Act* if directly liable to P, therefore no possible liability in BC action. No proximity in class action. Policy reasons to deny in both cases.
  + **Court**: The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
    - Promotes litigation efficiency, reducing time and costs. No wasting time and effort on hopeless claims.
  + On a motion to strike, a claim will only be struck if it **is plain and obvious**, assuming the facts pleaded to be true, that the pleading **discloses no reasonable cause of action**.
    - The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial.
    - However, the **judge cannot consider what evidence adduced in the future** might or might not show.
  + **Here**: plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

#### Carey Canada Inc. v. Hunt (SCC 1990) – No reasonable Claim or Defence

* **F:** Worker exposed to asbestos. Claimed that CC knew it was harmful and did nothing to prevent exposure—conspiracy claim. Hunt pleads conspiracy by unlawful means, and pleadings spoke to the elements of the cause of action. D argued that conspiracy has never been applied to a claim for personal injury, so there was no CoA
* **I:** Do pleadings disclose a **radical defect** making it plain and obvious they will fail? 🡪 NO
* **R:** This section is a “codification” of the court’s inherent power to stay actions that are an abuse of process or disclose no reasonable cause of action.
  + **TEST: Assuming that the facts as stated in the SoC can be proved, is it “plain and obvious” tht the P’s statement of claim discloses no reasonable cause of action?** 
    - Test is not whether P **WILL** succeed, only whether P&O that they **CAN’T**
      * If P **may** succeed, should not be driven from the judgment seat.
    - **Length, complexity, novelty, potential for a strong defence should not prevent the P from proceeding with his or her case .**
    - The fact that a pleading reveals an arguable, difficult, or important point of law cannot justify striking out part of the SoC. In fact, it may be critical that such actions proceed.
  + **HERE***:* it is NOT plain and obvious that P must fail. No court has ever said the tort could not apply outside of the commercial context. It would be inappropriate for the court to deny a litigant an opportunity to persuade the court that the facts are as alleged and that the tort should be held to apply on the facts.

#### Citizens for Foreign Aid v. Canadian Jewish Congress (BCSC 1999)- No Claim; Unnecessary, scandalous, frivolous or vexatious

* **F:** Defamation claim. Sought to strike 2 paras for disclosing no claim, or being scandalous, frivolous, or vexatious. Pled Malice- “ongoing campaign of vilification and incitement of hatred in which the CJC is engaged in competition with other groups to raise funds to create fear and apprehension about free speech or political views they do not like” and Conspiracy: “Conspiratorial worldview”
* **I #1:** Strike the paras for no claim? 🡪 YES
* **R:** Must show it’s **“plain and obvious” the claim won’t succeed**.
  + If there is **any doubt, it should be resolved in favour of permitting the pleadings to stand.**
  + **Assume the facts pled are true**.
    - Only question is whether the facts disclose a cause of action. Weak case won’t suffice.
  + **HERE***:* Malice may be hard to prove, but this isn’t the forum to engage in a detailed examination of the strengths & weaknesses of the Ps case. Here the alleged “improper purpose” if proved could establish malice. Conspiracy was alleging a “conspiratorial world-view,” and combats a “mythical enemy.” No reference to concerted action, etc. so facts don’t disclose a cause of action. Struck out.
* **I #2:** Strike the paras for scandal, frivolous or vexatious 🡪 NO
* **R:** *Irrelevancy & embarrassment* are both established when pleadings are so confusing that it is difficult to understand what is being pleaded.
  + An “*embarrassing and Scandalous”* pleading is one that is so irrelevant that it 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.
    - *An allegation that is scandalous* will not be struck if it is relevant to the proceedings. It will only be struck if it is irrelevant as well as scandalous.
    - It is *Unnecessary or vexatious* if it does not go to establishing the P’s cause of action or does not advance any claim known in law.
    - It is *frivolous* if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel
  + **HERE**: even though the malice allegations were scandalous in their offensive imputations against the D’s character, they went to establishing the P’s claim of malice and were therefore not unnecessary and were left in.
* **I #3**: Abuse of process? 🡪 NO
* **R**: Abuse of process may be found where proceedings involve a deception of the court or constitute a mere sham; where the 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 and serve no useful purpose.
  + **HERE:** Not the case here.

#### Pacific Coastal Airlines v. Air Canada & Air BC (2001, BCSC)

* **F:** P makes claim against D for inducing breack of K, unlawful interference with contractual relations, conspiracy & breach of confidence; PLUS alleged breaches of the competition act. This was an 18A application focusing only on the tort claims and unrelated to any of the claims in the competition act. D says even if P could prove all the elements of the torts, it is estopped from pursuing the tort claims as a result of determinations made in CCAA proceedings.
* **I:** Do the doctrines of res judicata or abuse of process prevent the P from asserting the tort claims? 🡪NO
* **R:** The doctrines of res judicata and abuse of process stand for the proposition that a party may not litigate a cause of action or an issue **which has been or could have been litigated in earlier proceedings.**
  + A prior decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, **unless** 
    - (i) it was a **final decision** pronounced by a court of competent jurisdiction over the parties and subject matter;
    - (ii) the decision was, or involved, a determination of the **same issue OR cause of action** as that sought to be controverted or advanced in the present litigation; AND
    - (iii) the parties to the prior judicial proceeding or their privies are the **same persons as the parties to the present action** or their privies.
  + **HERE:** No **cause of action estoppel** because the causes of action asserted were not and could not have been pursued in CCAA proceedings.; purpose of CCAA proceedings were to facilitate compromises and arrangements between companies and their creditors, not to deal with disputes between a creditor or a company and a third party, even if the company was also involved in the subject matter of the dispute. Not prevented.
  + **Issue Estoppel**: Question here is whether there was a determination of an issue the P is estopped from denying and which fatally affects its claim in the litigation. The issue before the prior proceeding was whether the restructuring plan should be sanctioned. Considered various criteria to be satisfied. None of those criteria and matters involved a decision on an issue required to be proven by the P to sustain his tort claims. 2nd source on this- claims officer decision- the claims officer did not decide an issue fatal to the P’s tort claim in the litigation.
* **RECALL:** Abuse of process is more than just issue & CoA estoppel; also recall that frivolous can also include estoppel.

# XII.) Injunctions & Pre-Trail Attachment

## A.) Pre-Judgment Garnishing Orders

Exception to general rule, where P has no recourse against D until AFTER judgment

Money is paid to the court, pending some other type of order

Usually a final order, or some kind of agreement

If garnishee doesn’t respond at all, then they may have to pay costs

### ***Court Order Enforcement Act*** ss. 1-27

###### Requirements

* S. 3(2) Judge or registrar may order that **all debts owing from the garnishee (a third party) to the defendant (a debtor) be attached up to the amount of the debt or claim**.
  + Done on **application WITHOUT NOTICE by** a P in an action or a judgment creditor (a & b) *so that the D doesn’t move assets/money around to avoid a garnishing order*
  + **Must be a cause of action pending if there is no judgment already** (c & d)
  + Claim must be for a **LIQUIDATED AMOUNT** (generally means debts—ascertainable without the need to try facts or law)
    - *Commonly used against bank accounts* (ie. you serve the branch)

###### Application

* S.3(2) The application must be supported by an affidavit setting out:
  + (d) **that an action is pending; when it was commenced; the nature of the cause of action; the actual amount of the debt, claim or demand; and that it is justly due and owing, after making all discounts**
    - can be brought at same time as action
  + (e) Stating that the **garnishee is indebted or liable** to the D, judgment debtor, or personally liable to satisfy the order, **and is in the court’s jurisdiction**
  + (f ) and the place & residence of the garnishee
* S. 9(1): **order is operative once it is served** on the garnishee
* S.9(2) Also have to **serve the D** with the garnishing order
* S. 3(4) **Cannot garnish wages pre-judgment**
  + Note: there are also restrictions on garnishing wages POST judgment
* Garnishee can **either dispute the debt allegedly owing, or pay** the garnished amount into court
* S.11(a) **If the garnishee neither disputes the debt owing, or pays the garnished amount into court, the court can order the garnishee to do so and pay costs of the process**.

###### Defects

* Because this is such an extreme remedy, any technical defect in the application for pre-judgment garnishment will result in the order being set aside. The affidavit must be complete and accurate (*Knowles v Peter*)

#### Knowles v. Peter (BCSC 1954)

* **F:** P obtained a garnishing order based on an affidavit which described the cause of actin as “debt on a chattel mortgage.” This was a form of security.
  + said they had a mortgage, not that they were in default of the mortgage
  + just having a mortgage isn’t a CoA, therefore no CoA (even though they knew what P meant)
* **I:** Cause of action sufficiently described? NO
* **R:** Attachment of debts before judgment is an extraordinary process, so there **must be a meticulous observance of the requirements of the act.** 
  + This calls for a succinct and informative statement of the cause of action so the judge can decide whether it is such a one as is provided for in the Act and with such certainty as would subject the P to an indictment for perjury if the statement of it should be untrue.
* **HERE:** A chattel mortgage is a form of security that may or may not contain covenants to pay. Judge was left to guess what is meant, though he was probably sure that the D was a mortgagor who had covenanted to pay, but that does not entitled the judge to say the P complied with the act. The affidavit did not reach the standard and the order was dismissed.
  + **Meticulous observance** of the requirements of the statute is required
    - no “we know what you meant” saviour

## B.) Pre-Trial Injunctions

Pre-trial injunctions are DRASTIC, EXTRAORDINARY orders

Get a remedy before having a trial on the merits

Courts are very hesitant to apply

Have to be doubly careful when putting these together:

Duty as an officer of the court AT ITS HIGHEST, *especially* when doing it ex parte.

MUST be before a Judge, NOT a master

### General

* Jurisdiction to grant relief is conferred on the SC by the *Law & Equity Act*, s.39
  + What is JUST and EQUITABLE in the circumstances
    - Where does the balance of conveniences lie?
* Often urgent and on short notice (straight up interim injunction) or no notice at all (ex partes interim injunction) to the other side
* High duty of candor owed to the court- refer back to professional obligations.
* Equitable remedy (*in personam*) used to prevent, or restrain a person from doing something in order to enforce or preserve a legal right:
  + Destroying or disposing of something (ie- property)
  + Illegal conduct (as in land use disputes or illegal pickets)
  + Or even action like holding a SH vote
* Interim injunctions contain an “expiration date” within the order
* Interlocutory injunctions stay in force until trial, or until further court order. Usually contains terms where a party can apply to court to have the terms varied, or the injunction dissolved

**“Irreparable harm”:** Damages for which money would not be an adequate remedy

ie. property destroyed is UNIQUE

### **Rule 10-4:** Injunctions (doesn’t really apply to injunctions as remedy)

* (1) Application for pre-trial injunction can be made by a party **whether or not an injunction is sought in the relief claimed**
* (2) Can **apply for pre-trial injunction before the start of a proceeding**, and can be **granted on terms providing for the start of the proceeding** (ie- interim)
* (3) If **application without notice, may grant an interim injunction**
  + Allows court to grant terms so that there’s a full hearing at a set date, and both parties have notice at that hearing
* (4) Must be **imposed by court order**
* (5) Order for pre-trial or interim injunction must **contain the applicant’s undertaking to abide by any order that the court may make as to damages**
  + Provides the enjoined party security, and comforts the court, that if the party seeking the injunction is ultimately unsuccessful, the enjoined party will be compensated
  + May be dispensed with in some circumstances—see *vieweger v rush (SCC 1964, below)*
* (6) party **may apply by petition after judgment for an injunction**
  + May be done if the P has not acted to put an end to the wrongful conduct within a reasonable period after it learned the facts, and the delay is coupled with prejudice to the D (*estoppel*)

#### BC (AG) v. Wale (BCCA 1986): Test for Interlocutory Injunctions

* **F:** Appeal from a judgment granting an interlocutory injunction restraining the indian chiefs & band members from catching, transporting, bartering or selling fish in the Skeena, Kispiox & Bulkely Rivers, contrary to regulations of general application governing such applications.
* **I:** What is the test for interlocutory injunctions?
* **R:** Injunction orders are discretionary.
  + **(1)** Applicant must satisfy the court that there is a fair question to be tried as to the existence of a right that he alleges and a breach thereof, actual or reasonably apprehended.
    - Also “reasonable” or “serious” question. Not a high threshold. Different from test for *Mareva* and *Anton-Piller*- strong PF case, or Very strong PF case
    - Also- rule 9-5- not a vexatious or frivolous claim
  + **(2)** Balance of convenience favours the granting of an injunction – no clear formula, just whether the granting of an injunction is just and equitable in the circumstances of the case.
    - Examine adequacy of dmgs as a remedy for the respective parties. Clear proof of irreparable harm is not required- doubt as to the adequacy of dmgs may support an injunction. Preservation of property is treated as one of irreparable harm justifying an injunction.
      * RE applicant: Injunction shouldn’t be granted unless there is doubt whether dmgs would be an adequate remedy in the event the application succeeds at trial. If dmgs are adequate, don’t grant.
      * RE respondent: If the only irreparable harm would be to the party against whom the injunction is sought, and injunction would not normally be granted.
      * Re Both: if balance is equal, consider: SEEE MORE COMPLETE LIST in CBC BELOW:
        + Preservation of contested property & status quo
        + Likelihood that if damages are fully awarded they would be paid
        + Strength of the applicant’s case
        + Special factors in the circumstances
  + **HERE:** AGBC was trying to preserve property, which would be irreparable harm. Would only delay chiefs/tribes from exercising a new right. Preserved the status quo and refused the injunction.

#### RJR Macdonald Test:

1. **Fair question** to be tried?
2. Will **irreparable harm** occur?

* Is damage such that money will not be an adequate remedy?
  + Preservation of property is a consideration: ie. is property unique?

1. Balance of **conveniences**?

#### International Forest Products v. Kern (2000, BCSC)

**R:** Interference with business as a going concern may amount to irreparable harm- reputation could be destroyed, and this cannot be quantified

#### CBC v. CKPG Television (1992, BCCA)

* **F:** CBC seeks interim injunction until rights are determined at trial to restrain 5 local TV stations from broadcasting during “basic reserved time” a signal other than the one designated by the CBC. Regional advertising by CBC had increased the scope of competition between the CBC and the BC affiliates for advertising dollars. Affiliates stopped broadcasting CBC’s microwave transmissions and instead broadcast the satellite transmissions they received directly. The regional advertising was eliminated from the transmissions. The CBC’s intentions re: regional advertising were frustrated by that course of action
* **I:** Give CBC the injunction?
* **R:** Applies the two-pronged **TEST**.
  + In assessing the balance of convenience, a judge should consider these points:
    - Adequacy of damages as a remedy if the injunction is not granted;
    - for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid;
    - the preservation of contested property;
    - other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;
      * which of the parties has acted to alter the balance of their relationship and so affected the status quo;
      * strength of the applicant’s case;
      * public interest factors; AND
      * any other factors affecting the balance of justice & convenience.
    - When considering the status quo, consider which party took the step which first brought about the alteration in their relationship that lead to an alleged actionable breach of the rights of one of the parties; consider which party took the action said to be an actionable breach of the rights of the other; and consider the nature of the conduct said to be wrongful and which is being carried on at the time that the application for the interim injunction is brought.
* **HERE:** Upholds the judge’s decision.

## C.) Undertakings As To Damages

#### Vieweger v. Rush (SCC 1964)

* **F:** Interim injunction granted. At trial, the other side won.
* **I:** Should the seeker of the injunction have to pay damages as per the undertaking?
* **R:** 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.** 
  + **Examples** of “special circumstances” include:
    - public bodies acting in the public interest to hold the situation in status quo until the rights are determined; AND
    - where the D, although he succeeded upon technical grounds, was guilty of conduct that did not move the Court to exercise its discretion in his favour.
* **HERE:** The respondent’s injunction had to do with holding machinery so the other side couldn’t profit from it. This is an ordinary case on an injunction, and the P’s must make good on their undertaking.

## D.) Mareva Injunctions

### General

**Prevents assets being pulled out of jurisdiction**

* Aimed at preventing the removal of assets from the jurisdiction or purview of the court, which are required to pay the D’s alleged debt, but not to preserve the very subject matter of the action (IE- to stop moving assets to “judgment-proof" themselves).
* Extraordinary relief that represents a departure from the general rule that there is no execution prior to judgment.
* Should not be granted where it will substantially interfere with a third party’s ability to carry on business, or when assets are being transferred in the ordinary course of business without an intent to defeat a judgment or claim against the D.
* Often granted where there is mala fides found on the part of the D (based on nature of the case, or evidence that exigible assets will likely be removed)—fraud isn’t necessary, but it helps!

**NOTE:** fraud is no longer necessary! Only an immiment threat that assets will be dissipated

#### Aetna Financial v. Feigelman (1985, SCC) - test for Mareva Injunctions

* **F:** Respondent defaulted on debentures issued to and held by Aetna. Receiver-manager appointed. 2 years later, respondents sought and obtained an injunction restraining the other side from moving their assets from Manitoba
* **I:** Are Mareva injunctions available in Canada? 🡪 YES
* **R:** Mareva action gives the right to freeze exigible assets when found within the jurisdiction, wherever the D may reside, providing there is a cause btw the P and D that is judiciable. **Unless there is a genuine risk of disappearance of assets**, the injunction will not issue.
  + **TEST:** 
    - **(1) show a strong prima facie case as to the existence of a right and a breach of that right;**
    - **(2) Assets or persons in the jurisdiction**;
    - **(3) genuine risk of disappearance of assets to avoid judgment;**
    - **(3) plus the balance of convenience**.
    - In the federal context, jurisdiction means the jurisdiction of the court, which may include other provinces. Moving that takes place in the **normal course of business** is not a sufficient risk of judgment-proofing.
    - “**Profound unfairness** to a rule that sees one’s assets tied up indefinitely pending trial of an action that may not succeed and result in an award of far less than the caged assets.”
      * Can result in “litigious blackmail.”
* **HERE:** D regularly moved assets in the course of business as a federally incorporated C. Moved it to other provinces, so not really beyond the court’s purview. No strong PF case because no bad faith shown.

#### Reynodls v. Harmanis (1995, BCSC)

* **F:** P applies ex parte for a world wide Mareva injunction that he cannot sell, mortgage, etc his assets. P is BC resident; D resides in Australia where he is a lawyer. He once lived and worked in BC. No current connection with BC other than that his wife & kids live there.
* **I:** mareva Injunction? 🡪 NO
* **R:** Apply test:
  + (1) Strong PF case – Not here because no evidence (in writing of the partnership K.
  + (2) genuine risk of removal of assets to avoid judgment –
    - **Even where, as here, there is evidence that the D was moving assets to place to place and dispose of real assets when he may have had reason to think that claims would be made against him, the injunction may not issue if there is no evidence he has ever failed to meet any of his obligations.**
    - That would be a possibility, not a real risk, that he would act to avoid the claim, which does not suffice.
  + (3) Assets ought to be within the jurisdiction of the court

#### Silver Standard resources Inc. v. Joint Stock Co (1998, BCCA)

* **F:** Arbitration rather than adjudication of a dispute. Proceedings in court of law stayed b/c of arbitration agreement, but continued the mareva injunction as an “interim measure of protection.” Court found an absence of evidence G had purposely arranged its affairs to make itself judgment proof in BC.
* **I:** Mareva Injunction? 🡪 NO
* **R:** Aetna took a “markedly cautious” approach to the injunctions in the interprovincial setting. Move away from this-
  + **No “hard and fast rule”** that a mareva injunction may never be made or continued where there is no fraudulent intent on the part of the debtor, or where the payment is proposed to be made in the ordinary business, or where it would materially and adversely affect an innocent third party.
  + **The oeverarching consideration in each case is the balance or justice and convenience between the parties.** In most cases, it will not be just or convenient to tie up a defendant’s assets or funds simply to give the P security for a judgment he or she may never obtain.
  + Mareva injunctions will not render the P a secured creditor;
  + **Mareva will not require a party to reduce his ordinary standard of living with the view to putting by sums to satisfy a judgment which may or may not be given in the future**. Cannot be enjoined from carrying on business in a normal way.
* **HERE:** factors in P’s favour are very strong: good claim, counterclaim difficult, if injunction is released, SS will not recover any award; no reciprocal legislation allowing for enforcement of judgments btw Russia and BC. Set aside the injunction anyways (may have had to do with trial judge discretion).

## E.) Anton PillAr Orders

### General

**Protects evidence from destruction**

* Orders the D to permit representatives of the P to enter the D’s premises for the purpose of looking for materials or documents, to copy or to remove them, and the retain them in safe custody pending the trial of the action, in order to prevent the destruction of evidence.
* Usually sought in IP cases where the first step many Ds take, on learning of an action, is to destroy evidence.
* Test is stringent. High obligation on counsel in both presenting the evidence fairly and on the application, and in ensuring the resulting order is carried out appropriately.

#### Anton PillAr KG v. Manufacturing Process (CA, 1975)

* **F:** P supplied an English company with confidential info about their machines. English D was going to exploit the inside info. Sought this order to get the evidence and remove them.
* **I:** Test for this order
* **R:** Order here does not authorize entrance against the other side’s will. It only authorizes entry and inspection by the permission of the Ds. It does, however, order the D to give permission, with the result that if they do not, they can be in contempt of court. Strongest to make the order without notice.
  + **TEST:** 
    - **(1) Extremely strong PF case;**
    - **(2) Damage, potential or actual, must be very serious for the P;**
    - **(3) Clear evidence that the Ds have incriminating documents or things**
    - **(4) Real possibility that they may destroy the material before any inter partes order can be made.**

#### Celanese Canada Inc v. Murray Demolition Corp (2006, SCC)

* **R:** Only justification for this remedy is that the P has a strong PF case and can demonstrate that on the facts, absent such an order, there is a **real possibility relevant evidence will be destroyed** or otherwise made to disappear.
  + **Protection of the other side is:** 
    - **(1) Carefully drawn order that IDs the material to be seized and sets out safeguards to deal with privileged docs;**
    - **(2) a vigilant court-appointed supervising solicitor who is independent of the parties; AND**
    - **(3) a sense of responsible self-restrain on the part of those executing the order.**
* **HERE:** None of them were enough to protect against the disclosure of relevant privileged docs- inadequate protections in the order; the protections provided for were not properly respected. Celanese’s solicitors lost sight of the fact that the limited purpose of the order was to preserve evidence, and not rush to exploit it. Celanese’s solicitors were kicked off the case!

### Notes on the Execution

* Specify exactly what evidence you want to preserve
* Hire an independent solicitor whose only obligation is to the court. They will prepare a report so the court can take comfort that the search was done correctly and pursuant to the order
* Supervising solicitor will catalogue the materials and show it to the searched side to ensure no privileged information is within
* THEN you may get to see the evidence.

# XIII.) Costs

* Payable either by virtue of the rules themselves, or a specific order by the judge. Phrased another way, either a judge makes an order, or the default rules kick in.
* Costs do not cover all costs of litigation; they cover 20-30% of what a litigant actually incurs. Policy choice 🡪 encourages parties to settle ; discourages unnecessary/improper steps in litigation
* Purposes:
  + Partial indemnification
  + Allow the court to control its own procedure (to deter or encourage certain behaviour)

### Types of Costs orders

* **Costs in the cause:** Party will obtain costs if they are successful on the ultimate issue (default)
* **Costs in any event of the cause:** Regardless of who wins on the ultimate issue, the party will receive costs of a given application. Usually used as a deterrent when the application was frivolous, or abusive in some way
* **Party & Party Costs:** Default. See below
* **Special Costs:** Awarded in exceptional circumstances as a result of misconduct in the course of litigation. Gives the court a means of controlling its own procedure. See more below.
  + **Standard of conduct:** reprehensible; *Garcia:* Reprehensible includes scandalous or outrageous conduct, or milder forms of conduct deserving of \_\_\_\_ or rebuke.
* **Lump Sum Costs:** Good for fast track litigation, or when dealig with a self-represented litigant; or when the other side is being difficult. Court will set the amount with regards to the tariff. Will inevitably receive less than with party and party costs. May still be faster and cheaper for the client
* **Costs payable forthwith:** Court can depart from the rule that costs are payable at he conclusion of the action Often combined with costs in any event of the cause to bring home to the litigant what their error was
* **Divided costs:** Awarded when there’s mixed success at trial.

Bill of costs in Form 62

Assessment before registrar

## A.) Party & party Costs

### **Rule 14-1:** Party & Party Costs

* (1) default is **assess costs as party and party costs in accordance with appendix B** unless
  + (a) parties consent to amount of costs and file a certificate setting out that amount;
  + (b) Court orders **special costs**
  + (c) court awards lump sum costs and fixes the costs under (15)
* (2) on an assessment of party and party costs, a registrar must allow those fees that were **proper or reasonably necessary** to conduct the proceeding
  + **Necessary:** indispensible to the conduct of the proceedings
  + **Proper:**  not necessary, but was reasonably done or incurred for the purpose of the proceedings
  + Registrar will disallow fees/disbursements that are:
    - Incurred/increased through extravagance, negligence, or mistake; OR
    - By payment of unjustified charges/expenses

###### Misc

* (9) **Costs go to the successful litigant unless otherwise ordered**
* (11) Still get costs if the party’s **lawyer is their EE**
* (12) Unless otherwise ordered, costs of applications
  + (a) If the **application is granted, costs go to the party who brought the application if they are awarded costs at tria**l, but the party opposing the application is not entitled to costs even if they are awarded costs at trial AND
  + (b) **If the application is refused, applicant won’t get costs for the application at trial even if they get costs at trial;** but the party opposing the application is entitled to costs if that party is awarded costs at trial
* (13) If an entitlement to costs arises during a proceeding, those **costs are payable at the end of trial unless otherwise ordered.**
* (14) If anything is **done or omitted improperly or unnecessarily, the court or registrar may order costs related to the act or omission not be allowed to the party**, or the party must pay the other side’s costs associated with the act or omission
* (15) The court **may award costs of a proceeding; or that relate to some particular application/step/matter; and in so doing they can fix the amount of costs including the amount of disbursements.**
* (33) If the **lawyer 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;
  + (a) Disallow any fees & disbursements btw the lawyer and the lawyer’s client, or if they’ve been paid, order they repay it
  + (b) Order that the lawyer indemnify his or her client for the costs they have 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 order to pay to another party
  + (d) make any other order it considers will further the rules.
  + **CAUTION:** CA now holds that this NO LONGER applies to only EGREGIOUS conduct

### **Rule 14-1:** Special Costs

**Purpose:** to protect the integrity of proceedings; guard against abuse 🡪 Special Costs address CONDUCT

**When Available:**

* conduct of party in question must be reprehensible
* encompasses:
  + - Scandalous or outrageous conduct
    - Milder conduct deserving of reproof or rebuke
      * See *Garcia v. Crestbrook*
    - Usually only for misconduct DURING litigation
      * However, no rule against SC for pre-litigation conduct (see *dockside brewing v. strata*). Should be limited to cases of fraud or unconscionability
      * Other circumstances: see notes from *Garcia*

###### Special Costs:

* (3) On an assessment of **special costs**, the registrar must
  + (a) allow fees **proper or reasonably necessary to conduct the proceeding,** and
  + (b) consider all the circumstances including
    - **the complexity of the proceeding & the difficulty or novelty of the issues involved;**
    - the **skill, specialized knowledge and responsibility of the lawyer**;
    - the **amount involved** in the proceeding
    - **time spent** conducting the proceeding
    - **The conduct of any party that tended to shorten or lengthen** the duration of the proceeding
    - **The importance of the proceeding** to the party whose bill s being assessed, and the result obtained
    - The **benefit to the party whose bill is being assessed of the services rendered by the lawyer**

### **Appendix B:** party & Party Costs

* Section 2: Scale of Costs
  + 2(1) court may fix the scale, from A to C, under which the costs will be assessed, and may order that one or more steps in the proceeding bu assessed under a different scale
  + 2(2) When fixing the scale, have regard to:
    - **(a) Scale A = little or less than ordinary difficulty**
    - **(b) Scale B = Ordinary Difficulty**
    - **(c) Scale C = More than ordinary difficulty**
  + 2(3) In fixing the appropriate scale under which costs will be assessed, may take into account
    - **(a) Whether a difficult issue of law, fact, or construction is involved; (warrants higher scale)**
    - **(b) whether an issue is of importance to a class or body of persons, or is of general interest (warrants higher scale)**
    - **(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied. (warrants higher scale)**
  + 2(4) **Scale B = default** if no scale is fixed.
  + 2(5) If the award of costs would be **grossly inadequate or unjust**, they may order that the value for each unit allowed for that proceeding, be 1.5 times that value that would otherwise apply to a unit in that scale
  + 2(6) It won’t be grossly inadequate or unjust merely because there is a **difference between the actual legal expenses** of a party and the costs to which they would be entitled under the scale.
  + 2(8) If there’s an offer to settle under Rule 9-1, any costs payable on acceptance of that offer must be assessed under Scale B.
* Section 3: Value of Units
  + (1) value for each unit is as follows:
    - (a) Scale A = $60
    - (b) Scale B = $110
    - (c) Scale C = $170

### Formula for calculating Costs

* Multiply the tariff by the scale. Identify how many units you receive for each tariff item and multiply by the amount. Add the units together and multiply by the scale.
* Fees must be reasonable and proper. Present the other side with the bill to assess this.

#### Garcia v. Crestbrook Forest Industries Ltd (BCCA, 1994) – Special Costs

* **F:** Action for wrongful dismissal. Was never suggested the dismissal was for cause. Crestbrook brings an appeal. Court invites submissions re special costs.
* **R:** Courts may award three types of costs: ordinary, increased, and special costs. They are all properly described as party & party because they are payable by one party to litigation to another party to litigation, in contrast with costs between a solicitor and his own client. **These costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement**.
  + **This encompasses scandalous or outrageous conduct but also encompasses milder forms of misconduct deserving of reproof or rebuke.**
  + That an action or appeal has “little merit” is not in itself a reason for awarding special costs
    - something more, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before he conduct will result in special costs.
    - **If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings on the opposing party where one party is financially much stronger than the other, then the absence of merit taken together with the improper motive may well amount to reprehensible conduct sufficient to require an award of special costs.**
* **HERE:** Other side asked that the appeal be abandoned because he couldn’t afford it. Conduct was reprehensible because no reasonable prospect of success; litigation was a financial drain on the respondent’s resources; appellant failed to pay promptly the termination payment under the ESA or provide him with his ROE as required to obtain EI. These circumstances amounted to reprehensible conduct
* **NOTE:** NOT IN CASE BUT- also often given for witness tampering, not meeting ex parte obligations, commencement of proceedings with improper motives; contempt; disobeying court orders; malic; contrived or fabricated evidence.
* **NOTE:** NOT IN CASE: Misconduct giving rise to the litigation will rarely result in special costs UNLESS it’s fraud, b/c fraud permeates the rest of the proceedings. Otherwise, that should be the exclusive domain of damages.

## B.) Offers to Settle

* No longer requires a formal requiest but requires certain language regarding costs
* Can’t mention pending settlement in court, but can ALLUDE to reserving on costs until “outcome is known”

### **Rule 9-1**, Offers to Settle

* (1) Offer to settle requires being **made in writing** by a party to a proceeding; has been **served on all parties of record**; and **contains the sentence:** 
  + “The {parties}, {Names of Parties}, reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.”
    - No other form requirements
* (2) **can’t tell the court** about an offer to settle until all issues in the proceeding, other than costs, have been determined
* (3) Offer to settle is **not an admission**
* (4) Court may **consider an offer to settle when exercising its discretion re: costs**
  + RETURN TO DISCRETION ROBS RULE OF ITS EFFICIENCY
* (5) In a proceeding where 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** to which they would have been entitled in respect of some or all of the steps taken in the proceeding after the date of delivery or service of the offer to settle
  + (b) **Award double costs** after the date of delivery of the offer
  + (c) Award a party costs to which they would have been entitled had the offer not been made (for after the date of the service)
  + (d) If the offer was made by a D and the judgment went to the P was no greater than the amount of the offer, award to the D the D’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.
* (6) Courts MAY consider
  + (a) Whether the offer to settle **ought reasonably to have been accepted**, either on the date it was delivered, or served, or on another date
    - a strategic, nominal offer MAY STILL be one that ought be accepted
    - whether someone ought reasonably have accepted requires the court to examine what the party knew about his or her case at the time
      * can’t look back at offer with respect to the actual outcome
    - refusal to produce documents/attend discovery may make rejection reasonable
    - was offer given enough time for consideration?
  + (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

### Scenarios – FIX THIS

* **D makes offer;** P looses = double costs against P (see Bailey v. Jang)
* **D makes offer;** P wins but gets less than offer = P deprived of costs
* **D makes offer;** P wins & gets more than offer = Why would D bring it up? No cost consequences. (???)
* **P makes offer;** P wins and gets more than their offer = Double costs against D
* **P makes offer;** P wins and gets less, or looses = No cost consequences (Why would P ever bring it up?) (??)

#### Bailey v. Jang (2008, BCSC)

* **F:** P advances a claim in damages for $1,000,000. Offer to settle at $35,000. Case dismissed at trial, and P gets nothing.
* **I:** Should the D get double costs? 🡪 YES
* **R:** Considers the factors in the rule. The offer was not one that should reasonably have been accepted. (Shows that we don’t look at the reasonableness in hindsight with knowledge of what the award actually was). Re: relative financial circumstances, consider relative to the parties themselves, not the insurers if one will be paying. They weren’t that different here. No other factors.
* **HERE,** P was prepared to take a considerable gamble to achieve a significant award. However, gamble meant that jury’s verdict was reasonable, and therefore should have been anticipated Had she succeeded, she would have sought double costs for her offer to settle. **Refusing an award of double costs would ignore the important deterrent function of the Rules**
  + **Double costs** awarded for period after settlement offer received + reasonable amount of time to consider the offer (7 days)

## C.) Security for Costs

* R. 14-1 (13) If an entitlement to costs arises during a proceeding, those **costs are payable at the end of trial UNLESS OTHERWISE ORDERED.**
* An order for security for costs typically includes a stay of proceeding until security is posted in the required amount.
  + The only **express authority** to make an order for security for costs arises in connection with corporations, pursuant to the *Business Corporations Act*, s. 236
    - **s. 236:** “If a corporation is a plaintiff in an action or other legal proceeding and it **appears that the corporation will be unable to pay the costs** of the defendants 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 proceedings until the security is given.“
  + In addition, the court, relying on its **inherent jurisdiction**, may make an order for security for costs against an individual

**“Guillotine Orders”:** if security isn’t posted within a set amount of time, then the action is dismissed

#### As Against an **Individual**: Han v. Cho (BCSC, 2008)

* **F:** Korean P, resided outside the jurisdiction, questionable whether they had any real assets in Korea. Korea was not a reciprocating state.
* **I:** Security for costs? NO
* **R:** No rule of court governs when an order for security for costs should be made. **No more rigid practice of ordering security if the P resided outside the jurisdiction**.
  + **A natural person can sue WITHOUT giving security for costs in any but excepted cases.** 
    - Distinction drawn between corporate and individual plaintiffs
    - **The rule flows form the principle that poverty is not a bar to access the courts.**
    - The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances.
  + **These could arise if an impecunious P also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance**.
    - HERE, no special circumstances.
    - While P resided outside the jurisdiction, D hadn’t shown that P would be unable to pay
  + **Onus is on applicant** to establish that he/she will be unable to recover costs
    - The fact that the plaintiff resides outside the jurisdiction, has no assets in the jurisdiction or is impecunious is not sufficient in itself.
    - **Examples** of egregious circumstances where an order for security for costs against an individual may be allowed:
      * a weak claim
      * a previous failure to pay costs; OR
      * refusal to obey a court order.
  + **HERE:** while P resides outside jurisdiction, D did not show that P would be unable to pay

#### As against a **Corporation:** Citizens for Foregin Aid v. CJC (BCSC, 1999)

* **F:** Defamation claim against the Citizens for Foreign Aid for conspiracy, etc.
* **I:** Give them security for costs (under Business corp act s. 236)—proceeding would be stayed pending posting of security of costs
* **R:** Court has inherent jurisdiction to order security for costs against a non-resident P, though the order is a discretionary one that must be exercised judicially and in the interests of all parties. Also discretionary under the company act. The possibility or probability that the P company will be deterred from pursuing its claim is not, without more, sufficient reason for not ordering security. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a D on the other.
* **Balancing injustices:**
  + Don’t want security to be used to deny litigants access to the courts, but also don’t want shell corporations to bring baseless claims with no risks of loss.
* **TEST:**
  1. **Does it appear the company will be unable to pay the D’s costs if the action fails?** 
     + If so, BURDEN SHIFTS
       - if a P really believes in their case, they should be willing to post security for costs UNLESS they can show that they CAN’T
  2. **Has the P shown that it has exigible assets or sufficient value to satisfy an award of costs?**
  3. **Is the court satisfied that the Ds don’t have an arguable defence to present?**
  4. **Would an order for costs visit undue hardship on the P such that it would prevent the P’s case from being heard?** 
     + Court balancing injustice against D against using security as an instrument of oppression to stifle a legitimate claim.
     + Also consider here if the P is in a reciprocating state.
* **HERE:** D established a PF case that the P lacks exigible assets. P has not established that it would be able to pay the D’s costs, that the D has no arguable case, or that an order would stifle the action. Therefore satisfied that security for costs is appropriate.

# XIV.) Interlocutory Appeals

## A.) Master’s Orders

### **Rule 18-3:** Appeals at the BCSC

* (1) If 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 enactment to be made to the court or to a judge, then it’s governed by this rule (to extent not inconsistent with enactment)
  + Examples:
    - *Small Claims ActI: s. 3(1)* Prov Ct 🡪 BCSC
    - *SC Civil Rules* R 23-6(8) Appeal from Master 🡪 Judge
* (2) Start by filing a notice of appeal

### **Rule 23-6** Appeals from Mater’s orders

* (8) **A person affectd by an order or decision of a master may appeal the order or the decision to the court**
* (9) The appeal must be made by filing a notice of appeal **within 14 days** after the order or decision complained of
* (11) An appeal from the decision of a master is **not a stay of proceeding** unless so ordered by the court or the master

#### Abermin Corp. v. Granges Exploration Ltd (BCSC, 1990)

* **F:** Applied for security of costs after P made an assignment into bankruptcy. Master granted the motion to adjourn the application to fix security for costs, on the condition that the XFD not proceed until the disposition of those applications. Complained that the master didn’t have jurisdiction to make that order, b/c it is either injunctive in nature or a final order.
* **I:** Could master make the order? 🡪YES
* **R:** **Standard of review:** An appeal from a master’s order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. (deference).
  + However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders that a master is permitted to make, a rehearing is the appropriate form of appeal.
    - A rehearing will proceed on the basis of the material before the master UNLESS there is **new evidence**
  + In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master.
    - At this point, judge **unfettered by deference to order** on appeal

## B.) Judge’s Orders

### ***Court of Appeal Act***

* S. 6(1) An **appeal lies to the court**, [except (2) where excluded by legislation, ie, from small claims]
  + (a) from an **order of the SC or an order of a judge** of that court AND
  + (b) in any matter where jurisdiction is given to it under an enactment of BC
* S. 7 (2): Despite s. 6(1), you **need leave to appeal** from (an appeal does not lie without leave from…)
  + (a) an **interlocutory order** [Defined as “includes an order made under the SC rules on a matter of practice or procedure” 🡪 not defined exhaustively!]
    - **TEST:** whether order FINALLY DISPOSES of the rights of the parties (ie. effectively brings end to litigation)
  + (b) an **order respecting costs** only
* S. 14: The time limit for an appeal is **30 days**, commencing on the day after the order appealed from is pronounced

**NOTE:** CA reviews reasons for judgment to find errors, but it is the ORDER (not the reasons!) being attacked

🡪 successful appeal overturns the **order**, not any part of the reasons

###### HYPOTHETICAL:

* Order granted, costs not yet dealt with
  + File appeal, but shouldn’t sign order until costs are set so they can be appealed together
    - Otherwise must file SEPARTE application for leave to appeal costs (when you already have a right to appeal the main issue…)

#### Forest Glen Wood Products Ltd. v. BC (BCCA, 2008)

* **F:** Application to vary an order heard by a single judge in BCCA Chambers directing that leave was not required on a BCSC matter because it was not interlocutory. Anomaly because this was a review of a single judge’s decision by a panel of three judges- not an actual hearing of the appeal, just a review application. The order at issue was an order striking pleadings re: breaches of K and negligence for disclosing no reasonable cause of action. P appealed, seeking to have struck pleadings restored
* **I:** Was the BCSC judge’s order striking pleadings interlocutory, such that leave was required? 🡪 NO
* **R:**
  + **An order that finally disposes of the rights of the parties is a FINAL ORDER.**
    - **Every other order is interlocutory**
    - EXCEPT where issues are determined on split trials in which case an order determining an issue, although not finally determinative of the rights of the parties, is a final order.
    - **Note**: need not deal with ALL of the interests of a party to be a final order.
  + No single formula can eliminate all controversies over what is a final order.
    - **Steps in a proceeding are interlocutory when they are incidental to the principle object of the proceeding, namely, the judgment**.
    - INCLUDES:
      * applications aimed at assisting parties in the prosecution or defence of proceedings, or at protecting or otherwise dealing with the subject matter of the proceeding before judgment; OR
      * steps in execution of the judgment once pronounced.

#### Rahmatian v. HFH Video Biz Inc. (BCCA 1991)

* **F:** At the end of P’s case, D moved to have the action dismissed on a motion for nonsuit. Judge heard counsel on the motion, and then, without hearing from P’s counsel, dismissed the motion and put D’s counsel to his election to call evidence or argue sufficiency of evidence. Trial had to be adjourned because of scheduling problems. D appeals the failure to grant the motion.
* **I:** Appropriate to appeal here?
* **R:** **This was a ruling, not an order, be it interlocutory or otherwise**. **As it is a ruling, it is unappealable until after the trial has been completed**. The trial judge must be master of proceedings from the commencement until the conclusion of trial. He is required to make decisions on numerous questions arising in the course of trial that may be the basis of an appeal against the judgment eventually delivered. However, the CA does not have jurisdiction to hear such matters until after the trial has been completed and judgment has been given.

**NOTE:** motion, if successful, would result in a dismissal of the action 🡪 P could then appeal as a RIGHT

#### Power Consolidated (China) v. BC Resources Inv. Corp (BCCA, 1988)

* **F:** Application for leave to appeal from a decision holding that disclosure on discovery of part of a letter written by counsel for the P did not abrogate the privilege which attached to the remainder of the letter.
* **I:** Grant leave to appeal?
* **R:** **Court will consider FOUR FACTORS** when deciding whether to **grant leave to appeal**:
  1. Whether the point is of **significance to the practice**? (of civil litigation generally
  2. Whether the point is of **significance to the action itself**?
  3. Whether the appeal **is PF meritorious**, or, on the other hand, whether it is frivolous?
     + Question isn’t whether they’ll succeed, only whether they’re **arguable**
  4. Whether the appeal will **unduly hinder** the progress of the action?

**Here:** all four factors exist: leave granted

#### Watson v. Imperial Financial Services Ltd (BCCA, 1992)

* **F:** Application for directions as to whether leave is necessary to proceed; and an application for leave. Applicants applied for an injunction to prohibit distribution of monies and to claim relief pursuant to the partnership Act. The applications were dismissed.
* **I:** Leave?
* **R:** The chambers judge was not finally disposing of the rights of the parties in the litigation.
  + The rights remained the subject matter of a pending action 🡪 therefore requires leave.
  + **In refusing an injunction, the chambers judge was exercising a judicial discretion.** 
    - The court would not interfere with that decision unless his exercise of discretion was **clearly wrong OR worked a substantial injustice**. Consider this on top of the other factors.
* **HERE:** Right to distribute the money had little importance to the specific issues in the action and has no general significance; it wasn’t PF meritorious—applied the injunction test briefly; Wasn’t brought for an improper purpose; left all the issues unresolved; and Master wasn’t clearly wrong. Leave not granted.
  + ie. couldn’t conclude Master was wrong in finding no PF case 🡪 deference to Master’s order

# XV.) Trial Procedure & Expert Reports

## A.) Expert Reports

### ***R v. Mohan* Test:** Admissiblity of Expert Relevant

###### Admissability of expert evidence govered by COMMON LAW

* (1) is it relevant (in that it tends to establish a fact in issue)
* (2) Necessary to assist trier of fact (trier of fact is unable, due to the technical nature of the issue, to decide without assistance—information must be outside the knowledge of the court)
* (3) Properly qualified?
* (4) Absence of any of the exclusionary rule
  + (can’t be argument; can’t review evidence & make conclusions of fact and law; can’t touch on personal knowledge; no credibility determination)
* Can touch on the ultimate issue if the is strictly necessary & relevant.

### **Rule 11-2-** Duty of Expert Witness

* (1) Expert appointed by one or more parties has **a duty to assist the court and is not to be an advocate for any party**
* (2) If an expert is appointed under this part, **the expert must, in any report he or she prepares, certify that he or she is aware of the duty, has made the report in conformity with that duty; and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.**

#### Vancouver Community College v. Phllips Barratt (BCSC 1988)

* **F:** Claim for negligence and breach of K in the performance of professional services. Expert prepared reports, but council was way too influential
* **I:** Rely on expert reports? NO
* **R:** **It is of he utmost importance in both the rewriting and consultation processes referred to that the expert’s independence, objectivity and integrity not be compromised**. **HERE** counsel participated far too much and inappropriately in the preparation of the reports. Expert also tried to impose his choice of language on the other experts. This is far removed from any role an expert may properly play. He regarded himself as part of the client’s “team” and met with other experts and helped them to vet and revise their reports. As a consequence, both his evidence and that of the other experts was rejected.

### **Rule 11-1** Case Plan

* If there’s a case planning conference, expert opinion evidence must not be tendered unless provided for in the case plan order applicable to the action.
* *11-4 Parties can appoint own expert (confirm)*

### **Rule 11-3 to 11-5:** who appoints Experts

* 11-4 Appointment of own experts
  + (1) parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue
* 11-3: Appointment of Joint Experts
* 11-5: Appointment of Court’s Own Experts
  + Court may appoint on own initiative
  + Court can request parties to suggest names, state connection with expert or provide other material
  + Each party can cross-examine the expert
  + Court can order a party to pay the expert fees
  + Any report prepared must be tendered into evidence

### **Rule 11-6 to 11-7** Content of report / Expert Evidence at Trial

###### CONTENT

* 11-6 Expert Reports
  + (1) Expert report to be tendered as evidence must be signed, include certification, and set out
    - (a) **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 that opinion**, including
      * (i) **Factual assumptions**
      * (ii) description of any **research conducted**
      * (iii) a list of **every document, if any, relied on by the expert in forming the opinion**
  + (3) Must serve the report at least **84 days before scheduled trial**
  + (4) Responsive reply expert report to be served **at least 42 days before trial**
  + (5) If the expert’s opinion **changes in any material way, they must, as soon as practicable, prepare a supplementary report** and it must be served on all parties of record.
  + (8) If a party’s own expert is served under the rule, **they must promptly provide them with the facts on which the opinion is based:** 
    - **a [written] record; OR**
    - **independent observations in relation to the report;**
    - **data complied by the expert in relation to the report; AND**
    - **the results of testing.**
    - If asked to do so, they also have to provide the other side with the content of the expert’s file regarding the preparation of the opinion **14 days before trial**, or promptly upon receipt if <14 days to trial
      * **See also *Phillips Barratt* and *Delgamuuk***
  + (10)-(11): Objections to admissibility must be made on the earlier of TMC or 21 days before trial

###### AT TRIAL

* 11-7 Expert Opinion Evidence at trial
  + (2) **Usually the expert’s report serves as their evidence at trial** & they don’t have to attend trial to give oral testimony, unless the court orders or there’s a demand under (3) within 21 days of service of the report
  + (3) **Other side can demand the expert attend at trial to be cross-examined** on their report. You have to produce them if the other side demands
    - subject, as always, to admissibility
  + (5) Evidence in direct limited to clarifying terminology or make report understandable (*Pederson v. DeGelder)*
  + Court may dispense with requirements of part if:
    - New facts (due diligence requirement)
    - No prejudice
    - Interests of justice

### Court Appointed Experts – Rule 11-5

* (1) **Court can appoint an expert on its own motion** if it thinks the expert opinion evidence may help the court in resolving an issue in the action
* **NOTE: For example,** Court may decide there are dueling reports that can’t be reconciled.

### Joint Experts- Rule 11-3

* If 2 or more parties adverse in interest wish to or are ordered to produce a joint expert, the following **must be settled** before the expert is appointed:
  + **(a) the ID 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 in (c) that they want the expert to consider**
  + **(e) the questions to be considered**
  + **(f) when the report must be prepared and given to the parties; AND**
  + **(g) responsibility for fees and expenses payable to the expert.**
* **NOTE potential issues**- if you have your own expert and don’t like the report, you can get rid of it and the other side never sees it. Downside to a joint expert.
* Rule 11-3(3)-(5)In addition, the court may order the appointment of a joint expert subject to the above matters being settled
* Rule 11-3(6) Agreement must be entered into and disclosed to all parties
* Rule 11-3(7) and (9) In the event a joint expert is appointed, the joint expert is the only expert who may give expert opinion on the issue, except where leave is granted to file additional expert evidence:
* Rule 11-3(10)Joint expert subject to cross by all parties
* Rule 11-3(11) Joint expert to be distinguished from a common expert

#### Surrey Credit Union v. Wilson et al. (BCSC 1990) – Experts and argument

* **F:** Negligent audit allegations. Ruling on admissibility of an expert report on accounting standards tendered in the course of trial. **Expert gave witness on the standards which the profession deems appropriate in the performance of an audit.** Other side objected because it contained opinion evidence outside of the w’s expertise; it is argument not opinion; it has conclusions of fact upon evidence that the trial judge must determine; large irrelevant, superfluous passages; many passages are not in relation to the issue.
* **I:** What to do about the report? 🡪 UNSATISFACTORY; could be saved if rewritten
* **R:** **If there is some practice in a particular profession or standard of conduct, evidence of that can and ought to be received.** 
  + - **Ok to give evidence on general practices, but not on the legal duty imposed by the standards.**  Ie. can say where acts/omissions might breach standard
  + The evidence can be either a statement of opinion re: hypothetical facts, or an opinion based on facts or assumptions of fact communicated to him. In either case, **must communicate the source of the facts of assumptions.** 
    - **He cannot make findings of fact himself.** **He cannot make findings of law, or argue the case**.
    - Expert opinions will be inadmissible when they are merely the reworking of the argument of counsel participating in the case.
      * **Counsel may assist in the preparation of giving evidence, but cannot go to the substance of the opinion (only the form).**
    - **Must tell experts the limits of the opinion evidence so they understand their role.**
* **HERE:** the report has flaws, but is not without merit. He just went beyond the realms of expert opinion and has frequently intruded into areas beyond his expertise He should now go re-write his opinion.

#### Yewdale v. ICBC (1995, BCSC in chambers)

* **F:** Yewdale was found negligent in driving. Claims against ICBC for mishandling her case. P produces 5 expert reports, and D objects to some or all of them.
  + The first report, dealing with the standard of care required of solicitors in personal injury claims, was based in part upon inferences of fact drawn by the author and contained conclusions of law articulated in the same manner and on the same points as the court would be required to do.
  + The second report, which was on the same issue, also contained legal conclusions as to whether the lawyers discharged their duties in accordance with the standard of the "reasonably competent solicitor".
  + The third report, dealing with the insurer's conduct in the investigation and negotiation, was a combination of self-evident statements, permissible statements of industry standards and legal conclusions based on inferences drawn from the facts.
  + The fourth and fifth reports dealt with the appropriateness of the awards made against the plaintiff with respect to medical care costs, fund management, tax gross-up and income loss.
* **I:** Admissible reports? 🡪 Only 5th report admissible
* **R:** The law on expert opinions:
  + **Opinion evidence admissible only where it would be of assistance to the court in deciding a question requiring long study or experience**
  + **Expert must stay within his area of expertise.**
  + **Expert not permitted to displace the role of the trier of fact. If opinion goes to the ultimate issue, they must state the assumed facts, and avoid making findings of fact on issues so as not to tie the hands of the trier of fact and so it can be given appropriate weight**
  + **Experts must not become advocates; express their opinions as opinions and leave conclusions of law to the court**
* HERE: One report dealt directly with what the appropriate standard of care would be, citing law. Not allowed b/c court would “sit like a court of appeal” over his findings. One report reaches legal conclusions that are not expert’s role. First and second reports give a narrative of facts replete with inferences and legal conclusions. Not OK. Fourth report deals with matters within the court’s expertise (variability of inflation rates, investment mixes, income tax calculations, and future earning projections); the final report was admissible PF, s.t. further arguments on its relevance being raised at trial.

## B.) Expedited Trials

Availability: where the amount in issue is less than $100,000; the trial will not be longer than three days; the parties consent, or; the court orders it. Not available for jury trials or class proceedings

How engaged: can be requested by any party of record by way of notice of fast track in Form 61. The words Subject to Rule 15-1 must be added to the style of proceedings.

Features of fact track litigation:

* Nothing in the rules limits the court from awarding damages in excess of $100,000.
* No contested hearings, without first attending a CPC or TMC (subject to some limited exceptions)
* XFD of a party by all other adverse parties is limited to a total of 2 hours unless the parties consent or the court makes an order
* Trial date within 4 months of the application for a trial date (provided the application is timely)
* Document discovery is the same as any other action
* No specific provision regarding the use of experts – this is governed by Part 11, as with all other actions
* Fixed costs (unless the court otherwise orders or the parties consent, subject, of course, to settlement offers)

### Rule 15-1- Fast Track Litigation

* (1) Rule applies to an action if
  + (a) the only claims are for one or more of money, real property, a builders lien, and personal property and the total of the money claimed is **less than $100,000**
  + (b) The trial can be completed **within 3 days**
  + (c) the parties c**onsent** or
  + (d) the **court on its own motion or any party’s application so orders**
* (3) Despite that, nothing prevents the court from **awarding more than $100,000**
* (4) Does **not apply to class proceedings**
* (7) A party to fast track action **must not serve on another party a notice of application** or an affidavit of application unless a **case planning conference has been conducted**
* (10) **No juries**
* (11) **XFD** must not exceed, in total, **2 hours** or a greater period to which the person to be examined consents
* (13) You get your **trial within four months**
* (15) **SET COSTS:**
  + **If time spent on the hearing of the trial is one day or less, $8000**
  + **Hearing 2 days or less, $9500**
  + **Hearing of more than 2 days, $11,000**