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Chapter 1: Purpose and Intention of the Rules of Court

Introduction:

A summary judgement is a motion brought by one party against another to have a case decided summarily, without going to trial. The motions judge may be asked to decide on specific issues of a case or the merits of the entire case. In either situation, the party bringing the motion must persuade the judge that there is no genuine issue requiring a trial. Either a plaintiff or defendant in a civil suit may make a motion for summary judgement

Party Prosecution: parties organize and pursue their own cases based on belief that they are in the best position to do so (because of access to information) and because they are motivated to do so as those most affected by the outcome

- Courts are reactive, not proactive
- Infrequency of case management (contrasted with US federal system – files are assigned right away and deadline are assigned too, so files are resolved quicker)

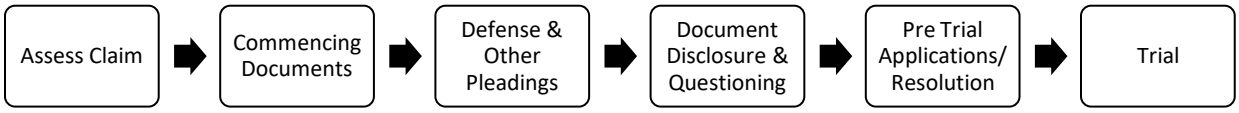
Party Autonomy: parties free to choose the extent to which they will advance or defend claims.

- You must go to the great expense of retaining a lawyer to defend the suit and try to resolve it on your behalf. The court itself will do nothing, and if YOU do nothing, it will not stop the Plaintiff from going ahead and taking steps against you.
- This process has a goal, and the goal is a "day in court"– that is the animating principle of civil procedure

Culminates in a **continuous, oral trial (aka day in court)**

4 steps of civil litigation: (for more pp 10-12 Cote)

1. Pleadings: someone sues someone else
2. The parties exchange information through documents and oral discovery
3. Adjudication: the claim is adjudicated at trial or a pre-trial application leading to judgement in someone's hands
4. Judgement enforcement: one party or another gets a judgement and do something with it



3-DAY TRIAL – TIME & COST: $40,000 TO 80,000

Steps:	Hours
Initial interview, information gathering and research:	10 hours
Draft Statement of Claim:	5 hours
Prepare and Finalize Affidavit of Documents:	10 hours
Assume two motions (including prep):	15 hours
One cross-examination on Affidavits (one day plus prep):	15 hours
Discovery (two days plus prep):	25 hours
Pre-Trial:	10 hours
Notices including Request to Admit:	5 hours
Trial Preparation:	30 hours
Trial Time:	30 hours
Miscellaneous letters, telephone calls, reports (assume one hour per month over 3 years from start to finish):	36 hours

TOTAL	191 hours

- Average hourly rate in Western Canada of a 2014 grad ($233) x 191 hours = **$44,503**
- Average hourly rate in Western Canada of a 2010 grad ($295) x 191 hours = **$56,345**
- Average hourly rate in Western Canada of a 2005 grad ($364) x 191 hours = **$69,524**
- Average hourly rate in Western Canada of a 1995 grad ($415) x 191 hours = **$79,265**
  ➔So if an action would take $191 hours to take to a quick 3-day trial, that would cost between $37,000 and $83,000 depending on whether you had a seasoned veteran lawyer or an articling student.
- This cost effectively means that claims of a certain amount cannot be cost-effectively adjudicated in the superior courts
- Spending $80,000 to get a $75,000 judgment would not make much sense

IS THERE COST-EFFICIENT ALTERNATIVE?

PROPORTIONALITY/PRINCIPLES OF THE RULES OF COURT

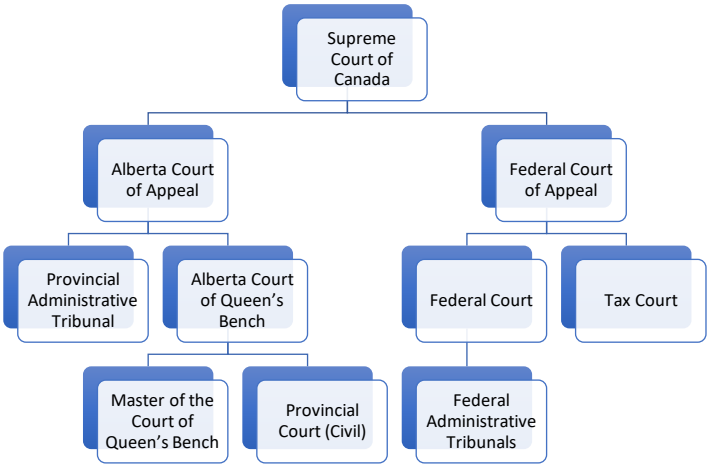
- Well one is using more "proportional" adjudication than a full blown trial, like disposition by way of summary processes– usually meaning no in person viva voce (oral) evidence
- Another is the expansion of small claims courts, which are more navigable for unrepresented litigants. The monetary limit for civil claims that can go to ABPC was $2,500 until 2002 and now it's $50,000 and will probably go up again.
- ARC (adjudication that does not verbal in person evidence – usually affidavits): 1.2(1) The purpose of these rules is to provide a means by which claims can be **fairly and justly** resolved in or by a court process in a **timely and cost-effective** way
- *Hryniak v Mauldin* – culture shift - this shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of **proportional procedures** tailored to the needs of the particular case.
  - This emphasis on "proportionality" was described in what was probably the most important civil procedure judgment of the last 30 years, Hryniak and Mauldin, which was decided four years ago and has since been cited nearly 4,000 times (!)
  - Hyrniak talked about a "culture shift" toward adjudication with methods short of trial
- Efficient use of judicial resources, see ARC R 1.2(3)(d)
- The theory that disputes eventually "went to trial" was always something of a legal fiction
- ***Hryniak v. Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure.
- It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". (Windsor, 2014 ABCA 108)
- In 2018-2019, Stats Can looks at 586,334 civil cases in superior courts. 52% were resolved within 3 months
- Most of these are discontinuances or settlements. Few contested civil cases disposed of during that time with some exceptions.
  - Foreclosures, consumer debt actions, restraining orders – are majority and pretty quick
- Typical time to trial for civil lawsuit ABQB= 5 years

Chapter 2: Jurisdiction

In Alberta the Court system includes three levels of Courts:

- Provincial Court:
  - Criminal Division
  - Family Youth Division
  - Civil Division
  - Traffic Division
- Court of Queen's Bench
- Court of Appeal, and the
- Federal Court that deals with matters outside the territorial jurisdiction of Alberta.

Civil Litigation in Alberta



- At the top is the SCC →It hears civil appeals by leave from the ABCA– (no as of right civil appeals)
- The ABCA hears appeals from certain administrative tribunals, and from Justices of the Court of Queen's Bench
- Justices of the Court of Queen's Bench hear appeals from Masters of the Court, and from the ABPC (both of whom are provincially appointed, unlike superior s96 judges)

Rules of Court

- Legal basis
  - Statute (they are a Regulation under the Judicate Act)
  - Courts' Inherent Power to Control Its Own Processes
- Generating the Rules
  - "Old" Rules
    - Essentially static from 1968-onward
    - No longer in force; only used for interpreting old rule based case law
  - Rules of Court Committee – statutory
  - ALRI – based in law school
  - The "New Rules"
    - Drafting began in 2001, enacted in 2010
    - Period of huge technological shift in the profession but meant that Rules were in some ways outdated the day they were released (fax dominance over email)
  - Purpose – see 1.2
    - **1.2(1)** The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
    - **(2)** In particular, these rules are intended to be used
      - (a) to identify the real issues in dispute,
      - (b) to facilitate the quickest means of resolving a claim at the least expense,
      - (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
      - (d) to oblige the parties to communicate honestly, openly and in a timely way, and
      - (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
  - **Rules of Court** are only one source of "civil procedure"
  - Other sources of squishier provenance include
    - Notices to the Profession
    - Practice Notes
    - Manuals (ex. Cost Manuals)
    - Court Policies
    - Unwritten rules
      - Ex. Much of Chambers practice, including the use of a list, is only implied by the Rules and not described.
      - Ex. Check in with the clerks
      - Counsel is addressed in the order of seniority
      - There is an order of matters

Concurrent vs Exclusive Jurisdiction

- **Concurrent jurisdiction**: two or more court/tribunals have jurisdiction over a claim
- **Exclusive jurisdiction**: only one court/tribunal has jurisdiction over a claim

Court of Queen's Bench

- Majority of civil litigation
- It is a superior court/section 96 court i.e. British Columbia Superior Court, Saskatchewan Court of Queen's Bench
- Has plenary & inherent jurisdiction
  - **General rule:** Court has jurisdiction unless it has been abrogated by statute
  - See *Judicature Act* ss 2, 4-9
- Filing fee for claim $250
- Process ARC R 1.1
- Appeals to Court of Appeal, *Alberta Rules of Court* Part 14

Masters Jurisdiction

- Note: Status of Masters is currently in a state of flux. Under a Notice to the Profession, all matters which can be heard by either a Master or a Justice must go to a Master. Post-Hryniak, that includes most SJ applications. This sits uneasily with the bar on hearing matters with contested facts.
- Jurisdiction
  - Jurisdiction set out in the Court of Queen's Bench Act, s8-16
  - Can hear:
    - Many interlocutory, procedural matters (incl ones that resolve the claim, ie summary judgement)
    - See Notice to the Profession, November 25, 2016 https://albertacourts.ca/docs/default-source/Court-of-Queen%27s-Bench/ntp-2016-10-master-39-s-jurisdiction.pdf
    - Matters by consent, s9(1)(b), even where facts contested (but only if parties agree) s. 9(3)(b)
  - Cannot hear, CQBA s.9(3):
    - Trials
    - Contempt proceedings (except potentially contempt in the face of the court?)
    - Applications for injunctions (other than pre-judgment attachment orders under the *Civil Enforcement Act*)
    - Things required by statute to be done by a "judge"
  - Appeals to a Court of Queen's Bench Justice, ARC, R 6.14
    - No direct appeal to the Court of Appeal R 14.4 – first goes to master and then justice

Provincial Court (Civil)

- Statutory court – jurisdiction established by statute, *Provincial Court Act* (*PCA*), also other acts
- **Can hear**: claims for debt, damages, unjust enrichment, title to personal property, specific performance, recission
- **Cannot hear**: claims for title to land, wills and estates, defamation, malicious prosecution, false imprisonment, action against peace officers. *PCA* s 9.6(2)
  - Or anything against police officers, which creates a bar to A2J for these claims given their low quantum (damages are low - $10,000 – therefore access to justice problem because cannot be heard by lower court)
- **Threshold amount**: $50,000 or less – applies to each cause of action (*Parris v Reber*) – PCA s 9.6, *Provincial Court Civil Division Regulation* s2
- Filing fee for claim: ≤$7500 = $100; >7500 = $200 (*Provincial Court Fees & Costs Regulation*, s 1)
- Process, see Provincial Court Act, Part 4 & Provincial Court Civil Procedure Ligislation
  - *PCA*, Part 4; Court can supplement the *PCA* by applying or modifying the Rules of Court, *PCA* s 8
  - Most litigant are self-represented
  - Use of agents are relatively common; generally not permitted in QB
- Appeals to the Court of Queen's Bench, *PCA*, s 46 (this is as far as the claim can go); no further appeal to ABCA, but implied right of appeal to SCC since SCC has plenary jurisdiction

ABPC and ABQB: Transfers

- ABPC can order matters transferred up to ABQB, but only if the matter is outside ABPC jurisdiction (monetarily or otherwise): s. 56 of the *Provincial Court Act*
- ABPC can also accept transfers down from ABQB by *consent of the parties only*: s. 57
- The ABQB *cannot* order matters down to ABPC without the consent of the parties: *Rai Trucking Ltd. v. Barakat Industries Ltd.*, 2002 ABQB 1057
  - (Cf. *Eve v. Pearton*, 2014 ABPC 179)

Federal Court

- Statutory Court – jurisdiction established by statute, esp, *Federal Courts Act*, s 17-26
  - Jurisdiction to hear actions against the federal crown, intellectual property matters, maritime law, citizenship & immigration, judicial review of federal administrative bodies and intergovernmental disputes (see *Judicature Act* s 27); mostly hear matters from federal tribunals
  - Many areas of jurisdiction are concurrent with provincial superior court, some are exclusive e.g., administrative law remedies against federal boards, commissions and tribunals, FCA s 18

- Filing fee for claim - $150, see *Federal Court Rules*, Tariff "A"
- Federal court has a officer that is akin to a Master called a "prothonotary"
- The deadlines in this court cannot be waived by agreement of the parties like in superior and inferior court in the province. You have to have a court order to waive a deadline – so matters in the court move more quickly
- Process, see *Federal Court Rules*
- Appeals to the Federal Court of Appeal, *FCA* s 27

Administrative Tribunals

- May have exclusive or concurrent jurisdiction
  - I.e. exclusive = Workers Compensation Board, *Workers Compensation Act*, s 17, 23
    - Right of appeal to Workers Compensation Appeal Commission, further right of appeal to the Court of Queen's Bench, *WCA* s 13.1-13.4
  - I.e. concurrent = Residential Tenancy Dispute Resolution Services, *Residential Tenancies Act*, s 48, 54.2
    - Concurrent with both ABQB and ABPC
    - Right of appeal to the Court of Queen's Bench, *Residential Tenancy Dispute Resolution Service Regulation*, s 23

Arbitration

- May be agreed to voluntarily or mandated by contract
- Arbitration matter are governed *by Arbitration Act*; *International Commercial Arbitration Act*
- Procedure: may be set out in contract or agreed to by parties
- Need to determine whether the contract requires mandatory arbitration and its limitation periods. If you miss limitation periods for arbitration because you sued in court instead – may not have any remedies available due to missed limitation periods.

Court of Appeal (no inherent jurisdiction, enacted by statute)

- Statutory court
- General rule: can appeal civil matters from Queen's Bench without leave (without permission of COA – you appeal master to justice – justice can be appealed) R 14.1 (1)
  - Some exceptions, see R 14.1(2)-(5)
  - No appeal to CA from DIRECTLY a Master R 14.1(4) (appeal from QB Master to QB Justice) – it has to go to justice and then to CA
  - Can't hear appeals of civil matters originating in ABPC – PC judgement re civil matters can only be appealed once
    - Small claims court have concurrent jurisdiction with QB
  - Can also hear references from the Alberta Government, *Judicature Act*, s 26
- Cost of filing an appeal? $600, ARC Schedule "B", Division 6
- Process: *Rules of Court* R 1.1
- Appealing an administrative tribunal's decision? Look at governing legislation
  - e.g., Appealing SDAB? "Permission" required, *Municipal Government Act*, s 688

Supreme Court of Canada

- Statutory Court, jurisdiction established by statute, esp *Supreme Court Act (quasi -constitutional)*
- Jurisdiction (plenary – can have authority of all disputes)
  - Litigants need leave for civil appeals and some criminal matters, *SCA* s 40
  - Some appeals "of right" on criminal matters, *Criminal Code*, s 691 – where there is a dissent in the court of appeal
  - References from Federal Government, *SCA* s 53-54
- Cost of filing an application for leave to appeal? $75 see *Rules of the Supreme Court of Canada*, Schedule B
- Process: *Rules of the Supreme Court of Canada*
- Since 1949 – no further appeal bc abolished appeal beyond

➔ In conclusion, the vast majority of civil litigation in AB takes place at ABQB. Some happens at ABPC and some at ABCA. There is a whole field of administrative proceedings that roils below the surface of the Courts and is subject to appeal to them from time to time.

Civil Contempt

- Species of contempt:
  - (1) **Criminal contempt**: must have an "element of public defiance", and the sanction of contempt is essentially punitive. These are crimes – even though not in criminal code.
    - Criminal contempt– UNA Nurses (4-3). Sheila Greckol and her husband, Alex Pringle, represented UNA. The Labor Relations Board had issued directives forbidding a strike which had been filed as orders of the ABQB. The union striked anyway. The attorney general brought a proceeding for criminal contempt and the union was issued $350,000 in fines.

        - The Court's judgment is really interesting from a constitutional and criminal law perspective because UNA made neat arguments about s7. But the contempt issue was really just explaining that criminal contempt arises in situations of defiance of the court, rather than out of defiance in a purely private setting. Obviously that line can be hard to draw, since defying any court order inherently defies the court's powers. Criminal contempts are crimes and are prosecuted by the AG, rather than the parties.
    - (2) **Civil contempt** is "primarily coercive rather than punitive."
- **Power to hold in contempt**:
    - Court of QB – R 10.51-53, 10.55
    - Provincial Court – *PCA* s 9.61

- Now within those general categories of contempt, we also distinguish between:
    - **Contempt in the "face of the court" (*in facie*)**
        - Something done in the court's presence. The presiding judge or justice has inherent power to deal with it. If you take off your shoe and throw it at the judge, she can hold you in contempt. No application.
    - **Plain old contempt *outside* the face of the court, of the court's order or directions or processes (*ex facie*)**
        - Superior courts can punish both, inferior/admin tribunals only *in facie*

Cary v Laiken , 2015 SCC 17– civil contempt

F	- These facts are pretty unusual for one reason– the contempt application was against a lawyer rather than a party. So they aren't common! - In any event, Laiken said Carey gave his client back $400,000 he was holding in his trust account in violation of an injunction preventing any person from "disposing of or otherwise dealing with" assets of Carey's client
I	To be found in contempt of court, must a party have shown "contumacious" (means willfilly disobedient) intent when disobeying the court order? (Mens rea) Carry wanted to transfer the money and not to breach the order.
D	**Ratio:** No need for willful disobedience, "contumacious intent" an aggravating factor to be considered at the penalty phase, not liability phase. It has to be proven beyond reasonable doubt (the burden of proof both as to persuasion and the need for evidence is entirely on the party alleging contempt, and the standard is proof beyond a reasonable doubt.) - **3 Part Test** (*Cary v Aitken*): o (1) The order alleged to have been breached must state clearly and unequivocally what should and should not be done o (2)The party alleged to have breached the order must have had actual knowledge of it o (3) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels o Court retains discretion to find "no contempt" even when all three elements made out to find, if holding party in contempt would work an injustice o *** Important procedural note: Rule 10.5.2 → **Requires personal service in the same manner as a commencement document! Your lawyer cannot do it – the same as civil statement claim. If the party was not served personally – court will not find content.** o You have to meet 3 part test + rule 10.5.2 o *Evacon*: • But excuse still relevant to actus reus of contempt: "the party allegedly in breach must have *intentionally* done the act that the order prohibits or *intentionally* failed to do the act that the order compels" • In other words, a "due diligence" defence to contempt? • Court overturned two of the three contempt findings and modified the penalty

	• *Envacon:* [W]here an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt .... That excuse goes to the finding of contempt, and not to the remedy or penalty.

336239 Alberta Ltd. v Mella

	• Judges have discretion in ordering sanctions for contempt, which must be proportionate and reflect the gravity of the offence and the personal culpability of the contemnor • "[t]he decision to find a party in contempt is discretionary, as is the sanction for contempt, and both are reviewable on a standard of reasonableness. "[t]he decision to find a party in contempt is discretionary, as is the sanction for contempt, and both are reviewable on a standard of reasonableness.
Conclusion	[38] The decision to find contempt was reasonable, as were the sanctions imposed, including fines, imprisonment and costs. In my view, a three month term of imprisonment is entirely proportionate, and necessary. Alberta courts have held that a party in contempt cannot access the court to participate in litigation unless the contempt is purged

Envacon Inc v 829693 Alberta Ltd – mens rea – no reasonable excuse

F	- Originally a leasing dispute between a landlord and commercial tenant, ballooned into larger war - 829 was ordered to produce "unconsolidated financial statements" of three companies - Statements not provided (829 said they did not exist, all statements were "consolidated") Envacon applies to hold 829 in contempt
I	Did 829 have a 'reasonable excuse'? They argued they couldn't provide the statements because they did not exist
A	• ABCA interpreted *Carey* to rule out "reasonable excuse" from mens rea of contempt– the contemnor's "motivation" is irrelevant • But excuse still relevant to actus reus of contempt: "the party allegedly in breach must have *intentionally* done the act that the order prohibits or *intentionally* failed to do the act that the order compels" • What does that mean in practice? – "Particularly in the case of mandatory orders, an alleged contemnor may argue that his or her failure to do what the court required was not intentional. In these cases, a finding of contempt will turn on whether the alleged contemnor did enough to bring about the result the court order required." • In other words, a "due diligence" defence to contempt? • Court overturned two of the three contempt findings and modified the penalty • *Envacon:* [W]here an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt .... That excuse goes to the finding of contempt, and not to the remedy or penalty. Note: The persuasive burden is on the party alleging contempt and that party also has the burden to adduce evidence or point to evidence on the record, to support the allegations. So by the time the

	topic of reasonable excuse comes up, the party seeking a contempt finding will have already proven the prima facie breach.
H	In sum, the burden of proof both as to persuasion and the need for evidence is entirely on the party alleging contempt, and the standard is proof beyond a reasonable doubt. [68] There was no contempt of Production Orders 1 and 2 because there was some uncertainty as to whether they required production of unconsolidated financial statements, and therefore they do not meet the Carey requirement of a "clear order". [69] Instead of the remedy of striking 829's pleadings, Envacon is entitled to costs on a solicitor and client basis for all steps taken in relation to securing compliance with Production Order 3.

Contempt: Sentencing Factors

"Judges have discretion in ordering sanctions for contempt, which must be proportionate and reflect the gravity of the offence and the personal culpability of the contemnor"
Court should consider:
(a) the proportionality of the sentence to the wrongdoing;
(b) the presence of mitigating factors;
(c) the absence of aggravating factors;
(d) deterrence and denunciation;
(e) the similarity of sentences in like circumstances; and
(f) the reasonableness of the fine or incarceration.

- Imprisonment is usually only when the party repeatedly goes against a court order.
- Rule 10.5.1 – party does not rapidly show up in court when had a court order to appear – you can get a police warrant – and police service arrests person and brings them to QB – only lasts for 24 hours.

LIMITATION PERIODS

Purpose of Limitation Periods

1. Provide repose
    a. Document retention – can't expect persons to retain documents for decades
    b. Psychological relief – allow persons to conduct themselves without continually worry about a lawsuit
        i. Learned Hand said "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death"
    c. Insurance costs – longer the limitation period, the more expensive insurance
    d. Saleability of businesses – harder to sell a business with longer limitation periods
2. **Loss of evidence** - memories fade, witnesses die, documents destroyed
3. Changing standards – proving industry practices or standards from decades ago may be impossible
4. Promotes diligent pursuit of claims

Need to file commencing documents, S/C or Originating Notice before limitation period (LP) expires

Kinds of Limitations Periods:

(1) Discoverability Limitation Period

Limitations Act s.3(1)(a)

- Runs **two years** from, whichever comes first: 1) from when the P **knew, or** 2) **ought to have known**:
    1. That the injury had occurred, and
    2. The injury was attributable to D, and **(discoverability)**
    3. The injury, assuming liability of D, **warrants bringing a proceeding**
- "Fairly short limit… Which starts to run when the person wanting to sue learns the important facts and seriousness of the matter.."
- whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Examples:

- LP starts when you realize you can no longer enjoy cotton candy because of event
- Debt owed - LP starts based on usual practice of when you expected to be paid

Unethical to send demand letters when LP has expired?

- No, up to D to raise limitations defense

If claim is discoverable – you have 2 years, if not discoverable – 10 years. Remember that you look at the discoverability period FIRST. It's only if the claim wasn't discoverable (so the 2 year period doesn't apply) that you would look at the 10 year period

(2) Ultimate Limitation Period (hard end)

Limitations Act s 3(1)(b)

- Another long period… starts to run from the happening of the event, and operates independently of knowledge or ignorance
- Runs **ten years after the claim arose**, if the discoverability LP has not expired previously
- s 3(3) – definition of claim for 3(1)(b) – breach of duty arises when conduct, act or omission occurs
- *"another lone ione"*
- whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
- When did claim arise? See LA s 3(3), which includes a definition of claim BUT ONLY for ultimate limitation period

Bowes v Edmonton – Ultimate LP expired as the last act, issuing building permit, occurred longer than 10 years prior to filing claim

- At the ABCA, Justice Cote explained the rationale for the ultimate 10 year period
  - "Now the big complaint of the plaintiffs is that the time for them to sue expired before they knew that they had a claim, indeed maybe even before they **had** a claim which the law would act upon. They say that is unjust. Their statement is correct in fact. And if one looks only at the plaintiffs, it is unfair."
  - "We must start by recalling the main purpose of limitations legislation. It is enacted to prevent certain plaintiffs from suing on good causes of action."

Bowes v Edmonton, 2007 ABCA 347

Facts	There were geotechnical report that were give to the city – that said it was dangerous 1987 – city issues permit (limitation period starts here) 1988 – house built 1998 – cracks appear around house 1999 – river bank collapses and the city disclosed the contents of the report 2000 – statement of claim issued Pls were suing the city for breach of duty to disclose the info and to issue permits
Analysis	Limitations Act s3(3) for the purpose of subsection 1(b) and 1.1(b) → (b) a claim based o a breach of a duty arises when the conduct, act or omission occurs – the city failing to disclose the content of report when permits were issued – so this is when the clock on limitation period started. Sued city and geotechnical engineers who had examined the land City had *prior to 1987* "negligently failed to consider and disclose a geotechnical report which may have resulted in a denial of the Plaintiffs' application to develop and build" So you first go through the discoverability criteria. Didn't know the cracks were serious enough to be an "injury" prior to the collapse, didn't know a proceeding was warranted, didn't even necessarily know who to sue. It was only after the collapse that the City disclosed the report. So not discoverable and so not barred by 2 yr period. At the ABCA, Justice Cote explained the rationale for the ultimate 10 year period:

	[119] What is the policy reason for barring such suits? To eliminate the harm to defendants of very belated litigation. Most of that harm divides into two categories. [120] **First**, people and businesses have to get on with their lives. They should not have to store bulky or fragile records forever, even for decades. Their savings and futures should not be founded on fading memories, or the hazard of whose witness first dies or disappears. The social cost of all that is high. People and businesses must be able to plan their affairs without keeping idle huge reserves against the possibility of ancient claims arising. No one would buy a construction business or a professional practice if it might drag with it claims over 30 years old. Indeed, Canadians daily use buildings, bridges, dams, roads, and railways a century or more old. Companies depend on constituting documents drafted by long-forgotten solicitors. Wills and trusts generations old govern pensions plans and other vast sums. Many Canadians were delivered by obstitricians over 65 years ago; and got medical advice over 60 years ago. [122] The **second** aspect of the harm is that trying to find and test evidence about events decades old is usually roulette, not a serious exploration of the truth. After some years, a defendant cannot prove a proper defence, or even disprove the plaintiff's allegations.
	Ran out the ultimate limitation period

Suspension of Limitation Periods

3 ways to suspend (limitation period that shorten a limitation period is unlawful and unenforceable in AB – but the contract can lengthen the limitation period)

1. Fraudulent Concealment
    a. *LA* s. 4(1) – The operation of the [ultimate limitation period] is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which remedial order is sought has occurred
    b. ex. falsifying records so P unaware, D covers up poor workmanship
    - Employer (D) falsifies records, so that employer (P) does not know that employee has been misappropriating funds
    - Contractor (D) covers up shoddy workmanship, so building owner (P) cannot see it
2. Minor Plaintiffs
    a. *LA* s. 5.1(2) – suspended during time P is a minor (under 18 yrs *Interpretation Act* s 28(1)(ii))
    b. There is a process to start the limitation periods running against the Minor, LA 5.1(3)-(9)
        i. Deliver notice to Public Trustee (and if there is one) Minor's Guardian
        ii. This process CANNOT be used where:
            1. (i) potential defendant is the Minor's Guardian, or
            2. (ii) "claim is based on conduct of a sexual nature including, without limitation, sexual assault."
3. Disabled Person Plaintiffs
    a. *LA* 5(1) – suspended anytime P is a person under disability, restarted when person is no longer treated as disabled
    b. LA s 1(1)(h) "person under disability" means
        i. (i) a represented adult as defined in the Adult Guardianship and Trusteeship Act or a person in respect of whom a certificate of incapacity is in effect under the Public Trustee Act, or
        ii. (ii) an adult who is **unable to make reasonable judgments in respect of matters relating to a claim**;
    c. *Munroe v Levin* – possible addiction/substance abuse can qualify, judge unable to decide on summary j
    d. *Knibb v Foran* – tortious conduct of D caused P to be permanently disabled – no limitations defense for D

Other Provisions

Restarting Limitation Periods

(1) If a limitation period for recovering a debt has not yet expired, it will be restarted if debtor (LA, s.8-9):

- Debtor, personally, makes a payment toward debt, or
    - payments that are made after the limitation period do not restart the clock
- Signs a written acknowledgment of debt

Example: credit card and mental health issues.

- 2004 Client gets credit card
- 2004-2012 – Client uses credit card regularly

- 2013 Client develops severe mental health issues, stops using credit card, last payment October 2013
- August 2017 Small payment made on credit card, no evidence who made payment. Client claims it was not her.
- July 2019 Credit card company files lawsuit

Does the client have a limitations defence?

- Did the part payment restart the limitation claim? But we do not know who made the payment – if it was her – then it would restart the limitation period; if it is not her – than it would not restart the limitation clock.
- Depends whether she made it or not– " if a person liable in respect of a claim … makes a part payment in respect of the claim"
- Would likely withstand (be unaffected) SJ if brought

(2) No LP for **Aboriginal** Breach of Fiduciary Duty Claim

- LA 13 An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act,* RSA 1980 cL-15, had not been repealed and this Act were not in force.
- BUT see also *Manitoba Metis Federation v. Canada*, 2013 SCC 1 - no limitation period applies to applications for declaratory relief

(3) Other types of Claims with Special Rules

- S 3.1 no limitation period for claims related to
  - Sexual assault & battery
  - Sexual misconduct or violence towards a minor, a person with a disability, a person in an intimate relationship with the defendant, a person dependent on the defendant

(4) **Judgement** (court order requiring payment by one party to other)

- Ten years from order granted *LA* s 11
- Can be renewed endlessly every ten years ARC 9.21
  - ARC 9.21
  - (1) On application, the Court may grant a judgment creditor a new judgment or order on a former judgment or any part of it that has not been paid
  - (2) onus is on judgment debtor to show cause why new judgment or order should not be granted…

(5) **Contract** can to extend LP, but not restrict LP, *LA* s 7

Limitations periods are about filing, not service!

Limitation periods apply to:

- Provincial Crown, LA s 2(5)
- Federal Crown, for causes of action that arise in Alberta (depends on province where it occurs) (*Crown Liability and Proceedings Act s32*)
  - If in Alberta then *LA* applies unless legislation specifies different period
  - If outside Canada? – Default period is six years
- Limitations defences **aren't automatic;** they MUST BE PLEADED– parties can waive them, so if not pleaded, can't be argued

- Legislation Specifying Limitation Period

- E.g.
  - 6 months to file a judicial review application, ARC s 3.15(2)
  - Cannot be extended by court
  - 6 months for filing a complaint under the *Employment Standards Code*, RSA 2000 c E-9, s 82(2)
  - Can be extended in "extenuating circumstances"
  - 6 year limitation period for suing on student loan, see *Canada Student Financial Assistance Act*, SC 1994, c 28, s 16.1
- Good resource
  - *Alberta Limitations Manual*, 2nd ed, looseleaf

Statement of Claim vs. Originating Notice

- Two choices of commencing documents under ARC
- (1) Default – file **Statement of Claim**
  - Starts civil litigation process that (potentially) culminates in continues oral trial

- "The Statement of Claim is the all terrain vehicle. An Originating Application may be used if the criteria set out in 3.2(2) are met.": Dash Distributors (Master Schlosser)

- (2) **Originating Notice**. When filed, litigants are provided with a court date to have their matter determined. Court will decide on basis of affidavit evidence (& questioning on affidavit, if applicable).
- Court can convert from one to the other, ARC 3.2(6).
- A statement of claim must be used to start an action unless. ARC R3.2(2) for Originating Notice
    - (a) there is no substantial factual dispute,
    - (b) there is no person to serve as defendant,
    - (c) a decision, act or omission of a person or body is to be the subject of judicial review,
    - (d) an enactment authorizes or requires an application, an originating application, an originating notice, a notice of motion or a petition to be used,
    - (e) an enactment provides for a remedy, certificate, direction, opinion or order to be obtained from the Court without providing the procedure to obtain it, or
    - (f) an enactment provides for an appeal to the Court, or authorizes or permits a reference to the Court, or provides for a matter to be put before the Court, without providing the procedure to be used,
- Originating notice can also used:
    - Where legislation says to bring an application & no statement of claim filed, R 3.3(3)
        - E.g., Application to force compliance with corporate documents, *Business Corporations Act* (Alberta) s 248
    - Where legislation says to bring an appeal or reference & no process provided, R 3.3(5)

Boyd v Cook

- The legal test is not whether this plaintiff actually knew that the situation warranted suing. It has two branches. The test is whether he knew **or** whether in the circumstances he ought to have known. The test is largely objective, that of the reasonable person in the same circumstances.
- The limitation period set out in the *Limitations Act* can be altered by other statutes, such as insurance legislation or environmental protection legislation. See Alberta *Limitations Act*, RSA 2000, c L-12, s. 2(4)(b).

Dash Distributors Inc. v Powlik

- The Statement of Claim is the all terrain vehicle. An Originating Application may be used if the criteria set out in 3.2(2) are met.
- ROC:
  (3) If an enactment authorizes, requires or permits an application to be made to the Court,
  (a) if the application is made in an action in respect of which a commencement document has been filed, the application must be made under Part 6 [Resolving Issues and Preserving Rights] unless the Court otherwise orders, or
  (b) if the application is made in an action in respect of which a commencement document has not been filed and the enactment does not provide a procedure to be used, an originating application must be used unless the Court otherwise orders or these rules otherwise provide.

Parties

Parties Requiring Litigation Rep (Cannot Sue in Their Own Capacity/lacking legal capacity)

- Lawsuits have many participants
    - Lawyers, witnesses, judges
    - Who is a **"party"?**
        - Anyone who both is directly interested in lawsuit and has a right to control the proceedings, make a defence, or appeal from an adverse judgement
        - One by or against whom a lawsuit is brought → litigant

- Main parties are only litigants: plaintiff and defendant

Basic Parties:

- **Plaintiff**: The party who starts an action by way of Statement of Claim (ABQB) or Civil Claim (ABPC). The person suing.
- **Defendant:** The party against whom an action is started (again by way of SOC or Civil Claim). The person being sued.
- **Plaintiff-by-counterclaim/ defendant-by-counterclaim**: usually also a plaintiff or defendant
- **Third party**: noun, someone who was not named as a party in the original lawsuit but is somehow implicated in it and brought in by the Defendant. Also a verb. "to third party"
- **Applicant/Respondent:** are the Plaintiff and Defendant in actions started by Originating Application. Also refers to status in interlocutory applications.
- **Appellant/Respondent:** Respondent depends on the outcome of the proceeding below. The fact that the responding party to an application and an appeal are called the same thing in Canada is confusing.
    - The Plaintiff/Defendant would be listed in the STYLE OF CAUSE: A v B.

Litigation Representatives

- Litigation representative is someone appointed (automatically or by application) to represent in a lawsuit who is a minor, dead, or does not have mental capacity

- Litigation representative **MUST** be used in the following situations:
    - Estate if no personal representative (if there is a personal representative aka executor of the estate, they represent the estate: R2.1)
    - Minor
    - Person lacking capacity if no one charged with decision -making
    - Missing Person

Unless court orders otherwise – court can waive the requirement of having a litigation representative if for example the dispute is not highly contested

- **Duties** of Litigation Representatives
    - Lit reps do not get paid
    - Instruct counsel
    - Pay costs if litigation representative to plaintiff, ARC R 10.47 – lit rep might be liable for costs
    - MUST hire counsel (unless a lawyer) in 99% of the cases, see *Champagne v. Sidorsky*, 2012 ABQB 522 (*maybe*)
        - Re hiring counsel, that case pre-dates the modification of Rule 2.23 to restore the "discretion of the Court, subject to any limits imposed under the *Legal Profession Act*, to grant a right of audience to any agent, other than a lawyer, to speak on behalf of an individual or corporation." For now the cautious approach is to say that Lit Reps need counsel.
        - Not always have to hire a lawyer. Some lawsuits are not contested
    - Lit reps also control when lawsuits Discontinued, abandoned & settled - usually will require court approval, R 2.19 (unlike other court actions – the approval by the court is required)

- Appointment can occur
    - Automatically, R 2.13
    - Self-Appointment, R 2.14, by "Interested person"
        - ***LC v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 use definition in *AGTA***
    - Court Order, R 2.15-16 – can apply generally under those rules
- Court can replace, terminate or place conditions on litigation rep, R 2.21
- Court can dispense with need for litigation representative, R 2.11

1. Deceased Person/Estate if no Personal Representative

- Cause of action against a deceased person survives, *Survival of Accidents Act* s 3
    - You can sue the estate
- Cause of action by them survives *SSA* s 2.5 with some limitations
    - only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable
    - E.g., no claim for loss of future income, because there won't be anyone around to incur those future damages
    - E.g., no damages for pain and suffering (ie "general damages") since non-pecuniary

- Would also bar damages for actions maintainable without proof of damages, like trespass or defamation, unless there is evidence of actual loss

- Sues & defends by: (*SAA*, s 8; *ARC* R 2.11(e))
  - Personal Representative, or
  - Litigation Representative
- If litigation is already ongoing, the death stays it and you have to apply to lift the stay: R4.34
  - give time for families to grief and parties to lawsuit to decide whether they want to continue

2. Minor

- Sues and defends by litigation rep (old term → next friend & guardian ad litem)
  - Rationale for public trustee & court involvement? Inherent vulnerability of minors, potential for parent and child's interest not to be aligned at least to the extent that trustee and court should take a look
  - Usually is the parent, unless there is a potential for conflict i.e. parents are divorcing
- Public trustee supervises litigation, must give 10 days notice of application minor's property, *Minors Property Act* s 15
- Settling a claim requires court approval *MPA* s 4
  - Usually other civil claims do not require court approval – everything is usually settled by lawyers
  - Court wants to make sure that a parent does not compromise child's right to get shout cash from court settlement
- Parent = automatic litigation representative of child under ARC R 2.13 & *Family Law Act*, s 21
  - But parent should not act as litigation representative if potential for conflict between parent's & child's interest

3. Person Lacking Capacity (relatively rare)

- Guardian or trustee may be authorized to pursue/defend litigation under appointing order
  - Guardian oversees personal matters i.e. health & social
  - Trustee oversees financial matters
- Litigation rep required in 2 situations
  1. If person is a "Represented Adult" under *AGTA* (*Adult Guardian and Trusteeship Act*)
     a. Guardianship &/or trusteeship order in place, but does not' give power to pursue/defend litigation to anyone
  2. If person lacks capacity – *AGTA*
     - (d) "capacity" means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of
     - (i) a decision, and
     - (ii) a failure to make a decision;
- Capacity needs to be assessed with respect to complexity of decision being made
  - If defendant party is detained under *Mental Health Act*, to proceed:
    - Do court search, see if someone has been appointed as guardian or trustee and if there is a right to defend by one of them; go to court house and look for all actions with person's name in action

4. Suing a business

- Do a corporate Registry search. Determine of it is a
  - Corporation (are they are incorporated or is it a partnership)
    - Who is liable? (who is named: directors and shareholders)
    - Is business current or dissolved?
      - They can sue and be sued withing 2 years of corporation being dissolved, *Business Corporations Act* (Alberta), s.227
      - 5 years to revive dissolved corporation, BCA (Alberta), s208, 210
        - Important because if the company is dissolved it is unlikely that PL can enforce judgement on them – the judgment might be worthless
    - Extra-provincial corporation wants to sue in Alberta? Must register in Alberta to sue as a home jurisdiction or extra-provincial registration, BCA (Alberta), s295
      - They can be sued in Alberta as long as they are doing business here, do not need to be registered here.
      - To enforce a judgment for the company that is not registered in AB requires a long process – you have to register the judgement in their home jurisdiction and enforce it there
      - If they are not in here, may want to seek security for costs
  - Partnership
    - Need to serve each of the partners individually if they are personally liable, depending on the partnership

        - If acting for a partnership or sole proprietorship, make sure that any declarations required under the *Partnership Act* have been filed or action may be stayed, *Partnership Act*, s 113
    - Sole Proprietorship – can sue trade name or individual's name
- This is extremely important because suing a company is worthwhile only if you can recover, and if it doesn't exist, you probably can't! Which is why you also pull PPR, bankruptcy, and Court searches. For more, take judgment enforcement!

5. Suing the Crown

- Provincial law – *Proceedings Against the Crown Act* s 12 – sue "Her Majesty the Queen in Right of Alberta"
- Federal law – *Crown Liability and Proceedings Act* s 23 – sue "Attorney General of Canada"
- You would name the party as Attorney General of Alberta

- **Crown Immunity**
  - Compare *Interpretation Act* (BC), s 14 vs. *Interpretation Act* (AB), s 14
  - Generally subject to similar procedural rules as other litigants, including liability for costs, see *PACA*, s 8, 9, 16; *CLPC*, s 27-28, *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-60
  - Some types of immunity remain:
    - Cannot undertake enforcement proceedings against the Crown, *PACA*, s 25; *CLPC*, s 29
    - **No enforcement** proceedings against Crown
      - Generally prohibited
      - Crown is expected to obey the judgments without enforcement necessary
    - Cannot enforce discovery against Crown in proceedings where Crown is not a party to the action, *Canada v Thouin*, 2017 SCC 46
    - **No injunctions against Crown** – *PACA* s 17; *CLPC* s 22
      - You cannot subpoena or get discoverability someone who represents Crown if the Crown is not party to lawsuit
      - Crown does not have to be involved in private parties that it is not party to.
- Contesting constitutionality of crown legislation? Give them at least 14 days notice, see *Judicature Act*, s 24

Canada v Thouin, 2017 SCC 46

- 40 We conclude that the common law immunity from discovery continues to apply to the Crown in proceedings in which it is not a party.

Class Actions

- *Class Proceedings Act, SA 2003, c C-16.5*
- A proceeding by a group or class of people. Bringing an individual claim would not be cost efficient or even generally efficient.
- Class proceedings are generally used where there are small wrongs which cannot each be economically sued on given the amounts at issue
- E.g. a bank charges a small unlawful fee to every customer, $5/customer/month, but millions bank-wide
- Has been used as vehicle for important, landmark litigation like Residential Schools claims
- Canada does not have a particularly well-developed class-action system compared to the US
- Alberta relatively unfriendly venue for class-actions; small bar
- **Goals**
  - Judicial economy – do not want everyone who has a claim to show up to court
  - Access to justice – not everyone has financial wherewithal to sue, so P rep sues for all
  - Behaviour modification – if a big corp knows it can be held liable by aggregated claims, may cause them to act more responsibly
- **Process**
  - File/Issue statement of claim
  - Certification hearing – have matter certified as a class action
    - Need recognized legal cause of action, identifiable class, have common issues i.e. late fee being improperly charged
    - Once certified – the court basically blessed the lawsuit, if no certification -lawsuit fails
    - Once a class action is certified, most corps will want to settle, trial is expensive
  - Settlement hearing
    - P rep acts for all Ps
    - Court oversees to ensure D does not find P willing to settle for lowest amount and then help that P become the P rep
    - Court must approve any settlement at a "settlement conference"

Who Can Represent At Court (Appearing in-person before court)?

- *Legal Professions Act* s 106 – **(only lawyers can appear as lawyers before the court) –** s.106 prohibits people from practicing law unless they are a barrister & solicitor OR subject an exception, including:
  - Self rep R 2.22
  - Student legal services
  - Students-At-Law *LPA* s 105
  - Foreign lawyers with authorization *LPA* s 48; *Rules of the Law Society* R 71-73.3
  - Small claims court → **People other than barristers/solicitors can act as agent in civil Provincial Court**, *Provincial Court Act* s 62
    - For example, agent can be someone who works for the company

- **Not exempt from s.106: cannot represent in court**
  - Representative plaintiff
  - People acting for free i.e. pro bono foreign lawyers
  - Lit rep acting for a person/estate – *Chapman Estate v Ramjohn* 2015 ABCA 34
    - Again, re Chapman, unclear whether affected by amendment to R2.23. Probably still good to assume Lit Reps need a lawyer!
  - Corp director acting for corp - *908077 Alberta Ltd v 1313608 Alberta Ltd*, 2015 ABCA 117

- **Corporations in Court (PC is not a problem, but QB -non-lawyer representation was a problem until recently)**
  - S.62 of the Provincial court Act
  - S. 62 of the *Provincial Court Act* provides that corporations may be represented by an agent
  - In ABPC they often self-represent through an officer/director, whether that person is construed as being an "agent" or the party itself
  - But in ABQB, until very recently, the *Legal Profession Act*, combined with R 2.23, barred companies from appearing without counsel, and Court had no discretion to permit it
  - But R2.23 was amended within the last year!
  - Restoring the Court's discretion to grant non-lawyer representatives from corporations an audience
  - The "presumption is still that corporations must be represented by lawyers. Rule 2.23(4) merely restores the discretion of judges to give a right of audience to non-lawyers connected to the corporation": *Vuong Van Tai v Alberta*

- **Other persons can provide assistance**
  - (1) R 2.23
    - Can make quiet suggestions, note-taking, support, addressing needs of a party – cannot be disruptive or contravene *LPA* s 106 i.e. cannot have a lawyer making arguments
  - (2) Court can grant audience to agent as part of its inherent jurisdiction to control own process. Court will consider *Champagne v Sidorsky, 2012 ABQB 522 at para 38-40:*
    - A court will consider family relationship i.e. daughter making submission for parents
    - if the party using a free or a legal advisor service
    - economic hardship such that they cannot retain counsel
    - Would refusing audience to agent deny party benefit of <u>any</u> representation
  - BUT where audience is granted, it mayst be for something less than the full gamut of a barrister and solicitor.
- Represent as student? Can rep in provincial court as an aid or wait until you are called to the bar
- Amicus
-

VUONG VAN TAI V ALBERTA, 2020 ABCA 169

- The Court now has a discretion to permit an individual to speak in court on behalf of a corporation. Clause 5 of the order of October 8, 2015 is accordingly rescinded. To be clear, the enactment of R. 2.23(4) does not mean that non-lawyers have an unlimited right to represent corporations. The presumption is still that corporations must be represented by lawyers. Rule 2.23(4) merely restores the discretion of judges to give a right of audience in court to non-lawyers connected to the corporation.

Vexatious (causing worry or frustration) Litigant

- Those who abuse the courts with meritless suits
- Nearly always self-represented
- "Know it when you see it"
- Mental health issue – "querulousness"
- Usually, the issue is small to begin with and then it is ballooned into something crazily out of proportion.

- Judicature Act s 23.1
  - If the court is satisfied the person is instituting vexatious proceedings, the court may order that the person on institute further proceedings or proceedings instituted may not be continued without court approval

- Indicia of vexatious litigant *Chutskoff v Bonora*, 2014 ABQB 389 para 92
  - Repeatedly filing claims with no merits
  - Repeatedly not obeying court orders
  - Repeatedly not paying costs
  - Bringing applications for improper purposes i.e. sue someone, then immediately sue their lawyer to intimidate them
- OPCA – organized pseudo legal commercial arguments (*Meads* case)
  - Distinction between straw person & real person i.e. trademark oneself, unusual spelling of name
  - Claim of right/laws don't apply – can opt out of legislation by serving a claim of right on gov't
  - Draw distinction between lawful and legal
  - Argue courts are admiralty courts
  - Government does not have a monopoly on producing money – pay in a form of currency that does not really exist
  - Argue that courts are public traded corporation, therefore their decision are not enforceable
  - Litigation Terrorists
- Find a vexatious litigant by doing a courthouse search – would be declared one in one of the cases
- Vexatious litigant database – Resolution and Court Administration Services, call Edmonton Law Courts (7806448219)
  - Effective Jan 15, 2016 – only to be used in rare cases, not to be used for routine checks of clients by law firms, questions contact Heather.Amos@gov.ab.ca

VEXATIOUS LITIGATION & VEXATIOUS LITIGANTS

Vexatious *Litigation*

- Court can hold a summary hearing on the basis of written applications & strike claim/defence if it is determined to be vexatious
- See Alberta Court of Queen's Bench, Civil Practice Note #7 (June 21, 2018)

Vexatious *Litigant*

- Court can prohibit an individual from seeking relief from the court if the individual is determined to be vexatious, see: *Judicature Act*, s 23.1; *Family Law Act*, s 91
- The processes for dealing with vexatious litigants are only to be used in the clearest of cases
- Recently ABQB had gone a bit overboard in making extremely broad vexatious litigant orders
- Had been doing it primarily on the Court's own motion– "*sua sponte*" (ie not on application by a party)
- Had been as a matter of course ordering the vexatious litigant can only litigate by retaining a lawyer
- Relying solely on court's "inherent jurisdiction" rather than the *Judicature Act* process
- ABCA reined-in ABQB in a 2020 trilogy *Jonsson*, *Makis*, and *Vuong*
- Orders must be "no wider than is necessary" and "proportional"
- Orders to retain counsel are disfavoured

Indicia of what constitutes vexatious litigation or conducting litigation in a vexatious manner, see *Judicature Act* s 23. Includes:

- Repeatedly re-litigating the same issues;
- Repeatedly bringing claims with no hope of success;
- Multiple instances of not paying costs;
- Repeatedly and unsuccessfully appealing court order;
- Repeatedly engaging in inappropriate behavior in the courtroom.

15. Bruin files a separate lawsuit against BML in which refers to herself as "the Human:Soul/Being known as BRUIN" and says she is "subject only to the Admiralty courts and not the treasonous corporation known as the Court of Queen's Bench". You pull a court search for her and find out she has sued every Prime Minister and Premier since 1980 for "sedition" and has $100,000 in costs awards against her. Which of the following are generally true (check all that apply)?

A The Court will on its own motion declare her vexatious

B The Court will forbid her from accessing the Courts except through a lawyer

C If you apply to have her declared vexatious, you must give notice to the Attorney General of Alberta

D The Court will use its inherent jurisdiction to declare her vexatious, rather than the process in the Judicature Act

i A, B, and D were disfavoured by the ABCA in *Jonsson*, *Makis*, and *Vuong*.

AVI v MHVB, 2020 ABQB 489 (Grasser, J) – Vexatious Litigants

- Justice Rob Graesser received an unsolicited letter which began:

Dear Robert A Graesser
This is to inform you that [MHVB] is Lawfully standing under Article 61 of the 1215 Magna Carta which was Invoked on March 23rd2001 according to Constitutional Royal Protocol. The Court of Queens Bench is an Unlawful Assembly with **No Authority** to deal with this matter since the Invocation of Article 61 thus All Judgments made by the Court of Queen's Bench in this matter are Null and Void. [MHVB] and All of her Property are Protected by the Constitution and the People of the Commonwealth Realm. We require the **Immediate Restoration of Her Property** see the enclosed **Exhibit: G** in the notice of Conditional Acceptance.
Failure to restore the Property of [MHVB] within 7 Days of receiving this letter will constitute as High Treason, which still carries the Gallows. I urge you to consider **Eichmann vs the People** "I was just doing my job' is no defence. **Nuremberg**.
Maxim in Law Ignorance of the Law is No Excuse

Jonsson v Lymer, 2020 ABCA 167 – Vexatious Litigants

- the case management judge followed a line of Queen's Bench decisions which describe the procedure under the Judicature Act as "obsolete, or at best duplicative of the authority vested in the Alberta Queen's Bench as a consequence of its inherent jurisdiction to control its proceedings" and which apply a common law ". . . more robust, functional, and efficient response to control of problematic litigants . . ."
- Vexatious litigant orders are the most extreme response to inappropriate litigation. Vexatious litigant orders are intended to be extraordinary in nature, and they should only be used when other procedural techniques are ineffective. They are not generally an appropriate method of specific case management. They should be no wider than is necessary in the circumstances.

Pleadings, Interest and Venue

Damages Terminology

- **Liquidated** damages – when the amount can be ascertained with certainty i.e. a debt claim with mechanism to calculate interest.
  - When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be "liquidated" or made clear…
  - - Liquidated - Debt claim to recover loan $4,000 + interest at 15% *per annum*
- **Unliquidated** damages – claims that require some sort of assessment i.e. permanent injury to a person's hand. Can't be calculated, but need to be calculated via mechanism.
  - But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated.
  - - Unliquidated - Damages for causing permanent impairment to plaintiff's hand. Damages for wrongful dismissal for pay in lieu of notice.

- **Pecuniary** damages (monetary) – calculable items some loss of money, can occur pre and post trial i.e. facility care costs
  - "Pecuniary damages are generally assessed on the basis of calculable losses for items such as the plaintiff's prospective loss of earnings and profits and costs of future care, as well as other expenses.
  - Pecuniary – pre-trial cost of care & future cost of care
- **Non-Pecuniary** damages (intangible losses that cannot be calculated by money)– compensate for intangible loss either physical or psychological pain and suffering
  - In contrast, non-pecuniary damages cannot be arithmetically calculated because they compensate the plaintiff for **intangible** losses arising from physical and psychological pain and suffering as well as from any loss of amenities or expectations of life."
  - Non-Pecuniary – general damages for pain & suffering

- **Special** damages – pre-trial pecuniary damages, when you go to trial and can show out of pocket expenses i.e. cost to repair vehicle damaged in accident
  - Special = pecuniary damages, generally incurred pre-trial
    - E.g., Cost of repairing motor vehicle damaged in accident
    - Cost of homecare from date of motor vehicle accident to date of trial
- **General** damages – **non-pecuniary** damages & post-trial pecuniary damages i.e. general pain and suffering, estimated future assistance care costs
  - General = non-pecuniary damages & can include post-trial pecuniary damages
    - E.g.,
      - General pain & suffering
      - Expected cost of homecare in the future
- Note that some legislation (e.g., the *Defamation Act*, s 16) uses the term "special damages" and Courts may have interpreted this term to include different categories of damages.

Pleadings

- Court documents that are filed as part of civil litigation
- **Examples**: S/C (Statement of Claim), S/D (Statement of Defence), Counterclaim, Reply, Third Party Claim
- **Purpose**:
  - Define issues between parties & know what the scope of litigation is at outset
  - Puts the other party/parties on notice – *audi alteram partem* – founding principle of procedural justice to know pleadings against you and the right to respond
  - Build narrative – chance to tell your client's story
- **The Court can amend pleadings at any time during litigation**
- **STATEMENT OF CLAIM**
  - Style of cause, court, judicial district, action number, document type
  - Address for service
  - Particulars of claim/defense
    - Some claims must be specified R 13.6(3) i.e. limitations defense
    - Some claims must be particularized R 13.7 i.e. tort of fraud has 4 elements
    - Plead facts, not evidence
  - Things to notice

    - The beginning of the pleading introduces the parties and notes where they are resident
    - Not necessary, but usually done
- Then tells some kind of chronological narrative about what took place
    - There was a piece of land
    - And a GC was building on it
    - GC hired plaintiff to do work
    - Etc
- Prayer for Relief/Remedy sought (in the example, it is unliquidated, pecuniary, special)
    - Damages (general, special, punitive), debt, injunction, provision of an enactment
    - Interest, costs
- In this example, note:
    - If naming more than one defendant, are you claiming against them jointly and severally?
    - Then a $ of damages
    - Say what *kind* of damages (if claiming both general/special etc)
    - Interest!
    - Costs– we will get to this later in the class, but note the author seeks "solicitor and own client full indemnity" costs. Those are only permitted if set out in a contract, or for gross misconduct during the litigation. My practice is just to claim "costs" and you can specify the scale later
    - Basket clause– surprisingly useful even if odd

- General rules – be succinct, consecutively number paras
- Technical rules R 13.6-13.17

Facts v Evidence

- Facts: On January 19,2020 Scott had a coffee at 10:43 AM
- Evidence: On January 19, 2020, a video camera in HUB mall captured Scott having a coffee at 10:43 AM
- Pleadings only include FACTS and not evidence. Evidence is established through discovery process.

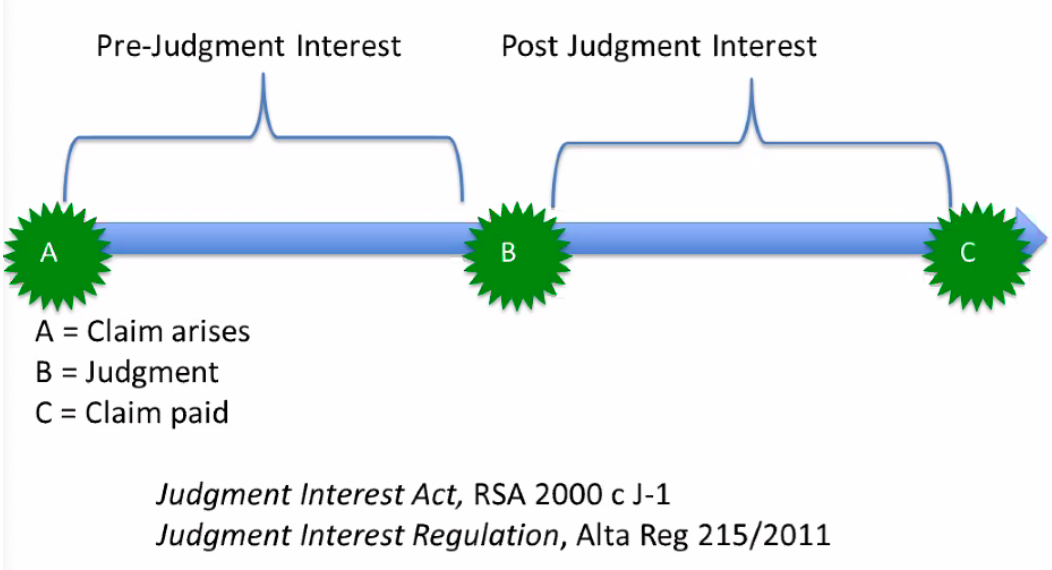
Paniccia Estate v Toal, 2012 ABCA 397

- This was a medical malpractice claim arising out of a doctor's alleged failure to diagnose cancer
- Plaintiff died during the action
- At the end of the trial, the Defendant raised two other defences not pleaded:
- "One legal argument is that the *Fatal Accidents Act*, RSA 2000, c F-8, does not give compensation for shortening of life, and the other is that disbursements for American therapies were not caused by the tort found."
- Those arguments weren't pleaded. Statement of Defence "merely contains a denial of liability" and says that if "plaintiff suffered damages, they did not result from any negligence or breach of duty. It is just possible to read that as saying that there was a breach of duty but it did not cause the damage."
- "This continuity of pleading is not mere failure to update a pleading filed during Mr. Paniccia's life. Though the initial statement of claim was issued by Mr. Paniccia himself, the statement of claim changed after his death. His executrix promptly had herself substituted as plaintiff, and the style of cause and the body of the statement of claim were amended accordingly, including a full plea of his death and why it then occurred. The appellant's amended statement of defence used at trial was filed in reply to that revised statement of claim and suit. But the new statement of defence after the death still did not plead either of the two points of law."
- "Our Court and other higher courts time and time again have held that pleadings do matter, and a judgment based on an issue not pleaded is improper. So the trial judge would have been wrong to find for the appellant on either of the new issues without such an amendment
- An objection to lack of a plea, made at trial, will often lead to the issue of amending the pleadings. If the party with the defective pleading wants to amend it, the usual principles for amendment (including whether there is prejudice) apply. After trial, that would usually mean asking whether a new trial would be fair. The answer to those questions decides the issue. If the matter arises before the trial judgment is entered and the party with the defective pleading does not ask to amend his pleading (as this appellant does not), that really should end the question."

- Principles behind the Rule– avoiding surprise, preventing prejudice, ensuring the parties have the opportunity to lead the facts and argue the law that they need to prove their case

Interest

INTEREST MUST BE EXPRESSED IN PER YEAR TERMS in addition to PER MONTH TERMS UNDER FEDERAL INTEREST ACT – when drafting contracts



Judgment Interest Act, RSA 2000 c J-1
Judgment Interest Regulation, Alta Reg 215/2011

- **Pre-judgement interest (PJI)** – interest when claim arises until judgement is granted, may be agreed to by the parties as set out by the contract (which is usually higher rate than statutory amount) or may have to look to legislation to determine i.e.
  - **Contractual interest only applies before the judgment and statutory interest applies for post judgement when there is a contract**. If no contract, then it is all statutory interest.
  - Expropriation Act s 66
  - Interest Act s. 3 & *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd*., 2013 ABQB 428
  - Otherwise, apply interest rates set out in *Judgment Interest Act*
  - Non-pecuniary damages in statutes are set out much higher than pecuniary damages.
  - Prejudgment interest must be pleaded or you won't get it! *St. Isidore Co-Op Limited v AG Growth International Inc* (Friesen, J)
  - (If you forget, you have to apply to amend your pleadings, and you may not be able to!)
  - Note that the PJI rate has been so low for so long that this may not make much practical difference UNLESS
    - You're eligible for the 4% non-pecuniary amount (as in many personal injury actions)
    - OR you have a contract which specifies interest(as in most debt actions)

- **Post judgement interest** – interest when judgement is granted until debtor pays; set out in *Judgment Interest Act*
- **On exam**: calculate either using *Judgement Interest Act*
- **Court can vary interest** *JIA* s 2(3), **must have a good reason** *Aetna Insurance Co*:
  - If P delayed bringing action
  - If contractual interest rate exceeds criminal interest rate (60%/yr) unless pay day lender
  - *Unconscionable Transactions Act* – if cost of loan is excessive/unreasonable
  - If P could not invest in opportunity because of D's actions, court may give a higher interest rate
  - **Refuse a good offer** – no pre-judgement interest accrues after the date of refusal *JIA* s 3

Calculating Interest

JIA = *Judgment Interest Act*
JIR = *Judgment Interest Regulation*

Type of Claim	Pre Judgment Interest	Post Judgment Interest
Pre-Judgment Pecuniary Damages/Debt	Rate in *JIR*, see *JIA* s 4(2)	Rate in *JIR*, *see* JIA s 6(2)
Post-Judgment Pecuniary Damages	No interest payable, *JIA* s 2(2)(a)	
Non-Pecuniary	4 % per annum *JIA*, s 4(1)	

Judgement Interest Regulation s 1

January 1 to December 31	% Rate/Year	January 1 to December 31	% Rate/Year
1993	6	2006	3.5
1994	4.5	2007	4
1995	5.25	2008	4.25
1996	5.5	2009	2.75
1997	3.5	2010	0.825
1998	3.5	2011	1.85
1999	4	2012	1.20
2000	6.25	2013	1.40
2001	6.25	2014	1.10
2002	5.25	2015	1.05
2003	4.5	2016	0.55
2004	3.75	2017	0.53
2005	3.4		

Venue

Alberta Rules of Court, Appendix

"judicial centre" means the office of the Court in
(a) Calgary,
(b) Drumheller,
(c) Edmonton,
(d) Fort McMurray,
(e) Grande Prairie,
(f) Lethbridge,
(g) Medicine Hat,
(h) Peace River,
(i) Red Deer,
(j) St. Paul, or
(k) Wetaskiwin

- 11 different judicial districts in Alberta
- **Where to file** R 3.3
  - Closest judicial centre by road to residence/place of business of both parties (if multiple offices look to location closest to where claim arose)
  - Closest judicial centre to either party, as decided by party commencing action
  - Or as agreed to by parties

- Plaintiff fails to comply with Rule 3.3
  - Responding party must bring application to change venue, onus on PL to show choice reasonable

- **Transfer** R 3.5
  - If court deems it unreasonable to continue at current location. Court asks is it unreasonable to continue at current location, unreasonableness means option does not stand up to a probing examination (*Siver v Siver*)
  - At request of parties
  - Note: This is not the same for ABPC. There the Defendant's location is usually decisive factor. This can create difficulties.
  - Factors to Consider on Transfer Application (*Odland v Odland*)
    - a) the number of parties or witnesses in the current and proposed judicial centre;
    - b) the nature of the issues in the lawsuit;
    - c) the relationship between the parties in respect of the issues in the lawsuit (e.g. where relevant interactions between the parties relating to issues took place);
    - d) the parties' financial resources;
    - e) the stage of proceedings;
    - f) the convenience of location for pre-trial motions; and
    - g) the location of relevant assets.

- **Venue transfer: Claim for Possession of Land** – R 3.4 Expediated rule (very useful)
  - This "expedited transfer" process for land-related claims doesn't apply to others
  - So the main problem with venue rules from an A2J perspective is that the defendant must bring an application *in the wrong judicial centre*, where they *do not reside*, to move it.
  - That is very burdensome, often impossible, particularly in pre-COVID era when you must appear in person in Chambers
  - A party can fill out form that requests transfer to district closest to land in question
  - R 3.4 provision for automatic transfer assuming there is no dispute
- This "expedited transfer" process for land-related
- The location of counsel is not relevant where the judicial centre, the parties are expected to find a lawyer in the appropriate judicial centre.
- Parties can agree together to have a judicial centre somewhere else.

QUIZ #2

CHAPTER 10: Joinder of Parties & Causes of Action

Joinder & Intervenors

Avoiding Multiple Proceedings

Policy concerns

- Incentivizes parties to put their best case forward
- Waste of court resources
  - R 1.2(3) … the parties must, jointly and individually during an action… when using publicly funded Court resources, use them effectively
- Unfair to parties to incur expense of multiple proceedings
  - R 1.2(2) rules be used (b) to facilitate quickest & least expensive means of resolving a claim
- Avoid conflicting judgements
  - R 1.2(2) …these rules are intended to be used… (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
  - 2 scenarios:
    - Go to court for car accident, first claim you sue for vehicle damage, successful other driver at fault; decide to go and sue for personal injury, new evidence appears and you are found at fault – creates inconsistency
    - Go to court for car accident, two drivers might be at fault, sue each in a separate action, in both actions the other driver is found to be at fault, result is client does not recover – avoid this by joining claims together, called **joinder**

Joinder

- Happens before even you file a lawsuit – or combining parties and claims when the lawsuit starts. Claims, parties were never part of separate lawsuit.
- **Joinder = combing 2 or more claims or parties in one lawsuit, not combining lawsuits.**

- **P can join two claims** – **Joinder of Claims** R 3.69
    a. i.e. employee sues ex-employer for defamation and wrongful dismissal
- **P can join two Ds** R 3.70
    a. i.e. house trashed during party, P sues two guests for damage to house
- **Two Ps join claims against 1 or more Ds** R 3.0
    a. i.e. spouse and child of deceased individual bring claims for bereavement damages against party or parties that caused individual's death, [see *Fatal Accidents Act, s.8*]

Separation & Consolidation

Court can separate or consolidate

- multiple claims or
- actions brought by/against multiple parties R 3.71, 3.72.

Court will consider

b. Complexity
c. Delay
d. Prejudice to parties

→ This should be consider in the beginning stages of lawsuit because otherwise efficiency will be undermined.

SEPARATION

- Bottom line– courts are usually wary of "splitting" claims
- Long-time sense from ABCA that doing so does not in fact create efficiencies
- It is common in one situation (which doesn't really count)– when a party has agreed to liability and only needs damages adjudicated (or vice versa).
    - This is not real separation – considered informal.
    - But that is not technically "splitting" because the second half has been resolved by settlement

Egg Lake Farms Ltd. v. Alberta (Minister of Environment and Sustainable Resource Development), 2014 ABQB 42

FACTS:

- Egg Lake Farms located next to waterfowl habitat
- Minister of Environment builds weir on Egg Lake to stabilize water levels
- Two claims, neg misrep and expropriation, same parties, same events – would have taken less time to hear expropriation claim, but hearing together would take less time than two trials separately and the minister applying to separate would not
- Egg Lake Farms brings claim for compensation under *Expropriation Act*, then adds claims for tort (negligent misrepresentation etc)
- be prejudiced by hearing claims together, court refused separation

TEST: FACTORS THE COURT USES TO CONSIDER WHETHER LAWSUIT SHOULD BE SPLIT UP OR PUT TOGETHER:

MIKISEW CREE FIRST NATION V CANADA, 1998 ABQB 675 (SAME AS FOR CONSOLIDATION) :

i) whether there are common claims, disputes and relationships between the parties;✪
ii) whether consolidation will save time and resources in pre-trial procedures;
iii) whether time at trial will be reduced; ✪
iv) whether one party will be seriously prejudiced by having two trials together;
v) whether one action is at a more advanced stage than the other; and
vi) whether consolidation will delay the trial of one action which will cause serious prejudice to one party. ✪

CONSOLIDATION

- Something you do with 2 existing separate lawsuits that are being combined

- Putting claims together
- Much more common in practice than separation
- Rule 3.72:

Consolidation or separation of claims and actions – R 3.72 allows for a lot of judicial discretion

3.72(1) The Court may order one or more of the following:

(a) that 2 or more claims or actions be consolidated;
(b) that 2 or more claims or actions be tried at the same time or one after the other;
(c) that one or more claims or actions be stayed until another claim or action is determined;
(d) that a claim be asserted as a counterclaim in another action.

(2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions

(a) have a common question of law or fact, or
(b) arise out of the same transaction or occurrence or series of transactions or occurrences.

- Does create real efficiencies and avoids duplicity of proceedings.
- <u>But you don't always need formal "consolidation" which means actually squishing multiple actions into one.</u> FORMAL CONSOLIDATION requires new pleadings: "Plaintiffs would be required to file of a consolidated statement of claim and the defendants a consolidated statement of defence": *Bank of Montreal v. Valerio*, 2009 ABQB 57
- THIS IS MORE COMMON(than formal consolidation): putting lawsuits under Rule 3.72(1)(b) allows you to just litigate them together even though they won't technically become one. That allows for shared oral and documentary discovery
  - No new action numbers
  - Not repleaded
  - BUT they continue on parallel track together
  - The evidence in one can be used as the evidence in another
  - Will be heard by the same judge together or one after another
- Test for getting an order depends on factors in 3.72(2) as interpreted in ***Mikisew Cree First Nation v. Canada*** (1998) 1998 ABQB 675 (CanLII), 224 A.R. 157 (Q.B.)…

TEST: FACTORS THE COURT USES TO CONSIDER WHETHER LAWSUIT SHOULD BE SPLIT UP OR PUT TOGETHER:

MIKISEW CREE FIRST NATION V CANADA, 1998 ABQB 675 (SAME AS FOR CONSOLIDATION) :

i) whether there are common claims, disputes and relationships between the parties;✪
ii) whether consolidation will save time and resources in pre-trial procedures;
iii) whether time at trial will be reduced; ✪
iv) whether one party will be seriously prejudiced by having two trials together;
v) whether one action is at a more advanced stage than the other; and
vi) whether consolidation will delay the trial of one action which will cause serious prejudice to one party. ✪

EXAMPLE OF CONSOLIDATION

- For example, Plaintiff is truck driver carrying load of expensive goods
- In an MVA, he is injured, and goods destroyed
- Sues other driver for personal injuries
- And in separate suit, owner of goods sues for same negligence arising from same collision
- Since parties are different, outright "consolidation" may not be warranted
- But negligence issue identical; inconsistent findings is a risk and must be avoided; and Defendant would be prejudiced by litigating that twice
- **Order under 3.72 to hear together appropriate**

Intervenors

R 2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court. See also R 14.58 re: appeals
Considerations for the court are canvassed in *Auer v Auer*, 2018 ABQB 510 at parar 109-110: **TEST**

- Intervenor is specially affected by decision facing the court,
- Intervenor is able to bring some special expertise or insight to issue before court, or
- Intervenor will represent party whose interest in proceedings would not otherwise be fully argued or protected by existing parties
- Intervenor will provide court with fresh information or fresh perspective on a constitutional or public law issue
- Intervenor's participation will (not) cause prejudice to one or more of the existing parties

- Not common at the trial level aka for Master or Justice, more common at the appeal courts.
- When you are acting for a client and you know there is a piece of litigation going on, the outcome of which will be very important for your client
- R 2.10 – a court may grant status to a person to intervene subject to terms and conditions with rights and privileges; appeal R 14.58
- **3 Situations when to intervene** (*University of Alberta v Alberta*, 2011 ABQB 389):
  1. Intervenor specifically affected by decision facing court
  2. Intervenor can bring special expertise or insight to issue before court, or
     a. 2. An Intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence (Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs (1996), 199 N.R. 1 (F.C.A.) (at para. 2));
  3. Intervenor will represent party whose interest would not be fully argued or protected by existing parties

→The Court should take a two-step approach to determine an Intervenor application: first determine the subject matter of the proceeding, and second determine the proposed Intervenor's interest in the subject matter (Papaschase at para. 5).

Crown's statutory right of intervention

- On Judicial Review, R 3.17
- On constitutionality of legislation, *Judicature Act* s 24 & also *Administrative Procedures and Jurisdiction Act*, s 14

Res Judicata

1. Cause of Action Estoppel
2. Issue Estoppel
3. Abuse of Process

Cause of Action Estoppel

- Cannot sue on the same cause of action, court will not relitigate the same cause of action
  - Court will prevent "fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation but which properly belonged to it" *864503 Alberta Inc v Genco Place Properties*
- If you are successful in raising it, then the new claim "merges" with the previous judgement (see Merger below)
- Unsuccessful plaintiff? New claim barred by judgment for defendant
- **Test: cause of action estoppel can be used when**
  a. New claim raises "cause of action" previously determined
  b. Prior judicial decision was final
  c. Prior judicial decision included the same parties (mutuality)
  d. PLUS "the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence."
     i. **"**A **cause of action** is a group of operative facts giving rise to one or more bases for suing, or the factual situation that entitles one person to obtain a remedy from another person… Accordingly, cause

of action estoppel operates to prevent a party from attempting to re-litigate a case by advancing a new legal theory in support of a claim based on essentially the same facts of combination of facts." *Britannia Airways Ltd. v. Royal Bank of Canada,* (2005) 5 CPC (6th) 262

e. It is broader than the legal basis for your lawsuit

- ***Cahoon v. Franks,* [1967] SCR 455**
  - Plaintiff in motor vehicle accident
  - Plaintiff sues for property damage
  - Limitation period expires
  - Plaintiff applies to add claim for personal injury – D argues limitation defence
  - Defendant claims new "cause of action" barred after expiration of limitation period
    a. [different rule would apply in AB now, see *Limitations Act* s 6)
  - SCC holds: no limitations defense because both claims arise from same cause of action

EXAMPLE: CAUSE OF ACTION ESTOPPEL

BACKGROUND:

- Patrick is rear-ended while driving. He is injured and his car is written off. Ron is the other driver.
- Patrick sues Ron for property damage (the value of the car). He gets a default judgment, which is enforced.
- Then Patrick starts a second lawsuit for personal injuries arising from the same accident.
- In order to try and do that, his personal injury lawyer applies to have the default judgment set aside (to avoid Ron from pleading merger in defence in the injury action)

DECISION:

- ABQB refuses to set aside the default judgment, holds there is cause of action estoppel and all of Patrick's causes of action merged in the default judgment even though injuries not pleaded.

- "merged" means if you are suing about something and you get a judgement about it, all of the legal grounds that would support your judgment even if you did not plead them, are merged in your judgement → so you are estopped from raising in the next lawsuit any merged causes of action from previous lawsuit
- This is obviously a harsh rule but it is subject to the Court's discretion, which is sometimes exercised
- Usually when there is no prejudice to the Defendant and great prejudice to the Plaintiff; no prior litigation on the merits (so the "judicial efficiency" rationale does not apply); or some kind of mistake, the court may decide not to apply cause of action estoppel and allow second lawsuit.
- See e.g. *Booth v Christensen*, 2019 ABQB 878 (Feth, J) → the facts of the example – the judge allowed second lawsuit
- If you wish to reserve your right sue later upon the same set of facts, you must include the following term in the judgement: nothing prevents plaintiff from suing for personal injuries later.

Merger

- If you sue for something and win, then all claims you had in that cause of action merge

Applying 4 Part Test – *Sherwood Steel v Odyssey Construction Inc*, 2014 ABCA 320

1. New claim raises cause of action previously determined
2. Prior judicial decision was final
3. Prior judicial decision included the same parties (mutuality)
4. Reasonable diligence

- Sherwood hired Edmonton Concrete to provide steel not paid, Sherwood sues Edmonton Concrete and gets $216k judgement, Sherwood sues Odyssey for $216k on basis that Odyssey agreed to pay Sherwood if Sherwood did not file builder's lean
- No merger because there are different parties and it is a breach of a different contract (Odyssey made side contract)

Issue Estoppel

- Court will not allow parties to relitigate <u>issues</u> that have been finally decided in prior judicial proceedings between the same parties or those who stand in their place
- It is a shield and not a sword – usually used as a defence by defendant.
- **Prerequisites**: TEST

a. Same issue has been decided
b. Prior judicial decision was final
c. Prior judicial decision included the same parties (mutuality)

AND Court maintains residual discretion to not estop, even if these prereqs are made out

EXAMPLE: ISSUE ESTOPPEL

BACKGROUND

- Religious group protests at Airport
- Proceeding 1: 8 members of religious group charged with trespassing.
  - Charges dismissed – Court finds *Charter* applies to airport and s 2(b) protect protests
- Proceeding 2: airport applies for injunction to bar members of group from protesting at Airport – takes position that Charter does not apply
  - Religious group says issue estoppel applies, Airport cannot take position that *Charter* does not apply

ABQB in Proceeding 2 finds issue estoppel does NOT apply

- Same issue? Yes, i.e., applicability of *Charter* to airport & whether or not it protects protests
- Was 1st Proceeding a Final decision? Yes
- Same parties in 1st & 2nd Proceedings? No. Proceeding 1 b/w 8 members & Crown. Proceeding 2 b/w Airport and Religious Group
  - " While Judge Fradsham's thorough analysis and findings may be persuasive authority for this Court, the decision is not binding and the issues determined are not *res judicata* before me or in the underlying action brought by the [Airport]"

SEE: *The Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform*, 2014 ABQB 493

Penner v Niagara – SCC on residual discretion

FACTS

- Penner arrested in Courthouse
- Makes complaint to police. Police disciplinary hearing finds officers committed no misconduct
- Penner starts civil claim relating to alleged police misconduct

ISSUES: Is Penner estopped from pursuing a civil claim for damages arising from misconduct when disciplinary commission found no misconduct? **No**

- **Ratio: you cannot use issue estoppel to block a civil claim based on an administrative tribunal decision**

TEST: (i) Same issue, (ii) Final decision, (iii) Same parties. BUT court maintains residual discretion and should sometimes be granted (particularly in Penner where: claimant had "reasonable expectations …about the impact of the proceedings on their broader legal rights." and it would be "unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. "

When the initial decision is from an administrative tribunal, the court asked to apply doctrine of issue estoppel should consider:

- Unfairness in the initial process
- Unfairness of relying on the initial process as determinative

- SCC: In retaining residual discretion, **applying Issue Estoppel – consider 2 elements of fairness**:
  1. Was it fair or some breach of natural justice in the process? – was P given a chance to argue, was decision maker biased, can court say decision maker acted in a way that was unfair?
  2. Unfair to P to rely on initial process as determinative?
- In this case, 2nd element was present, admin tribunal decision concerned punishing officers/Ds so P does not have as much at stake to argue vs a civil claim concerns damages for P, much more at stake for P – so unfair for P to rely on previous admin tribunal decision

PRIOR CRIMINAL CONVICTIONS

- *Alberta Evidence Act*
  a. (4) When proof of the conviction or finding of guilt of a person is tendered in evidence pursuant to subsection (2) in an action for **defamation**, the conviction of that person or the finding of guilt against that person is conclusive proof that the person committed the offence.

b. (6) Subject to subsection (4), **the weight to be given the conviction or finding of guilt shall be determined by the judge or jury**, as the case may be.
   i. *Cho v Phimsarath* – more weight should be given to a D who pleads not guilty, goes to trial and loses vs. a D who pleads guilty to get it over with quickly or did not have a lawyer
   ii. Comes in personal injury litigation – traffic offence – pled guilty and paid fine – further injury claim/civil proceeding – guilt is presumptive but not final or conclusive- but the weight is pretty substantial.

Abuse of Process

Court has inherent jurisdiction to protect its processes from being misused in a way that would bring the administration of justice into disrepute

"**Abuse of process may be established where**: (1) the proceedings are oppressive or vexatious, and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency" *R v. Scott*, [1990] 3 SCR 979

It is a flexible doctrine

Example, *Bomac Construction v Stevenson* (1986) 48 Sask R 62

- Two passengers injured in a plane crash
- Passenger 1 sues pilot & plane company in negligence. Wins.
- Passenger 2 sues pilot & plane company in negligence.
  - No mutuality, so no estoppel (2nd passanger was not party to 1st proceeding – so not issue estoppel)
  - Court says it would be an abuse of process for pilot and plane company to deny negligence
    - The airline and pilot cannot re-litigate and fight for a better result

- **Broadest form** of Res Judicata, applied flexibly by courts
- **Essential idea** is the court has inherent jurisdiction to not allow people to misuse court processes in a way that would bring the administration of justice into disrepute
- **Established where** (*R v Scott*): **1)** proceedings are vexatious or oppressive, **and 2)** violate the principles of fundamental justice underlying the community's sense of fair play and decency
- *Sherwood Steel v Odyssey Construction Inc*, 2014 ABCA 320 – see facts of case under Merger above
  a. Court found no abuse of process because there were two separate agreements, concern of double recovery? Court said depends on facts, need to see whether the agreement was only to pay out whatever could not be paid out by Edmonton Concrete or was no builder lien so valuable that the agreement was really for that

Collateral Attack (used more than Abuse of process)

- If you do not like an order, there are ways you are supposed to contest it i.e. by appealing
- **Collateral attack is where a party initiates proceedings in an attempt to undermine an order via an improper fashion i.e. by not appealing**
- Example: Guy seeks various permits from gov't, the gov't says no, to contest this he should have sought judicial review. Instead Guy withholds royalties owed to the gov't, the gov't sues, Guy's counter claims alleging negligent misrepr. To listen to allegations of negligent misrep would undermine the gov't's decision and process for issuing permits.
- "It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment"
  a. *Wilson v. the Queen*, [1983] 2 SCR 594
- Example, *Alberta v Cox*, 2017 ABCA 5
  a. Individual denied permit by minister
  b. Individual brings claim against minister for negligent misrepresentation re: permit
  c. Court: proper avenue to dispute ministers decision is to apply for judicial review

Service

Service

Service

- Service is NOTICE, by way of getting the recipient a document to alert them to what's happening
- "Service is a quintessentially practical consideration. The only point of service is that the defendant must get notice of the claim against it. Service is not some sort of magical or formalistic ritual that has to be followed."
  - *Concrete Equities Inc., Re*, 2012 ABCA 266

Hvozdanski Estate v. Gasland Oil Ltd., 1999 ABQB 964

- Master Funduk
- Defendant was Imperial Oil Ltd.
- A non-party had given the SOC to Imperial
- Imperial claims that is not good service
- Master Funduk disagrees
- "Lawyers and judges, and Masters too, know that "service" is just a synonym for giving a document to someone. Serving a defendant with a statement of claim is giving it to the defendant. The language used to describe the act is not important. The importance is the act itself."
- "Usually the plaintiff, or someone at his direction, serves the statement of claim on the defendant, for a self-evident reason. But the Rules, the case law or the legislation do not mandate that service must be by the plaintiff. The defendant can be given the statement of claim by the plaintiff, by a co-defendant, by an officious stranger, or even by getting it by going to the Clerk's office and getting a copy.
- "If the object has been attained it does not matter how it was obtained. Who the delivery man is not relevant. The delivery is what is relevant."

Serving Commencing Documents

- General rule is requires **personal service** of commencing documents
  - It is not preferred method for interlocutory documents particularly when a party is represented by counsel
  - Heightened obligation to inform the other side with commencing docs
- Purpose of service: 1) establishes court's jurisdiction over a matter, and 2) puts D on notice about claim

- **Commencing docs** (defined in Appendix):
  - S/C – usually must be served within 1 year of filing R 3.26
  - Originating Notice (of an application or a judicial review)
  - Counterclaim
  - Third Party Claim
  - NOT Notice of Appeal – *Harder v Hayter*

- Electronic service generally NOT PERMITTED for commencement documents
- This is an unfortunate result of the time period where the New Rules were being written – Drafting began in 2001, not enacted until 2010, and even then with significant transition rules
- So while email communication was popular in 2001 it was not ubiquitous, so it was not included for commencement docs (can be used for interlocutory docs in certain circumstances)

Personal Service on an Individual (R 11.5)

1. Leave with an individual (service effected on date left), or
2. Send by recorded mail, service acknowledged on date acknowledgement is signed by individual to whom it is addressed
   a. "recorded mail" defined in Appendix to ARC: "means a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing as specified in Part 11"

b. Before, it meant Canada Post. But now the currier is used. **You want a process server.** People can ignore Canada Post and FedEx.

- R 11.18 - self-represented litigant can accept service of commencement document in writing

Ways to Locate an Individual

- Hire a skip tracer – they will put together a report of all publicly available information indicating where they think the person is located
- Search Personal property registry – if there is a leased car, can pull an address off of that
- Search certificate of title at Land Titles Office - Land titles office may have an address for service or use a name search at land titles, which will pull all information with that person's name on it (limits on name search, *Name Search Regulation*)
- Request a credit report, will include info on where person lives (can only request if trying to collect on a debt)
    - *See Consumer Protection Act, s 44 for situations in which credit report will be disclosed, includes to aid in collection of debt & in response to court order*
- Search Motor vehicle registry
    - See *Access to Motor Vehicle Information Regulation* for situations in which information will be released, includes "to a person for use in or for the purposes of, a proceeding before a court or quasi-judicial body"
- Search social media OR hire an e-investigator to do it for you
- Ask your client to talk to people who know the other party

Personal Service on a Corporation (R 11.9, 11.4 & Alberta Business Corporations Act (ABCA) s. 256)

- Leave with:
    - Officer of corp w/ management or control responsibilities
    - Person w/ management or control responsibilities at
        - Principal place of business in Alberta
        - Place of business in Alberta where action arose
        - 11.9 (look at Cote) ok to leave secretary/front desk only if registered office.
            - If serving at the place of business – do not leave it with secretary.
            - Should serve at both – registered office and place of business
            - Service to secretary? Yes, at the registered office, by process server. See Cote's annotation to Rule 11.9. Keep in mind many corporations' registered office isn't the same as their actual business. Service on the company at their place of business (if it isn't their registered office) may not comply with the service rules without proof it got to someone important. So serve at the registered office. Most lawyers also copy the place of business either by process server or regular mail.
- THE RULE IS SERVE THE COMPANY at registered office (do search at Corporate Registry)
    - Usually bot not always a law firm.
- If not personal service, then send by recorded mail to:
    - Principal place of business in Alberta, *Alberta Rules of Court*
    - Registered Office, *ABCA* (Business Corporation Act) – look at the address in Corporate Record Search
    - PO box designated as address for service i.e. in corp registry, ABCA

- Compare *BCA* s256(3) & ARC R11.9(2)(b):
    - ARC – service by recorded mail effected "on date acknowledgement of receipt signed
    - BCA – service by registered mail effected "at the time it would be delivered in the ordinary course of mail unless there are reasonable grounds for believing that the corporation did not receive the notice or document at that time or at all."
        - Registered mail defined in *Interpretation Act*, aligns w/ definition of "recorded mail" in ARC
        - if the party signs, that's the effective date. Only if the mail was not claimed would you then be looking to define an effective date, in which case you would want to refer to R11.22(2)(b) and the BCA section you referred to. The problem of unclaimed registered mail is another reason why personal service of commencement documents is highly recommended.
    - This can be a significant problem if the company is in dire straits, has many creditors, is avoiding service, etc. Often personal service on director/officer required, or an order for substitutional service.

Other Rules for Personal Service of Commencing Docs

- **Contract dispute**
  - if contract specifies method of service R 11.3 – make sure the provision in the contract is broad enough to include commencing documents *Aero Aviation Centre*
  - Address for service may be provided on a filed document i.e. filing a counter claim, address for service will be on S/C, R 11.15
- **Service on a lawyer**
  - Can serve on a lawyer if you know they generally represent the client, you need to ask, they will have to check with client before accepting in writing R 11.16
    - For commencement documents, lawyer can voluntary accept the service on behalf of the client.
  - If they are the lawyer of record, R 11.17, 2.24-2.32 – make sure if you are fired, to not stay on as lawyer of record
- **Trustee & Personal Rep,** R 11.6
- **Litigation Rep**, R 11.7
  - Must serve lit rep, not person being represented R 2.12
- Missing Person, R 11.8 (serve Public Trustee)
- Partnerships, R 11.10, 11.11, see *Partnership Act*, s 92, 100
- Sole Proprietorships, R 11.12
- Statutory Entities, R 11. 14; see also *Municipal Government Act* s 607
- **Crown**
  - *Proceedings Against Crown Act* s 13 – Minister of Justice or any lawyer employed by the Department of Justice
  - *Crown Liability and Proceedings Act* s 23(2)
- Business Representatives of Absent Parties, R 11.19
- NOTE: special rules apply to Family Law Actions, see R 12.55 to 12.58 (e.g. SOC for divorce require "a picture of the individual served"!)

Affidavits of Service

- The person who does the serving (usually a process server, but sometimes a legal assistant if it's being done by email/fax) swears an affidavit describing what they did and attaching proof including a copy of what they served (or tried to serve)
  - LAWYERS SHOULD ALMOST NEVER SWEAR ON AFFIDAVIT – usually assistants or paralegal
- If they were <u>unable</u> to serve, they explain what happened and why. You need this evidence regarding their attempts in order to get substitutional service by some other means
  - A process server should sign affidavit for successful and unsuccessful service
  - You need affidavit of unsuccessful service if you want to get a substitutional service order by proving that the personal service is impractical
- If they <u>were</u> able to serve, you need the affidavit to conclusively prove service
- Affidavit just describes in narrative form what happened

Service

- Cote has some choice thoughts, pg 30
- "If he or she will not take [the documents being served], then telling him or her what they are and dropping them at his or her feet, or putting them onto the table or counter in front of him or her, will do. It does not matter that the person then throws the papers back (or into the street or a garbage can). It does not matter if he or she says that service is refused"
- "If the item were wrapped up like a present, or put into a carton, then it might be necessary to show that the person served opened the wrapping, or was shown the open container…" (pg 30)
- Lesson: do not wrap Statements of Claim like gifts

Service of Other Documents (Not Commencing)

- What do we mean by "other documents"?
  - Pleadings subsequent to the SOC (SOD, reply)

- But note that Third Party Claims are "commencement documents" as are Counter Claims (these are commencement documents – but the opposing party is known and represented by counsel – so easier to locate because the lawsuit has started)
- Mainly interlocutory applications or resulting orders

- Can use same methods for serving commencing docs, but more common
  - 11.21 electronically
  - 11.22 recorded mail
  - 11.3 as agreed between the parties (email by agreement)
- Can serve electronically i.e. email, fax. **Must meet two requirements R 11.21:**
  1. The other side must receive something in a useable form
  2. Sender must receive a receipt of the transmission
     - Service by email without agreement = is not possible because of lack of read receipts
       - But any reply to the email counts as confirmation, so often not in issue
       - In practice, where both parties represented by counsel, common for interlocutory applications to be served by email.
     - FAX IS THE MOST COMMON for interlocutory documents
- **Recorded mail** at address for service on most recently filed document R 11.22
  - **Service is effected at time acknowledges singed OR 7 days from when document sent**
  - Court applied 7 days "deemed service" rule in *Brace v Mcken*, even though debtor did not check PO Box until 4 months after Statement of Defence sent.
- Generally speaking, Court will hold parties to be able to be served with subsequent documents at the place listed on their pleadings:
  - "A plaintiff who commences an action and gives an address for service must appreciate that documents will be served upon him at that address, whether he is there or not and if he does not provide the postal service with a current mailing address, he cannot say he has not been served in accordance with the Rules."
- Foreclosure documents – special rules apply R 11.23-11.24

Serving Outside Alberta R 11.25

- **In Canada** – R 11.25(1) do not need a court order, but need to set out facts in commencing documents that establish a real and substantial connection to the jurisdiction in which you are bringing the claim
  - Real & substantial connection
  - Commencement documents set out facts that establish real & substantial connection
  - No court order needed in advance
- **Outside Canada** – R 11.25(2) need a court order to serve, so bring an ex parte application with affidavit detailing facts supporting real and substantial connection – serve the other party with commencing docs + the court order
  - Real & substantial connection
  - Need a court order in advance (obtained *ex parte*)
  - Prepare affidavit detailing facts that establish a real & substantial connection
  - Serve person with commencing document & court order

Methods for Service Outside Alberta, R 11.26

(1) Using same methods for service in Alberta
(2) Using methods of service provided for in foreign jurisdiction
(3) For international cases, using methods provided for in *Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters* – only applies to signatory members of the convention
  - In civil law jurisdictions service is managed through a centralized authority, so send to them and then they serve
  - Can sue someone on government authority – when suing internationally
- Some very careful parties may try all three

E.g., there is a major lawsuit in Calgary right now regarding the Nexen tower, which is 37 storeys tall and completely empty

- Nexen is owned by the Chinese oil company, CNOOC. They moved out and alleged it was because of asbestos contamination. The landlord alleges the termination was improper and asbestos is just an excuse. The landlord also sued a related CNOOC entity which had indemnified the tenant for the lease– and that became an issue

- The indemnity contained a clause which sets out addresses for service on the indemnifier (in Calgary, at the tenant's office)
- The landlord's lawyers at Bennett Jones were *very careful* about service
- They served on the tenant's office in Calgary pursuant to the indemnity agreement
- AND they obtained an *ex parte* order from a Master for service ex juris under the Hague Convention
- AND they had process servers serve the company at its headquarters in Hong Kong
- BUT, there is one lesson– Bennett Jones sent an unfortunate articling student to get this *ex parte* order for service *ex juris* from the Master.
- " concedes that the articling student who appeared before the Master on the *ex parte* application made a number of unfortunate and inadvertent errors as she tried to outline the factors under Rule 11.25(3) that establish a real and substantial connection between Alberta and the facts on which the claim is based. Principally, she misstated the role of CNOOC Ltd., misidentified the parties to the Lease, wrongly identified which party was responsible for payment of rent under the Lease, and wrongly identified which party terminated the Lease."
- Under the Convention, the receiving gov't has an obligation to serve the party. If they don't within 6 months, you can apply to validate as if they had
- So when the 6 months was up, the landlord brought an application to validate its service, and the indemnifier cross-applied to set it aside
- The Court resoundingly found in favour of the Landlord. After all, this was about building *in Calgary*, with a contractual provision on notice, and actual service personally in Hong Kong
- The indemnifier is appealling (!) and applied for a stay pending appeal (they lost)

Validating Service R 11.27 (ex-parte – one party application – other party is not present)

- R 11.27 **Court can validate in two situations**:
  - **Retrospectively**: the method of service used **brought or was likely to have brought the document to the attention** of the person to be served, or
    - **11**.27.1 – the court can bless a non-compliant service
  - **D is evading service:** the document would have been served on the person or would have come to the person's attention if not for the person evading service.
- Date of service specified in order – reply to email.
  - Important because you can note a party in default if does not respond to your service
- *Redecopp v 226911 Alberta Ltd*
  - Cannot validate service when document provided to party with confirmation that document is not being served on party.
  - The party must understand that his/her legal rights are being engaged
- *Procrane v Thompson* – "Service is a question of fact: did the person being served actually get a copy of the document. If the document was actually received, the method of service is inconsequential" – email service validated
  - If the party responds to the statement of claim and the party responds with statement of defence – there is no need to validate. You only validate in the circumstances where no response and you need to ensure the OP has been served to enforce missed deadline etc.

Order for Substitutional Service R 11.28

TEST (ex-parte)

- R 11.28 Court can authorize different method if satisfied:
  1. Service methods provided in Act are impractical, and
  2. Alternative method is "likely to bring the document to the attention of the person being served"
- Date of service will be specified in order
- by Facebook. In *Blois v Salacki*, 2016 ABQB 323 party was allowed to serve opposing party by serving documents on OPs mom and sending them to OP by Facebook messenger
  - But courts seem unaware that FB messages from accounts which you aren't friends with get lumped into a different folder that is often never checked…

- by newspaper – note this is mentioned in Rule 11.28(3) and remains common even though it is an antique method and seems like little chance it will come to person's attention
- Usually ask for order to include more than one means of subservice

Order Dispensing with Service R 11.29 (ex-parte)

R 11.29 – **very unusual,** court will grant if satisfied: your application **MUST SHOW 3 THINGS**

1. Reasonable service efforts are exhausted OR otherwise impractical/impossible, AND
2. No or little likelihood matter will be disputed AND
3. No other method of service available

Proving Service R 11.30

- Affidavit of Service – do not swear your own affidavit because you do not want to be questioned on it, have someone else serve and swear
  - E.g., Service by recorded mail on individual?
  - State what filed court documents sent, who sent them, to what address, on what date, & how (e.g., registered mail, courier, etc)
  - Attach as exhibits
  - Receipt from postmaster
  - Tracking information & signed acknowledgment (e.g., available on Canada Post at https://www.canadapost.ca/web/en/home.page)
- Written acknowledgement of service – get this if you think they will acknowledge, but if they may evade then this method will put them on notice
- Order validating service

Setting Aside Service R 11.31 (ex-parte)

- A party can apply to set aside (usually applied in combination with setting aside noting in default)
  - Service of a commencement document
  - Order for substitutional service
  - Order dispensing with service
- Applying to set aside service ≠ attornment (not submitting to jurisdiction)

Ex-party applications must be highly accurate because there is no other party to confirm the information because that party is not there.

Source of Court Jurisdiction

- Traditionally at common law, Court has jurisdiction where:
  - Defendant served in jurisdiction (e.g., Alberta)
    - Cote: "an Alberta court probably always has jurisdiction over a civil suit if the person sued in Alberta is personally served with the Statement of Claim in Alberta" (pg 35)
  - Common law: Defendant consents/submits to jurisdiction (aka "attornment")
- Expanded jurisdiction – court will hear matter where there is a real & substantial connection b/w claim & jurisdiction

Real and Substantial Connection R 11.25(3)

- This rule is irrelevant when the parties is in AB and the proceedings started in AB.
- R 11.25(3) sets out a non-exhaustive list where a "real & substantial connection" will be presumed, includes:
  - Claim relates to land in Alberta
  - Contract made, performed or breached in Alberta
  - Tort committed in Alberta
  - Administration of an estate, where person died in Alberta
  - Necessary & proper party to claim properly brought against another defendant in Alberta

➔ Presumption rebutted if D can establish no real & substantial connection

Forum Conveniens

- Even if real & substantial connection established (rule 11.25(3) is met), a court may decide not to hear claim under forum conveniens doctrine
- Even if court has jurisdiction *simpliciter* may still not hear a case if jurisdiction is not *forum conveniens.*

- A jurisdiction is *forum non conveniens* if it is not a suitable place to hear the claim. Defendant must show there is another jurisdiction with a real & substantial connection to the claim AND it would be more suitable to hear the claim there.
- There can be more than one *forum conveniens*.
- Defendant can:
  - Apply to stay matter in *forum non conveniens*
  - Apply in *forum conveniens* to enjoin (prohibit) plaintiff from pursuing matter in *forum non conveniens*
- **BUT Defendant must <u>not</u> file a Defence in the jurisdiction they claim is improper, which will amount to an "attornment" or submission to that Court's jurisdiction. In the documents say "WE DO NOT ATTORN/SUBIT TO THE JURISDICTION"**
- Applying to set aside service ≠ attornment
- **Two Part Test**
  1. D must show another jurisdiction with a real & substantial connection
  2. D must show more practical/convenient to hear the claim there
- **<u>If established</u>** D can **1)** ask for a stay of proceedings or **2)** go to the court in forum conveniens jurisdiction and ask for an injunction to enjoin (prohibit) P from bringing claim in the other jurisdiction – better to ask for stay, but court may go along with injunction under principle of comity
- **Practical consideration** – P should consider where D's assets are located and how easy it is to enforce a foreign judgement in that jurisdiction
- **If you are acting for D and the suit is in the wrong place** → do NOT file the defence in the wrong forum ->> INSTEAD you apply to get the lawsuit moved – and state that you do not submit to the jurisdiction. Defending lawsuit in the wrong forum might mean you are attorning. If you win moving the case, consider judgment enforcement hurdles – so is it worth to move jurisdiction?

Renewing a Statement of Claim

- **General rule** – S/C must be served within **1 year from FILING** R 3.26(1)
  - Same rule applies to Civil Claims in ABPCL Provincial Court Civil Procedure Regulation, s.4
- EXTENSIONS:
- (1) **Prior to** one year expiration court can grant **3 month extension R 3.26(2)** – need a good reason explaining that you have been trying to serve the person, cannot be laziness – low evidentiary bar.
  - Need an affidavit
  - **Court cannot vary time period to serve** past 1yr+3months, exempt from court's ability to vary time under R 13.5, unless can fit within R 3.27
- **(2) R 3.27(1) – court may at <u>any time</u>, grant more time if:**
  1. **3.27(1)(b): Substitutional, validating or dispensing with service order is set aside; or,**
     - If D set aside the orders
     - Practice point – given parties are standing before a judge to set aside service, ask in the alternative if order is granted to extend time to serve and also ask D how to serve D
  2. **3.27(1)(a) D, imposter D, or D's lawyer, anyone purporting to negotiate on behalf of D leads P or P's lawyer to believe and rely on that belief that 1) D has been served, 2) D will not contest liability, or 3) time limit will be waived; or,**
     - *Brosseau v Janz Estate* – P does not serve D as insurer says would not contest liability, P sends S/C to insurer, 1 year after S/C filed, insurer objects for lack of service – court extended as D made P believe D would not contest liability and time limit would be waived
  3. **3.27(1)(c)Special and extraordinary circumstances exist resulting solely from the D's conduct or from the conduct of a person who is not a party to the action.**
     - What is a special/extraordinary circumstance?
       - A process server's fraud or negligence (i.e. swore on affidavit) – *Nixon v Timms, Sanderson Estate*,
       - *Stremich v Pefanis*
         - P files S/C does not serve, travels and for reasons beyond their control they are detained – may have a good argument for extraordinary circumstance
     - *McGowan v Lang* – Ratio:
       - 1) Failure to serve must be caused by special & extraordinary circumstances

- 2) Extension to serve should not be permitted where failure to serve caused by P's lawyer's inadvertence, even in a situation that would not prejudice D as this would undermine rule for lawyers to be speedy and diligent

- Note: Court's usual ability to vary/extend time periods under R 13.5 does NOT apply – so quite strict!
- Fail to serve in time? Cannot take any further steps against the litigation who was not served, ARC 3.28

WHAT IF:

#1

- Day 1 – S/C filed against individual defendant
  - Not immediately served b/c waiting to determine extent of P's damages from personal injury
  - Diarize date 1 year away
- Day 354- Limitations diary reminds you that there is only 1 month left to serve
  - Hire process server, can't find defendant
  - Registered mail sent to last known address of defendant returned undeliverable

What do you do? Rule 3.26(2)

- R 3.26(2) – ask for extension supported by an affidavit
- R 11.28 - ask for substitute service order – apply at the same time as the extension

#2

- M/V accident. 3 parties injured.
- 3 parties file S/C. P's lawyer does not serve S/C on "at fault" driver. Does send to insurer.
- Insurer for at fault driver indicates not contesting liability. Settles 2 claims.
- >1 year after S/C filed, insurer objects to lack of service re: 3rd claim.

What should P's lawyer do?
(see *Brosseau v. Janz Estate,* 2014 ABQB 136)

- PL brought application to extend/renew the service under R 3.27(1)(a) or (b) (b does not apply – no orders)
- "Failure to serve is unacceptably risky behavior. It could have the effect of ending the lawsuit."

3.27(1)(a) D, imposter D, or D's lawyer, anyone purporting to negotiate on behalf of D leads P or P's lawyer to believe and rely on that belief that 1) D has been served, 2) D will not contest liability, or 3) time limit will be waived; or,

Brosseau v. Janz Estate

- "In my view, there is enough in this case; though just barely, to fit it into the exceptions in 3.27(1)(a)(ii) or (iii).
  - There was advice that insurance would cover the accident and that limits had been set and settlement could be negotiated. There was the settlement of the two other claims, though one occurred after expiry.
  - The facts of the accident do not suggest any liability defence and none was ever raised. There is no evidence of any prior dissatisfaction with the pace of this file.
  - There is no prejudice. In other words there is just enough to take the subjective belief into the territory of being objectively reasonable.
  - Allowing one party to insist on formality without any warning in this setting is not an appropriate place to strike the balance between the parties"

#3

Day 1 – S/C filed against individual defendant
- Diarize date 1 year away
- Attempt personal service, service by registered mail, unsuccessful

Day 300 – Serve S/C on defendant by email

Day 330 – Apply for order validating service (R 11.27)

Day 380 – Defendant applies successfully to set aside order validating service.

What do you do?

3.27(1)(b) – relied on the orders of validation

FACTS
- P sues former lawyer (D) and his law firm.
- 1 year MINUS 7 days – P hires process server & instructs him to serve D with S/C
- 1 year MINUS 6 days – process server attends at lawyer's firm and learns lawyer is away for several days
- At some point, process server tells P documents not served
- 1 year PLUS 3 days – process server serves D with S/C

Can the Court extend time for service on the basis that "special or extraordinary circumstances exist resulting solely from… the conduct of a person who is not a party to the action?"

Stremich v Pefanis, 2017 ABCA 383

#4:

#4: Yes, under R 3.27(1)(c)

ABCA finds special and extraordinary circumstances exist:
- Process server is NOT a party to the action
- Failure to serve in time caused by process server
- Plaintiff prevented from applying for an extension before deadline expired because of physical disability

Other examples: process server lies about having served the doc; process server is negligent in carrying out service

BUT: failure to diarize service deadline is NOT special and extraordinary circumstances: *McGowan v Lang* 2015 ABCA 217.
- "An extension of time for service of a S/C under R 3.27 should not be permitted in circumstances where the failure to serve is caused by the plaintiff's lawyer's inadvertence, even in situations where there is not demonstrated prejudice to the defendants."

Asking For Particulars R 3.61

What if?
- Your client has been served with a S/C for damages resulting from slip & fall on your client's property
- Two plaintiffs named:
  - P1 "slipped & fell"
  - P2 – unclear what damages P2 has incurred or why client would be liable to P2

What should you do?
- If you are served with pleadings and there isn't enough detail in them to know how to respond properly, you can:
  - 1. File a demand on the other side asking that they provide you with particulars, and if they don't comply within 10 days
  - 2. Apply to court for an order that the provide you with particulars
- Cannot ask for
  - Evidence
  - Legal analysis

When you draft statement of claim it should contain enough details – R 13.6 and 13.7 require to provide particulars of some type of claims (eg. fraud):

Elements of Tort of Fraud

1. A false representation made by D
2. Some level of knowledge of the falsehood of the representation on the part of D (whether through knowledge or recklessness)
3. The false representation caused the P to act; and
4. The P's actions resulted in a loss

- You need include pleadings that you can prove otherwise the client might have to pay cost for unsuccessful claims
  - Pleading for example fraud (or other 13.6 and 13.7) and not proving can result in enhanced costs against the party. So you client needs to make sure they can prove the pleading of disparaging character.
- **Asking for particulars does not stop the clock** from running to file a S/D R 3.61(4), unless the court orders otherwise

- Can ask the court to extend time to file S/D, or
- File S/D with plans to amend it later
- Can ask lawyer for other side for an undertaking that they will not bring default proceedings against you pending receipt of the particulars – see Code of Conduct R 7.2-1
    - When both parties represented by counsel – the deadlines can be waived by agreement – this done 80% of cases.

WHY ARE PARTICULARS ORDERED?

- "the principle that each party is entitled to know the case that is intended to be made against it at trial. Particulars help to ensure that litigation is conducted fairly, openly, and without surprise. Particulars also help to narrow the scope of the issues to be decided, guide the discovery process, and help to streamline the litigation process." (*Altria*)
- Practically speaking, 90% of reason for particulars, and stage in which they arise, is by defendants (or defendants to counterclaim) before they file a defence, so they understand what is being alleged against them
- **That's why one of the TESTS for when particulars are ordered is: ""are there sufficient facts present to formulate a defence?" (*Re Indian Residential Schools*, 1999 ABQB 823)**
- What do requests look like?
    - "With respect to paragraph 10 of the Statement of Claim, provide particulars of alleged "breach of trust" committed by the Defendant"

Case Law on Particulars:

- *Alberta v. Altria Group Inc*, 2015 ABQB 390 – in complex litigation, particulars may need to be provided in stages
- **Two fallacies from Defendants about particulars (see Cote, 41-42)**
    - (1) "You don't need particulars, you will find all this out in discovery". But discovery is about evidence, and particulars are about pleadings, not evidence. Particulars say "what is claimed and what is not"
    - (2) "You know what you did wrong". This is not a proper answer to a request: *1021018 Alberta Ltd. v. Bazinet*, 2015 ABQB 151. The reasoning is circular– you know you're guilty because you're guilty.
- Particulars must balance
    - Defendant's right to know the case against it
    - Plaintiff's ability to move litigation forward

Amending Pleadings R 3.62

What if?

- You drafted a S/C for 2 plaintiffs for damages resulting from slip & fall on defendant's property
- Two plaintiffs named:
    - P1 "slipped & fell"
    - P2 – you neglected to set out what damages P2 has incurred or why defendant would be liable to P2
- You served S/C on D. Defendant applies to strike P2's claim.

What should you do?

- **R 3.62**
    - **Prior to pleadings closing (pleadings closed when after 2 claims are settled – SoC & SoD &reply)** – any party can amend pleadings any number of times prior to pleadings closing, before or after the defense is filed
    - **After pleadings close** – any part needs
        - a court order or
        - consent of the other party to amend

- **Pleadings are Closed R 3.67** when–
    1. Once S/C and S/D → & reply is filed & served OR
    2. time for filing & serving reply expires (10 days after S/D filed when)

    - **Throw away cost** – the other party might have entitlement for costs that they incurred for drafting to statements of defence because you amended your pleadings
- **General rule for amending pleadings** –any pleading can be amended at any time, **no matter how late or careless is the party seeking to amend,** UNLESS 4 exceptions apply:
    - In Provincial court civil – you don't need EVER (pleadings closed or not)court approval to amend pleadings – you can amend them at any time. But you still might be subject to throw away costs.
    - Other rules apply as is to QB

Summary, unless 4 exceptions apply

Time	Process	Rule
Before pleadings close	Any number of times without court's permission (throwaway costs might apply)	R 3.62(1)(a)
After pleadings close	With an order of the court or consent of the other party	R 3.62(1)(b), 3.65, 3.74
At any time	With the consent of the other parties	R 3.62(1)(c)
	When filing a response pleading to an amended pleading	R 3.62(3)

4 Exceptions: QB

1. Amendment would cause serious prejudice to opposing party, not compensable in costs i.e. key witness has died or disappeared
2. Amendment requested is hopeless i.e. claim barred by res judicata or barred by legislation (insurer attempting to include rectification)
    a. Difficult prove
3. Amendment adds new party or cause of action after expiry of limitation period – unless otherwise allowed by statute (see LA s.6)
4. Element of bad faith associated with not pleading claim in first instance or seeking amendment
    a. Difficult to prove

- *Attila Dogan Construction* – P had potential delay claim that waived rights to in agreement with D, lawyer repped both P & D in a third party claim, D wished to amend to D/C to include breach of fiduciary duty as lawyer repping both parties did not disclose past relationship with P and therefore should not pay costs, P wishes to amend alleging duress when signing agreement of waiver of delay claim – both claims are hopeless, delay should have been raised earlier in proceedings not 13 years later, no breach of fiduciary duty because interests aligned in claim against 3rd party
- **Highlight/underline amended pleadings** – not in rule, but usually done: 1st amendment in red, 2nd green, 3rd yellow, 4th violet

Amending Response Pleadings R 3.62(3)

What if?

- You are representing defendant
- Your client is served with S/C
- You file & serve S/D
- 10 days pass (i.e. pleadings close)
- P is granted court order to amend S/C
- Your client is served with amended S/C, raises new issues to which you wish to respond in your pleadings

Do you need a court order to amend your S/D? No! Just file an amended statement of defence

- **A party may without the court's permission amend that party's pleadings before or after pleadings close if that amended pleading is a response pleading**. A party has 10 days (subject to extension by counsel) from being served with an amended pleading to file a response pleading.
- Response pleadings:

Amended Pleading	Response Pleading (no need for court order) – within 10 days
Statement of Claim	Statement of Defence
Statement of Defence	Reply
Counterclaim	Defence to Counterclaim
Third Party Claim	Defence to Third Party Claim

In Federal Courts – the deadline **cannot be extended by counsel** and can only be extended by a court order.

Adding, Substituting or Removing Parties After Close of Pleadings R 3.74

What if?

- You are representing plaintiff
- You filed and served S/C against D1
- D1 files & serves S/D
- Pleadings close
- You realize you should also have sued D2

Can you amend S/C to include D2?

- Need a court order to add, substitute or remove a party after pleadings close
- **Test**
  - Must show amendment will not cause prejudice, which is not compensable by costs, adjournment or terms?
  - If P being added, new P must consent

BUT: keep in mind limitation periods.

Amending Pleadings After A Limitation Period Has Expired

What if?

- You are representing plaintiff in an employment law matter
- You filed and served S/C against D for wrongful dismissal
- D files & serves S/D
- Pleadings close
- Limitations period expires
- You realize you should also have sued D for defamation

- **Adding a new claim**, but same parties – *Limitations Act* s 6(2) – **1 part test**
  1. Added claim must relate to the conduct, transaction or events described in the original pleading (cause of action)
- **Adding a new D**, *Limitations Act* s 6(4) – **2 part test**:
  1. Added claim must be related to the conduct, transaction or events described in the original pleading, and
  2. Added D must have received sufficient knowledge of the claim during the **limitation period (2yrs) + time for serving S/C** (1 yr free to serve the new D) that **D will not be prejudiced in maintaining a defense to it on the merits** – so basically get an extra year
     - How do you determine if a D corp received sufficient knowledge of claim? – look to the directors of the corp
     - Once 3 year expired – the door is closed to add additional parties
- **Adding a new P**, *Limitations Act* s 6(3) – **3 part test**:
  1. Added claim must be related to the conduct, transaction or events described in the original pleading, and
  2. Added P must have received sufficient knowledge of the claim during the **limitation period + time for serving S/C** that D will not be prejudiced in maintaining a defense to it on the merits

3. Court must be satisfied that adding P is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding
    - Court is concerned that this will open the door for late plaintiffs to get in on litigation that has been started, **so cannot add a P if it has no effect on the claim**
    - Ex allowing new P to be added – woman was suing and realized she should have added the Crown as a P, she put forward evidence that if she could not add the Crown then she cannot recover damages and the Crown could come after her

POFF V GREAT NORTHERN DATA SUPPLIERS

- Master:
- allows amendment [QB upholds]
- leaves open new D's right to raise a limitations defence at trial [QB overturns]

- **QB Court has 3 options** when application is brought under s 6 of *Limitations Act*:
    1. Determine limitations period has not expired and allow the amendment
    2. Determine the limitations period has expired, but meets test under *Limitations Act* so allow amendment
    3. Determine it is unclear whether limitations period has expired and allow the amendment w/o prejudice to the added party's ability to bring a limitations defense

If limitation period is expired [here, conceded by plaintiff] and amendment allowed adding the defendant, defendant CANNOT raise limitations defense later (LA s 6(1))

Prejudice is hard to make out – court can remedy prejudice by timelines and costs.

Test for amendment to add a new defendant after the expiration of a limitation period:
(1) Added claim must be related to the conduct, transaction or events described in the original pleading
➔ Related to = broad standard.
➔ New D allegedly involved in key elements of dispute = giving insurance co wrong info

(2) Added defendant must have received sufficient knowledge of claim during period
- Limitation Period PLUS
- Time for serving S/C
- That it "will not be prejudiced in maintaining a defence to it on the merits."

➔ Knowledge made out b/c related companies had the same director. No evidence of prejudice.

Procedure on Default – D does not file S/D on time

What if?
- You file S/C for client & serve on D. Suing for debt $50,000 + contractual interest at a rate of 5% per annum.
- D doesn't file S/D within provided timeframe
    - E.g, see R 3.31:
        - 20D if D served in Alberta
            - You serve on 2nd the defence is due on 22nd – just numerical value of days
        - 1 month if D served in Canada, but outside Alberta
        - 2 months if D served outside Canada

What can you do?

TIME PERIOD FOR D TO RESPOND

- R 3.31(1) – to file S/D – if: D served in Alberta 20 days, D served in Canada outside Alberta 30 days, D served outside Canada 60 days
- R 3.34(3) – to file Demand for Notice – D served in Alberta 20 days, anywhere outside Alberta 30 days

What happens if party does not defend: Procedure

- 1) File Affidavit of Service – see Proving Service R 11.30 (above)
- 2) Determine if claim is liquidated or unliquidated
  - Liquidated – certain amount known – apply for **Default Judgement R 3.38, 3.39** – D did not respond so presumed to be admitted
  - Unliquidated
    - **apply to note defendant in default application R 3.36 (bars defendant from defending)**, then **make application for Judgement R 3.37**

Two Kinds of Default Proceedings

- "Rules 3.37, 3.38 and 3.39 provide for two kinds of default judgment - a judgment on application to the Court after a defendant has been noted in default under Rule 3.36. Such a judgment requires an assessment under Rule 3.37. The second form of judgment does not require that a defendant first be noted in default (except in the case of foreclosure (Rule 3.41)) and does not require an application to the Court. These judgments are those for a debt or liquidated demand (Rule 3.39), or "recovery of property" (R. 3.38), and are entered by the plaintiff" (*TLA Food Services Ltd*)
- "In the case of debt or liquidated demand, the jurisprudence has established that such default judgment is only when an exact or easily calculable amount is sued for. Logically, under the similar Rule 3.38, default judgment for the recovery of property should only be available when the property is easily ascertainable, without the need for a Court application."

Argent v Gray

- When D does not file S/D, they are deemed to admit facts as set out in S/C, BUT court can still examine S/C to assess whether a claim is made out
  - Practice tip – make sure everything is set out in pleadings such that there is a basis for liability and then the court will only be looking at quantum
- **You can file a S/D at any time up to when P files for default judgement or to note D in default**
- **Cannot note D in default or default judgement if an application has been filed, but not decided R 3.42** – application to set aside service, stay application or strike S/C

What if?
DAY 1: P files S/C on D in Alberta suing in debt. You are acting for D.
DAY 25: You realize you haven't filed S/D. P has not yet applied for default judgment.
What can you do?
You file for Defence – the court does not automatically do anything when the deadline passes – the PL had to note you in default or get judgement in default. SO FILE is none of those present.

Apply to Set Aside Default Judgement or Noting in Default – R 9.15

What if?
DAY 1: P files S/C on D in Alberta suing in debt. You are acting for D.
DAY 25: You realize you haven't filed S/D. P has applied for & been granted default judgment.
What can you do?
You can open it up – R 9.15
a. An **arguable defense**
b. D did not deliberately let judgement go by default & has some **reasonable excuse** i.e. illness or solicitor inadvertence
c. D **moved promptly** to set aside default after learning of it

If you acting for the plaintiff – you cannot control many factors except factor b – ex. D can argue he did not get good service

Court is given authority to "open up" default judgment or noting in default, R 9.15. It will do so where:

RULE 9.15: TEST

1. Some problem with procedure (e.g., service of S/C not actually effected). Where there is a **not-trivial flaw** in the process leading up to the default judgment, the **defendant acting promptly**, has a right to have it set aside
OR
2. Residual discretion: the judge hearing an application to set aside under R 9.15(3) retains discretion to grant that relief where fairness requires it to be granted (not all 3 prones in the test below must be met within this discretionary power)
OR
3. Defendant establishes three things: **ALL THREE MUST BE MET Rule 9.15: TEST to open up judgement**
    a. D has arguable defence
    b. D did **not deliberately** let judgment go by default & has some **reasonable excuse** for default such as illness or solicitor inadvertence
    c. D **moved promptly** to open default after learning of it

See *Palin v Duxbury*, 2010 ABQB 833. Must meet all three criteria.

These applications are very common and the Plaintiff only has (some) control over the second criteria, which it can mitigate with GOOD SERVICE.

Pleadings Subsequent to S/C

- **Note: if served with originating application (as a commencement document)– only file affidavit in response and appear on application (no statement of defence, no subsequent pleading filed)**
- The following option loosely apply to provincial court (prov claim uses different terminology)

- D's options for QB
    - Raise Jurisdictional issues:
        - No jurisdiction simpliciter (set aside service ex juris)
        - Forum (non) conveniens (stay proceedings)
    - Apply to strike the claim R 3.68
    - Demand for Notice R 3.34
    - S/D R 3.31
    - Counterclaim against P R 3.56
    - Claim against other Ds &/or 3rd parties
        - Notice to Co-Defendant R 3.43
        - Third Party Claim R 3.44

Timeline for Defendants to Respond: FILE AND SERVE

Place Where Defendant Served	Time to Respond in QB	Time to File a Dispute Note (aka statement of defence), Provincial Court PC Civil Procedure Reg, s 5
In Alberta	20 Days	20 Days
In Canada, outside of Alberta	1 month	30 Days
Outside of Canada	2 months	

Under new rules: day in court are numerical days – served in the 2nd → must respond on 22nd.

Nothing automatically occurs when timelines pass – they made for reliance for parties. The PL cannot strike your application if you file it late and there is no previous noting in default.

Time to respond runs from when service effected

- File S/D – R 3.31(1)
- File Demand for Notice – R 3.34(3)

CAN respond after timeline has expired, but RISK default proceedings

Plaintiff cannot note defendant in default OR move for default judgment when an application has been FILED and NOT YET DECIDED, R 3.42 (Filing things that are not a defence does not stop the clock for filing defence aka avoiding being note in default. **But the following do stop the clock**)
Applications:

- To set aside service
- To stay application
- To strike S/C R 3.68
- Note this **doesn't include** applications for SJ under Rule 7.3 (Summary Judgement – does not stop the clock)

Demand for Notice R 3.44

- Defendant does not contest liability, but wants to have input re: remedy (contests damages)
  - Prevents default judgment from being entered
- Defendant must be given notice of further applications
  - Commonly used in foreclosure proceedings i.e. D may want to argue how the house should be sold, it is a different process to sell a multi-million dollar home vs. a $500,000 home
- "Purpose of a demand of notice is to give the defendant who admits his liability under the cause of action sued on a chance to see that he is not held for more than he should be for that purpose and to present to the court anything that may be helpful in that regard": *Bell*
- Defendant can only file a S/D & contest liability if Court allowed defendant to withdraw Demand for Notice and file S/D).
  - Consider [from *Bell v. Grande Mountain Apartments*, (1984) 50 AR 372]
    - Good defense on the merits
    - Defendant acted promptly
- It is almost always better to file S/D because that means that that PL will have to go through a greater trouble to apply and obtain judgement. Defendant is likely to receive a judgement in more favourable terms compared to not filing the defence at all.

Statement of Defense (S/D) R 3.31

- Substance of S/D
  - (1) Admit uncontested facts
  - (2) Deny contested facts
    - Cannot use a blanket denial: Must provide more substance than "defendant denies everything and puts plaintiff to strict proof thereof", see *C(L) v. Alberta*, 2011 ABQB 12
    - Facts are assumed to be denied if not specifically admitted, R 13.12
  - (3) Add facts that raise a defense
- (4) "Silence in a defence is not an admission" (Cote 44, R13.12) but for some reason nearly all SODs "admit a few things and then help the reader by giving a blanket denial of every other fact alleged by the person suing" (Cote 44).
  - Everyone ignores this rule: Facts are assumed denied if not specifically admitted R13.12 → everyone ignores this rule. Practioners say in S/D everything that is not admitted here is assumed denied

- Ethical limitations on lawyers involved in drafting any pleading, see *Code of Conduct*, R 5.1-2

- Usually, competent counsel will use a defence to:
  - Tell your own client's story from its perspective, filling in important facts left out of the SOC which help your client
  - And then specifically deny and refute particular points from the SOC
- **Must include the following section:** Statement of facts relied on, any matters that defeat PL's claim, remedy sought (other sections can be modified by counsel)
- Rule 13.6 – remedy sought – the most following

Reply

- Substance
  - **"The reply may only make admissions or respond to matters raised for the first time in the S/D", R 13.10**
  - Recall – facts not specifically admitted are denied, R 13.12
- Timing
  - Reply must be filed and served w/i 10D of S/D being served, R 3.33
  - Replies are relatively uncommon, perhaps 20% of cases

Counterclaim R 3.56 (Commencement Document)

- "In principle, it is really a type of statement of claim; it just does not start a new lawsuit" (Cote 52).

Example

- D is sued. D has claim against P.
  - D could start a separate action, OR
  - D could counterclaim against P, R 3.56.

Service

  - Counterclaim = commencing document (see defn' in Appendix to *ARC*)
  - must be served pursuant to rules for commencing document rules, but see R 11.15, 11.17
  - Usually counterclaim and defense are served at the same time

Timing

  - Must be served in same time as provided for serving S/D, R 3.57
- **Timing must be served same as a S/D** R3.57 – 20 days Alberta, In Can outside AB 30 days, outside Can 60days
  - If you need more time
    - You could ask the court to extend, subject to its ability to do so, or
    - May be better to request an undertaking from other side not to note in default or seek default judgement.
      - If acting for P – best practice, you have to ask client, tell them if undertaking not given costs may be awarded against you, set a time period do not leave it open or it becomes unclear when a reasonable period of time has elapsed
  - As D you have an obligation to move expeditiously
- **Scenarios**
  - Scenario 1 - Allowed
    - P sues D
    - D counterclaims against P
  - Scenario 2 - Allowed
    - P sues D
    - D counterclaims against P & X (related party, now defendant by counterclaim)
  - Scenario 3 – NOT allowed, see *Lil Dude Ranch Ltd v. 1229122 Alberta Inc*
    - P sues D
    - D counterclaims against P & tried to add X as a second plaintiff by counterclaim
  - Scenario 4 – Allowed
    - P sues D

- D serves TPC (third party claim) on TP (third party)
- TP counterclaims against P or/and D

Notice to Co-Defendant (Cross Claim against Co-D, purely in tort cases only)

- **Widespread use in litigation since doesn't require grounds (abbreviated version to file notices of claim on co-defandant & not abbreviated is third party claim)**
- Ex. P sues D1 & D2, If D has to pay P, D1 can claim contribution from D2 by filing Notice to Co-Defendant under:
  - *Tortfeasor's Act*
  - *Contributory Negligence Act*
- **Timing**: must be flied within 20 days after D1 files S/D, R 3.43
  - D2 not required to file a response to Notice to Co-Defendant (there is no need for particulars, very short form)
  - Defences are not required
- **Common case**:
  - P injured car accident, sues D driver & D doctor, both jointly, severally liable, P can recover 100% from either will choose D doctor for insurance, D doctor will claim contributory negligence, so can simply put other D on notice for contribution claim with Notice to Co-Defendant
  - Often make Crown D, if you can get even 1% liability on Crown, can get 100% damages recovered from Crown, so Notice to Co-D used

Situation 1

- P sues D
  - D thinks that TP should be included in litigation (more below)
  - D serves TPC on TP

Situation 2

- P sues D1 & D2
- D1 has claim against D2 OTHER than under the
  - *Contributory Negligence Act*
  - *Tortfeasors Act*
- D1 serves TPC on D2

Third Party Claim (TPC)

Service

- Third Party Claim = commencing document (see defn' in Appendix to *ARC*)
- Must be served pursuant to rules for commencing document rules
- Party serving TPC must include copy of S/C

Timing

- Defendant must file & serve on Plaintiff & Third Party (aka Third Party Defendant) (not set in stone – can be adjusted as other deadlines, not like limitation rules)
  - within 6 months filed S/D or demand for notice, AND
  - before judgment entered against defendant, R 3.45

Situation 1

- P sues D
  - D thinks that TP should be included in litigation (more below)
  - D serves TPC on TP

Situation 2

- P sues D1 & D2
- D1 has claim against D2 OTHER than under the
  - *Contributory Negligence Act*
  - *Tortfeasors Act*
  - *(not tort claim but a contractual claim),*
- D1 serves TPC on D2

- Employee 1 want to leave to set up rival asks Employee 2 to come, E2 asks what about non-compete, E1 says will not get sued, E2 wants contractual indemnity from E1 if sued, E1 agrees, Employees sued, E2 will be looking for claim of contribution from E1 so serves E1 with TPC

- **Rationales** *Rural Auxiliary Hospital & Nursing* (similar to ones for why we allow multiple Ds and joinder/consolidation R 3.69, 3.70, 3.72):
  1. Avoids multiplicity of actions
  2. Avoids contrary and inconsistent findings
  3. Allows the 3rd party to defend the P's claim against the D
  4. Saves costs
  5. To determine issues between D and 3rd party ASAP

Technically it may be possible for the D to just wait until it is found liable to then sue the TPC for contribution/indemnity. That is now disfavoured and may be limitation barred.
NOTE the similarities in rationales b/w allowing Third Party Claims & Joinder/Consolidation, e.g., R 3.69, 3.70, 3.72

When can D use a Third Party Claim (TPC)?

- 3.44 A defendant or third party defendant may file a third party claim against another person who
  - (a) is or might be liable to the party filing the third party claim for all or part of the claim against that party (P sues D, D has **claim for contribution** from 3rd party) OR
    - Translation
      - P sues D
      - D has claim for contribution against TP
      - Under contract, tort, statute etc
      - Under *Tortfeasors Act, Contributory Negligence Act*
  - (b) is or might be liable to the party filing the third party claim for an **independent claim arising** out of
    - (i) a transaction or occurrence or series of transactions or occurrences involved in the action between the plaintiff and the defendant, OR
    - (ii) a related transaction or occurrence or series of related transactions or occurrences,

    Translation
    - P sues D
    - D has independent claim against TP in contract, tort, statute etc
    - D's claim against TP sufficiently related to P's claim against D

    - i.e. P contracts with contractor D to build house, house built is not what was contracted for, contractor D says problem was architect who contractor D contracted with architect to design house and they breached contract or negligence, so then contractor D serves TPC on architect
    - **Must be sufficiently related** i.e. not making lease payments on farm land because D bought a deficient piece of machinery that did not allow D to farm the land properly is not sufficiently related

  OR
  - (c) should be bound by a decision about an issue between the plaintiff and the defendant (least common reason)
    - *Cunios v Husk* – does not apply – lawyer misses limitation period for property division in divorce, P sues lawyer (D) for negligence, D wants to bring in ex-spouse for unjust enrichment as a result of D's negligence. The court found that there no basis to TP – there is no duty between the husband and wife's lawyer.
    - **Test NOT satisfied** in *Cunios v. Husk,* 2014 SKQB 63
      - P retains D (lawyer) re: division of property,
        - D misses limitation period
        - P sues D

- D serves TPC on P's ex-spouse (TP)
- Claims TP has been unjustly enriched & assets held in trust for P
- The main qs was missed limitations period – so it did not envolve the wife in any way
- (if TPC was successful, would reduce losses P suffered as a result of D's negligence)

- Potential scenario?
  - P claims to have better title to property owned by D
  - D knows TP has claimed to have better title to same property
  - D wants TP bound by decision

O'Connor Associates Environmental Inc, 2014 ABCA 140 (case example)

- FACTS
  - P bought assets from D.
  - Claims D mislead P re: assets.
  - Sues D for a number of torts.
  - D serves TPC on TPD. TPD was P's advisor during sale.
- 3rdPD moved to strike TPC, court considered 3.44(a)-(c)
  - 3.44(a) – contribution? Possibility both parties committed torts, but too remote, so exercise discretion not to allow
  - 3.44(b) – independent claim? No, 3rdPD did not owe a duty of care to D (it would be the case if D hired TPD as independent advisor for sale)
  - 3.44(c) – otherwise should bind TPD?
    - No, D's claims are really defences – "I did not do anything wrong, any loss is someone else's fault", if D establishes D not liable, there is no need to bind 3rdPD

Limitations Period to file TPC

What if:

- Day 1 - P "discovers" claim against D & TP
- Day 1 + 2 years – P files S/C against D
- Day 1 + 3 years – P serves S/C on D

If D files a TPC against TP, does TP have a limitations defence?

- *Limitations Act* s 3(1.1)
  - Amended December 17, 2014, retroactive to March 1, 1999
  - Limitations period against D bringing TPC
    - **2 years from <u>later of:</u>**
      - D served with S/C OR
      - D "discovered"(discovery) claim against TPD
    - **10 years from when claim against TPD arose**
  - This amendment is badly drafted, and the resulting law is one of the most complicated areas of Civil Procedure, so we won't wade too far into it.

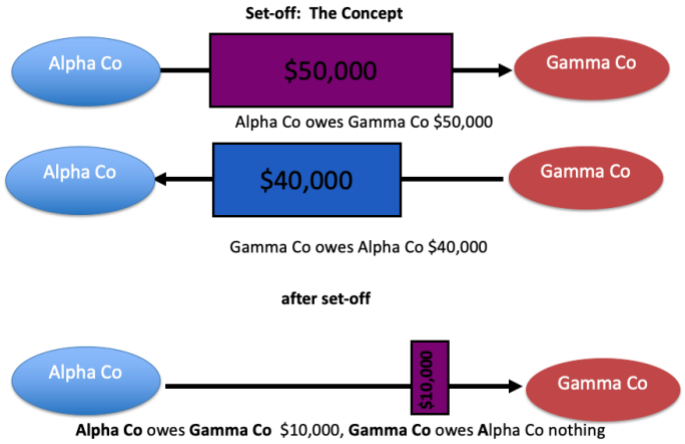
  - Discoverability LP: the **<u>later</u>** of 2 years from when D discovered claim against 3rd party D or D served with S/C
  - Ultimate LP: 10 years from when claim against 3rd party D arose

After TPC Served

- Third party files Third Party Statement of Defence (or Demand for Notice),
  - In Third Party S/D TPD Can:
    - Contest P's claim against D
    - Contest D's claim against TP, R 3.49
- Same time limits for serving as D has to serve SD, R 3.49
- Reply to Third Party Statement of Defence can be filed by
  - Plaintiff
  - Defendant (aka Third Party Plaintiff)

- If TPD doesn't defend, can note in default, but can't usually get judgment (because may not be liable to P!) and even if you do, can't enforce without application: R 3.53.

Set-Off



- **Can be a defense and/or a counterclaim R 3.59 (defence and/or counterclaim if D is owed larger amount by P)**
- Idea is you owe money and I owe money so it is cancelled out
- **Defence:** if the amount of D set off is less then the P claim – plead it as set off and not file as counterclaim
  - If P sues D for $100K, establishes claim
  - D defends, establishing set-off for $150K
  - Court orders D owes P no money

  → set of is pleaded in the defence no matter what
- **Counterclaim:** if the amount of money that D owed by the P exceeds the amount in S/C
  - If P sues D for $100K, establishes claim
  - D counterclaims, establishes set-off of $150K
  - D gets judgment for $50K

- **3 Types**
  - Legal Set-Off
  - Equitable Set-Off
  - Set-Off by Agreement

Legal Set-Off

- **Requirements**
  - (1) Have to show mutual obligations, and
  - (2) Debts or liquidated claims

Example 1: works
- A is owed $50K by B (a debt/liquidated)
- B is owed $40K by A (a debt/liquidated)
- A sues B for $50K. B pleads legal set off. A gets judgment for $10K

Example 2: Example 2 no mutuality – A owes B $40k, B owes A $50k, A assigns its debt to C – no mutuality, A owes B $40k, B owes C $50k. No legal set-off, equitable set-off may apply

Equitable Set-Off

- **Requirements**
  - Mutual claims, whether or not liquidated, if arising from the same contract or series of events or otherwise closely connected
  - Mutuality is lost as a result of an assignment of a debt or claim, mutuality not lost if

- The sum to be set off accrued or became due prior to the notice of assignment (whether or not it is payable before that date) or,
- The sum to be set off arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with the contract or series of events, even if it accrues after the notice of assignment

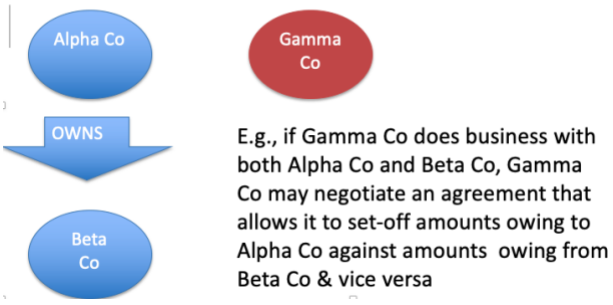
- Example 1 works – A sells B business, takes promissory note for $50k, B believes breach of contract for sale, business not as warranted, estimates damages $40k, A sues B for debt – B has defense equitable set-off
- Example 2 *Telford v Holt* – A sells B land remaining price to be paid $150k, B sells A land remaining price to be paid $100k, A assigns its debt ($150k) to C, C sues B for $150k
  - In case it was really a land swap and payment schedules were coordinated, so it would be unfair not to allow B defense of equitable set-off

Mutuality Requirement

- *Telford* – no mutuality required
- *Chubak v Corner Brook Farms*, 2015 ABQB 806 – Alberta court said there must be mutuality at some point or concept does not apply
  - A sues B to recover debt, B owns company, company has breach of contract claim against A, B raises company's claim as set-off against A.

Set-Off By Agreement (Contractual)

- Can expand or rights of set-off otherwise available, can be unliquidated and can happen after an assignment
- Need to see if the contract contains legal remedies such as set off.
- Ex. If A is parent co that owns B and G does business with both A and B, G can negotiate an agreement that allows G to set-off amounts owing to A against amounts B owes to G.
  - Can expand or restrict rights of set-off otherwise available



**** QUIZ #3

Scope of Disclosure

Canada has an adversarial system of civil justice where litigants are responsible for investigating and preparing their cases, which are then presented in a continuous oral trial.

It is a litigant controlled process with many exceptions. **SO litigants control what they disclose.** SO they have a choice not to turn in inculpatory disclosure (it will never be discovered).

- Works because of professional obligations of counsel

Two main ways to get disclosure in civil litigation:

1. Litigants have to provide each other with all records relevant and material
2. Question parties from other side as litigant

- **Purpose of Disclosure** – efficiency (do not need to go to 3rd party if you can get info from other side), accuracy (relevant then get closer to truth), avoid ambush in civil lit – **5.1(1) within the context of R 1.2,** purpose is:
  - (a) obtain evidence relied on in action
  - (b) narrow and define the issues among parties – avoid ppl fighting over things not in dispute
  - (c) encourage early disclosure of facts/records
  - (d) facilitate evaluation of parties' positions and possible early resolution – very few cases go to trial, disclosure can facilitate settlement
  - (e) discourage conduct that unnecessarily delays or increases costs of proceedings

- No trial by avalanche – obligation on litigants to look at all docs they are producing, discourage litigants from burying the other side in paperwork R 5.2

R 5.2 Relevant & Material Test

- Look at pleadings to determine what issues are raised and what evidence will resolve those issues.
  - **Relevant (relevance – connection to the issues):**
    - (1) will help determine issue(s) raised in pleadings and
    - (2) will help ascertain evidence that will help determine issue(s) in pleadings

    Note: the fact that you might have a complete defence does not mean some evidence is not relevant.
  - **Material (utility of docs to the issue):** goes to weight of evidence – must "significantly" help determine an issue
- Can only send what is relevant & material, prevent trial by avalanche
- **R 5.6** relevant & material docs must be included in Affidavit of Records
- **R 5.25** relevant & material questions must be answered at Questioning [unless about privileged matters]

Relevant & Material: Tort of Fraud Example

P purchased Tom Thomson oil painting "the West Wind" from Rogue. Hired D to authenticate painting. D confirmed, "it's an original". It wasn't. Rogue disappears. P believes D was in cahoots with Rogue & sues D for tort of fraud, needs to prove:

- D made a misrepresentation
- **D knew or was reckless to falsity of misrepresentation**
- P acted in reliance on misrepresentation
- P suffered a loss

Which of the following might be relevant & material?

- Record of D's training as a watercolour painter
- Record of D's certification as an art appraiser
- D's "friend list" on Facebook.
- Report prepared for D's lawyer by another art appraiser about how convincing a "fake" the painting is
- Questions about whether or not D has recently been to Art Gallery of Ontario. [AGO is where original of the West Wind is on permanent display.]
- Letter from D to P begging P not to sue and offering to pay back part of P's losses

- all training should be considered – but a little tangentially related
- appraiser was hired as not appraiser but authenticator - tangentially related
- report – is very relevant – but it might not be useful
- AGO relevant – can prove knowledge and recklessness of the D
- letter – if there is admission of culpability can be relevant – but might not be used because of privilege (settlement)

Privilege

FIRST: assess relevance and materiality
SECOND: the docs that remain assess whether they are covered under privilege aka not needed to be reproduced

- **Is an exception to the obligation on litigants to disclose relevant & material info**
- Why? Protects interests and relationships that are rightly or wrongly regarded as of sufficient social importance to justify some sacrifice of the availability of evidence relevant to the administration of justice
- **R 5.16 to use evidence at trial that is covered by privilege, you must waive privilege**
- **Types of Privilege:**
  - Solicitor-Client
  - Litigation
  - Settlement
  - Case-by-case

Solicitor-Client Privilege

- **Class privilege**
- **Requirements**: *Solosky v The Queen*
  1. Communications between a solicitor and client,
  2. Made for the purpose of giving or receiving legal advice, and
     i.e. if in-house or in-government counsel may not apply because will not be legal advice
  3. Made with the intention that it be confidential
     i.e. does not apply if conversation is in public in place where you do not have an expectation of confidentiality
- **Rationale**: if client does not have a guarantee of confidence, candour will be inhibited and client will be unwilling or unable to obtain adequate legal advice
- **Exceptions:**
  - Risk to public safety
  - Accused's right to make full answer and defence
  - Criminal communications

University of Calgary v Information and Privacy Commissioner of Alberta, 2016 SCC 53

- **Facts:**
  - EE sues University
  - EE requests re: her employment under FOIPPA
  - Info & Privacy Commissioner requires University to produce documents, University claims solicitor-client privilege over some
  - University applies for judicial review of Commissioner's direction to produce documents
- FOIPA s 56(3) provision stated "Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record requiring under subsection (1) or (2)"
- SCC:
  - solicitor-client privilege is a principle of fundamental justice;
  - only time legislature can interfere is if they use **clear, explicit and unequivocal language** i.e. must explicitly state solicitor-client privilege
  - FOIPA s 56(3) provision not clear, explicit and unequivocal enough to empower commissioner to rquire production of documents subject to solicitor client privilege

Waiver

- **can ONLY be waived by the CLIENT**,
- can be **explicitly** i.e. look at letters my lawyer sent me **or impliedly (ex. implied including in pleading)**
  - *Sturgeon Lake Indian Band v Canada, 2015 ABCA 253* – impliedly waived solicitor-client privilege by making legal advice an issue in the pleadings
    - Most common: When the client sues lawyer on the advice they were given – assumption of waiver of the solicitor-client privilege

FACTS:

- 1990 treaty signed between Crown and Sturgeon Lake First Nation (SLFN)
- 1997 SLFN starts claim against Crown claiming add'l rights & that 1990 treaty was obtained by through tortious conduct & w/o providing full info to SLFN

ISSUE: Did SLFN waive privilege over its communications w/ lawyers prior to signing 1990 treaty by making the substance of that advice an issue in 1997 litigation?

MAJORITY: Yes. What SLFN told by lawyers prior time of signing 1990 treaty key to 1997 litigation

Common Interest Privilege

Disclosure of advice to another party will not amount to waiver of solicitor client privilege where the other party has a common interest in completing transactions to which the privileged advice relates

CANADA V IGGILLIS HOLDINGS INC, 2018 FCA 51

FACTS:
- Abacus & Gillis involved in multi-step transaction to avoid taxes
- Abacus & Gillis' lawyers jointly prepare a memo, shared with both parties

PROCEDURE: CRA demands copy of memo from Gillis. Gillis claims it is subject to solicitor client privilege.

ISSUE: Did disclosure of advice provided by Gillis' lawyer to Abacus (and by Abacus' lawyer to Gillis) amount to waiver of solicitor client privilege?

DECISION: No. Common interest privilege applies here.

Litigation Privilege

- **Class privilege**
- Common examples:
  - A lawyer's file – aka lawyer work product
  - Records if communications between the lawyer and third parties, usually experts or witnesses
    - **EXCEPTION:** Usually this covered by litigation privilege until you call that expert/witness at trial
    - To do that: you have to fill out a court form and give that material to the other side prior to the trial – so no surprises
    - But if the report is not favourable to you and you do not want to rely on it – you do not have to disclosed to the other side – it will remain privileged
  - Records **created** by a party (not by party's lawyer) that were in explicit contemplation of, and for **the dominant purpose of, litigation**, like:
    - Internal reports created for the company's legal department
    - Reports to the client's insurer for the purposes of obtaining liability coverage

→ **litigation privilege authority increased over last 10 years**

- **Scope & Test**:
  - litigation underway or reasonable apprehension of litigation
  - dominant purpose of **CREATING** document is preparation for litigation

7. While Garden Variety Co was arguing with Scout about the quality of the soil and whether it had to pay, Garden retained a botanist to investigate the weed infestation in the soil it received. The botanist prepared a report, identifying the most likely source of the infestation. Garden Variety Co has claimed that the report is privileged. Scout has challenged Garden Variety Co's claim that the report is privileged. Will the Court order it produced?

A Likely yes.

B Likely no.

C Depends whether the report was created after December 7, 2019.

i A reasonable apprehension of litigation is sufficient, see Blank v. Canada, Canadian Natural Resources Ltd.. v. Shaw Cor Ltd.

- **Rationale:** facilitates need for a protected private area to facilitate investigation and preparation of a case for trial by an adversarial litigant
  - Ex. Acting for D in car accident, you think P is malingering and claiming injuries they do not have like their thumb is broken, so hire investigator, proves thumb is working, this is now covered by litigation privilege

- "Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."
- **It protects the litigation process, whereas solicitor-client privilege protects the relationship between the lawyer and the client:**
    - "Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process, while solicitor-client privilege aims to protect a relationship." (Sharpe)

- WHEN IT ENDS? → **litigation privilege ends when the litigation is over!**
    - The purpose of the litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification. But to borrow a phrase, the litigation is not over until it is over. It cannot be said to have terminated, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat (*Bank*)

ALBERTA V SUNCORE ENERGY – ONLY COVERS DOCS CREATED FOR DOMINANT PURPOSE OF LITIGATION

- NOT documents created for some other purpose (eg statutory compliance, workplace policy)
    - EVEN IF those documents were collected for the purpose of litigation
        - Example 1: Neighbouring business captures bar fight between patron and bouncer on security camera. Footage collected by patron's lawyer while preparing lawsuit
            - it is gathered for the litigation**, but it** was not created for that purpose.
        - Example 2: Condo board involved in litigation re: fire at condo. Condo board's lawyer collects newspaper articles reporting on the fire.
            - it is gathered for the litigation, **but** it was not created for that purpose.

EXCEPTIONS

- Risk to public safety
- Accused's right to make full answer and defence
    - If there something exculpatory – the accused can use privileged materials to be used from the other party – expert investigation report.
- Criminal communications (threats, fraud – re fake accident)
- Evidence of abuse of process

LIZOTTE V AVIVA INSURANCE COMPANY OF CANADA 2016 SCC 52

Facts:

- There was a fire and family's insurance was Aviva
- Adjustor (allegedly) makes mistakes in investigation of client's claim – alleged arson against the family, so the family can sue insurance for punitive damages and damages in bad faith
- Client sues insurance company AND regulator investigates adjustor (administrative proceeding)
- Regulator from regulatory body that makes sure that insurance companies are behaving well demands file from insurance co
- Insurance refuses to disclose, claims litigation privilege
- Lawsuit between insurance co & client settled (the case was moot, but the court wanted to hear it anyway because important law can come out), insurance co discloses file

Procedure: Regulator applied for declaration that insurance company not able to raise litigation privilege against regulator

Decision:

- Insurance company CAN raise litigation privilege against regulator EVEN WHEN
  - Regulator not involved in relevant litigation (eg. between client and insurance co)
  - Regulator subject to a duty of confidentiality
- Litigation privilege not abrogated by legislation requiring insurance co to disclose any document to regulator
- Since the regulatory proceeding was closely related, the litigation privilege had not yet ended
- Litigation privilege got elevated to class privilege same as client-solicitor privilege as opposed to case-by-case privilege(where the court performs individual balancing test)

Litigation Privilege is broader than Solicitor-Client Privilege

Solicitor Client	Litigation
Applies to communication b/w lawyer & client	**Can ALSO apply to communication with stranger to litigation OR to self-represented litigant**
Communications must have been confidential	**Can communications made with no expectation of confidentiality**
Applies regardless of possibility of litigation	**Litigation or reasonable apprehension of litigation required**

Settlement Privilege

- **Class privilege**
- **Without prejudice = off the record (has settlement privilege)**
- **With prejudice = on the record**
- not all communication between counsel is privileged even it says off the record
- **Scope**: protects communications exchanged by parties as they try to settle a dispute. Looks at substance, "without prejudice" is not required aka not determinative
- Rationale: parties should be supported in attempts to resolve their disputes short of relying on the courts, without fear that attempts will be used in litigation against them
- Cannot threaten criminal proceedings to settle a civil claim – this is extortion

14. Garden's lawyer sends a letter to Scout's lawyer. It says in part, "only 50% of the soil delivered to Garden was defective, so in the interests of resolving this file, we are prepared to pay $35,000 in full and final settlement." Scout is insulted and rejects the offer. At trial, Garden's witnesses claim 100% of the soil was defective. Can Scout use the letter to impeach their testimony in cross-examination?

A Yes

B No

C It depends whether the letter was labelled "without prejudice"

i "Without prejudice" label not required; substance is what is important. Letter is privileged.

Exceptions

- Allowing disclosure of communications – *Bellatrix Exploration Ltd*, R 4.28: can disclose communications made in furtherance of settlement to
  - Prevent double recovery
    - A party sued two people with the same tort – settled with party number 1 for the full amount – cannot settle again with the party #2 – if they try (abuse of process)

- Communications are unlawful (threats, fraud)
    - Settlement letter (without prejudice) that is trying to bring media and drag their name through the mud – Not privileged – can apply for injunction to stop the party and in support of the application attach that letter
- To prove settlement reached or to determine terms
    - Happens after the settlement was reached – but one of the parties does not adhere to the agreement – not pay the money for example
    - Lawyer has to bring summary application and get judgement to enforce settlement – to prove settlement – you have to attach otherwise privileged info to the motion
- Settlement posture may be relevant when determining costs – if you refuse a reasonable settlement offer, you can be penalized with costs
    - Cost rules contain special provisions to incentivize settlement by increasing or decreasing the cost payable depending on whether or not you rejected a settlement offer that you should have accepted

- UNLILKE LITIGATION PRIVILEGE, settlement privilege continues after settlement is reached: *Union Carbide Canada Inc v Bombardier Inc, 2014 SCC 35*

Case-By-Case Privilege (residual category) – individual balancing test

- ***Wigmore* Test: ALL MUST BE MET**
    - (1) Communications originated in a confidence that they will not be disclosed
    - (2) Confidentiality is essential to the full and satisfactory maintenance of the relations between the parties
    - (3) Relationship is one that the community believes should be sedulously (diligently) fostered AND
    - (4) The injury that would inure to the disclosure of the communication must be greater than the benefit gained from correct disposal of litigation

AM v Ryan 1 SCR 157

- psychiatrist produce notes prepared in treatment of P? SCC allowed partially, lawyers could see notes, but would not allow the D to see, SCC found notes were so probative that it would prevent the court from reaching an accurate result if not disclosed. Facts: P alleged sexual assault by 1st psychiatrist, met with a 2nd psychiatrist, seeking disclosure of notes from 2nd psychiatrist
- note the P was only marginally issue or not at all. If not marginally, the privilege would be waived.

Use of Privileged Materials at Trial

- Imagine a personal injury lawsuit, P claims he has lost use of thumb due to D's negligence:
    - D's lawyer retains private investigator (PI) to videotape P
    - Video shows P using thumb to play games on phone
- Q: what class privilege would apply to video?
    - this video was made for the purposes of litigation – so there is privilege-but you cannot litigate by ambush
    - If D's lawyer want to introduce video at trial, she must disclose it prior to trial and waive privilege over it, R 5.16

Document Discovery

- **Rationales for Discovery**
    - Do not allow trial by ambush (surprise attack from concealed position)
    - Encourages settlement
    - Principle of natural justice to know the case you have to respond to
    - Efficient – instead of each party trying to get docs
    - Accurate – by requiring parties to produce all relevant docs
- **2 Types:**
    1. Document Discovery

a. Disclosure
b. Production

2. Questioning (oral discovery)

Affidavit of Records - Document Discovery

- **Affidavit of Records**: each litigant provides one to the other side, it lists all **TEST**
  - **(1) relevant & material documents that are**
    - 1) currently in the litigant's control, and
    - 2) were previously in the litigant's control (i.e. sending letters, do not keep original),
  - **(2) it also specifies whether documents are "producible" or "privileged"**
  - **➔ So: (1) relevant, material and producible – see schedule 1; (2) privileged (not giving to you) – see schedule 2; (3) I used to have the docs that were related to this – see the list of them in schedule 3**
  - old test was "possession, custody, power," meaning is same as control
- **R 5.14** litigants can either inspect or get copies of the other side's documents
  - Common practice to scan all or photocopy and provide on USB drive – send each other copies electronically or paper -based → NOT INSPECTION IN THE OFFICE

How can this possibly work?

- Essentially all document exchange in litigation is voluntary
- The party itself looks for documents (even very damaging ones for its case) and is expected to provide them to his or her lawyer, who will sort them and disclose them to the other side
- This is a bit insane. Why would a party hand over an incriminating document? → lawyers professional responsibility
- Lawyers tell their clients they need to go through:
  - All of their emails and search for particular keywords, including the name of the opposing party, the subject matter or any emails to and from particular people.
  - They have to dig up any other paper or electronic records which relate to the lawsuit
  - Cote complaints at pg.78 that it is increasing difficult to talk over the telephone to any live person in an organization.
- They give you everything and you work with paralegals to sort it, determine what is relevant, see if any of it is privileged, and produce anything which is relevant and non-privileged even if inculpatory.
- Cote notes that in order for this system to function it is vital that the litigants and their legal counsel take this discovery obligation seriously.
  - He warns that penalties on a party for not disclosing all records are severe and mentions prosecution for perjury, contempt, or inability to use nondisclosed document in the suit.
  - But prosecution against parties in civil actions for failing to produce documents are essentially unhear of. They effectively never take place.
  - And both prosecution and contempt both assume the opposing party has some way of finding out the unproduced documents exist.
  - So, like many things in the practice of law, the only factor which makes civil litigation possible is that most lawyers, most of the time, abide by their professional obligations
  - And allowing a client swear an affidavit of records which omits a key record is suborning perjury, and is a breach of the Code of Conduct
- For example, for years Apple and Google and other big tech companies colluded to keep employee wages down by making secret promises not to try and hire others' workers
- This led to a huge class-action lawsuit, settled for $415 million and regulatory prosecution by DOJ
- During discovery, emails produced between Steve Jobs and Eric Shmidt were given – very incriminating.

Relevant & Material R 5.2

- Parties can only send what is relevant & material, prevent trial by avalanche (overwhelming other side with docs)
- **Look at pleadings (relevance would be determined by what is in SoC) to determine what issues are raised and what evidence will resolve those issues.**
- **R 5.2:**

- Relevant: helps answer issues or identifies evidence
- Material: goes to weight – must "significantly" help determine an issue (have to help in greater than negligible weight ➔ not all relevant documents are material)

- **R 5.6** relevant & material docs must be included in Affidavit of Records

1400467 Alberta Ltd v Adderly

Background:

- P suing multiple Ds for breach of non-complete clause
- D1 files Affidavit of Records with 1,300 documents. Other Ds file AoR adopting D1's AoR
- P applies to strike everyone's AoR, except D1

Issue: Can court remedy "excessive and potentially irrelevant disclosure"

Decision: Yes, but remedy is that D's must identify which records from D1's AoR are relevant and material vis a vis them

Takeaway: It is important to carry out analysis of relevance and materiality re: records included in one's own AoR and the claims to which one is party

- if a party produces excessive and potentially irrelevant disclosure i.e. 1300 docs in Affidavit of Records, the court remedy is that the court requires that party to identify which docs are relevant & material
- Each party has an independent duty to disclose the materials.
- Litigation privilege and other privileges are not likely to apply the same way – different lawyers and clients

Affidavit of Records, Contents R 5.6

- Use Form 26, example on pg 368 in casebook
- **Contents:**
  - Affiant swears to accuracy and completeness of affidavit including statement "no other relevant and material records have ever been under the party's control"
  - **Schedule 1**: relevant, material and **producible** records under litigant's control
    - **R 5.7 – producible records must be numbered, identified** (description & date) **and can be bundled**
  - **Schedule 2:** relevant, material and **privileged** records under litigant's control
  - **Schedule 3:** relevant & material records **no longer under litigant's control**
  - Note saying place where records can be examined (Never used in practice)
    - Encourage inspection of records – if there is a self rep and you are concerned what they might do with the records

Identifying what documents are under a party's control

- Can become a complex question with interrelated parties

McAllister v Calgary 2012 ABCA 346

- City is the litigant
- Adverse party wants to produce Calgary Police Service records

ISSUE: are Calgary police service records in City's control?

Answer: NO. Records not in city's control

- A record is in a party's control if it has enforceable right to access the records (your records at bailee's office, lawyer, doctor, storage unit) – 1st party production – no need for application. But if doctor does not release records – P has to bring proof of multiple requests.
- A record is NOT in a party's control where it can request a record, but has no ability to compel compliance with that request
- Rule 5.13 – for third party production of records – have to bring an application to court to request 3rd party record production
  - If you do not want to use 3rd party record – you do not have to produce in AoR

- Application to personal injury – statute gives rights to individuals to request healthcare docs, so you could assert the docs are under a party's control – *Health Information Act*, RSA 2000

Affidavit of Records, Contents R 5.7

- Producible records must be numbered, identified (every page will have identifiable page number)
  - There is an obligation to <u>organize</u> your documents and create a spreadsheet for effective use of these records for later in the lawsuit – identifiable and unique – very useful in questioning, summary judgements, and trials.
  - Electronic documents will be identified automatically via software bate number (PL 001 can go up to 100; DF 00101 or start at 1) – but paper docs that were scanned do not get automatically populated – they have to be coded individually based on date and come up with a description.
- Producible records can be bundled
  - Eg: Schedule 1
    - Relevant and material records under the P's control for which there is no objection to produce:

No	Date	Description
1	January 3, 2015	Promissory note
2	January 3, 2015	Scotiabank loan details
3	January 4, 2015 – October 30, 2015	Bundle of emails between Barry Johnson and Amelia Hart

- ABPC civil: abbreviated document discovery: easier, quicker and cheaper process because of abbreviated doc discovery stage
  - Do not need affidavit
  - They are not organized or numbered, no spreadsheet
  - Just exchange bundle of documents – put in one pdf and send to the other side
  - So this process: relies on trust more – hard to tell what is left out, but it makes the process faster

Affidavit of Records – Privileged Docs (Schedule 2) R 5.8

- R 5.8 Must identify grounds for claiming a document is privileged
- Is this sufficient for Schedule 2? (in *Natural Resources v ShawCor Ltd just listing things was not enough – <u>but this was amended</u>*)

Categories of relevant & material docs under P's control for which there is an objection to produce:

- (a) Without prejudice (settlement) communications
- (b) Communications and copies of communications between solicitor and client
- (c) Solicitor's work product, including all interoffice memoranda, correspondence notes, memoranda, and other records prepared by our solicitors or their assistants
- (d) Records made or created for the dominant purpose of litigation, existing or anticipated; and
- (e) Records that fall into two or more of the categories described above

- *Canadian Natural Resources v ShawCor Ltd – the rule was ammeded 8 months ago – so you can put a bundle of whatever*
  - Before amendment, Schedule 2 (as described below) was not sufficient as per *Canadian Natural Resources v ShawCor*

Amended to R 5.8:

- **R 5.8 now→ number the records + describe the grounds for the objection to produce (cite (a) –(e) categories) + brief description**
- Provide enough of a description to allow adverse party to assess claim without giving away privileged info
  - Eg Bundle of emails between client & Liberty Law"
  - Everyone is back to bundling, but still have to number the pages and say which privilege attaches to which bundle
- In the spreadsheet → no description of the docs but what privilege is claimed (like in pre-CNR v ShawCor times)
- Generally, the records will be numbered and dated + description of privilege being claimed over it
- R 5.7 applies to Schedule 2: must be numbered, identified and can be bundled
- Must provide enough information to allow adverse party to assess claim (decide whether they want to challenge) without giving away privileged information i.e. bundle of emails between client & Liberty Law

- There has been pushback from this case as for example if Liberty Law were a criminal law firm, would not want the other side to know you met with a crim law firm as the mere fact of meeting with a lawyer is privileged

Problems with Affidavit of Records R 5.11

- Incomplete?
- Improper claim of privilege?
- Under R 5.11 a party can
  - question an adverse party on its Affidavit of Records and/or
  - apply to court for an order to:
    - 1) disclose records, and/or
    - 2) produce records over which privilege has been claimed
      - How did you gather documents?
      - Did you look for this word in your email search
  - Court can inspect impugned privileged records to assess privilege claim
  - R 5.16 party who fails to disclose or improperly claims privilege is barred from using document at trial (unless adverse party agrees or court orders otherwise)
    - Can be cost consequences on client or lawyer personally + professional discipline against lawyer

Timeline for Serving Affidavit of Records R 5.5

Party	Deadline for Serving Affidavit of Records
Plaintiff	3 months after being served with (first) statement of defense
Defendant	2 months after being served with plaintiff's affidavit of records
Third party defendant	3 months after filing their statement of defense

- These timeframes can be modified by counsel by agreement or ask chambers for longer timeline
- Unlike a S/C, S/D, TPC etc…Affidavit of Records and documents that underly them **ARE NOT FILED** at the courthouse R 5.32, they sworn and given with other docs to opposing parties because of implied undertaking rule.
  - **Implied undertaking rule –** the documents that are produced in discovery and oral testimony in the discovery are confidential between the parties to the lawsuit and are not put on a court file or maid public unless or until they are relied on trial
    - Implied undertaking rule has less force now bc modern litigation by summary judgment – so everything would be given to the courthouse and made public – so only really works for trial based proceedings.

Consequences for Late serving of Affidavit of Records

- **R 5.20** a party cannot carry out questioning of other parties until it has served its affidavit of records
- **R 5.12** a court will impose a monetary penalty "a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C", **unless the party has "sufficient cause"**
  - Usually, the OP party gets mad and says that they going to bring an application to court for the penalty and force you to give the record – the other party brings the record right before the hearing – the hearing is moot- so the penalty does not happen often.

Item	Up to & including $75K	Over $75K, up to & including $200K	Over $2000K, up to & including $675K	Over $575K, up to & including $2M	Over $2M
Disclosure of records under Part 5, including affidavit of records	$650	$1000	$1350	$1685	$2021

"Sufficient Cause" for late service

Penalty under R 5.12 is imposed on a party who serves AoR late without "sufficient cause"
What is sufficient cause:

- *Sun Life Assurance Company of Canada v Tom*
  - high threshold,
  - party must show it was diligent (did everything it could but ran into extraordinary circumstances)
  - Ex. Fire, flood damage, documented proof of failed courier, sudden medical emergency

Modifying Time Period to Serve Affidavit of Records (AofR)

- Interlocutory application do not automatically pause the obligation to go through discovery, in particular applications to strike under R 3.68 and summary judgement applications under R 7.3 → DO NOT AUTOMATICALLY STOP THE CLOCK on having TO PRODUCE YOUR AoR or having to go to questioning
- R 5.12 – indicated period can be modified by:
  - Agreement of the parties, or
  - Court order
    - *Chevalier v Sunshine Village*:
      - P sues D1 (individual) and D2 (corp)
      - D1 applies to have claim struck AND asks court for extension to file AofR until after application to strike is decided, otherwise it could be a waste of time and money for D1 to put AofR together
      - Court: grants the application. If claim against D1 struck, then time & money D1 would have spent putting together AoR is a waste
      - This is usually not the case!!!
      - This does not apply automatically. If you want an extension, you need to make an application.
    - You cannot evade discovery – if you trying to stop the lawsuit – it is still likely that you need to do AoR

Deemed Admissions R 5.15

- **A party (making or receiving an AoR) is deemed to admit that a document listed in AoR is**
- **(a) authentic (original true copy) and**
  - **Not the truth of the docs but authenticity of them (non forged)**
- **(b) was sent by sender & received by addressee, unless**
  - In the spreadsheet → no description of the docs but what privilege is claimed
  - **So you do not claim that they are truthful**

UNLESS

- **Party serves notice on adverse party disputing (a) and/or (b) within 3 months of document being produced (very rare) OR**
- **Party disputes (a) and/or (b) in its pleadings (not that rare)**

Ongoing Obligation to Disclose R 5.10 (evergreen disclosure rules)

- Obligation to disclose continues after AofR served
- If a party **<u>finds, creates or obtains control</u>** of a relevant and material record after AofR served, party must:
  - Notify other parties
  - Provide other parties with copies or opportunities to inspect
  - Serve supplemental AofR
  - Examples:
    - Ongoing medical records – wellbeing of the client is relevant now – to determine damages
    - How business is doing – need up to date business records
    - Finding old records – must reproduce

Who Swears AoR? R 5.9

- the litigant,
- the litigation representative (if one is appointed) or

- the corporate representative;

- OR another person if
  - 1) having person above would be inconvenient,
    AND
  - 2) parties agree OR court orders
- Usually, an insurer representative will be swearing instead of insured when you can't find the insured (moved away, or was just guest in the province)

Corporate Representative r 5.4

- Corp will usually appoint corp representative, but if not court will appoint one
  - Needs sufficient authority AND sufficient knowledge re what happened (these two have a bit of tension)
  - You do not want to pick president who knows nothing or a mail room clerk who has no authority but knows everything
- Provides evidence for a corp through
  - AoR
  - Questioning

Document Discovery in Practice

- In practice, the clients delivers a bunch of documents to the lawyer
- Often you must "chase your own client for records which he or she should have, but has not revealed to you"
- Lawyer and paralegals scan paper docs, and put paper and electric docs into some king of document management software
- Then you "code" the documents
  - Full in date/description fields
  - Which can be populated automatically for electronic docs
    - Email has to/from, date, re line, for example
  - Has to be laboriously done by hand for paper
  - Documents are given a unique, stamped number (often thousands)
- Review "coded" documents for relevance/materiality, label the irrelevant/immaterial as such
- Review the relevant/material and assess potential privilege, mark as appropriate
- Create the schedules listing the remainder ("producible") and privileged (see R 5.8)
- Meet with client to go over, swear
- Serve on other side
- Despite R 5.6, 5.10, 5.14, and Cote there is no inspection
- Other side asks for "production" (ie documents themselves), and you send them over.

Discovery Orders

Exceptions to the General Discovery Process

Anton Piller Order (Main Order) – ex parte order

- It is like civil search warrant
  - Very rare, costly, invasive
- Granted in regular civil litigation
- Used if concern re: **misuse of property OR destruction of evidence**
- Order to discover, detain and retain documents and property which is important evidence (to an action or relevant to an issue in an action) which a party may think the other side will destroy
- Circumvents normal discovery process
- Order appoints an independent law firm to identify and pull out all relevant documents and retain at their office
- **Test**: *Celanese Canada confirmed by Peters & Co Limited v Ward*, also R 6.25, 6.26

1. A strong prima facie case
2. Alleged damage must be very serious
3. Convincing evidence that D has in its possession incriminating documents or things, and
4. P must show a real possibility that D will destroy such material before the discovery process can work
    a. For example, that the other party already shredded docs or hid or tempered with the docs
    b. USE THE MODEL FORM ORDER when doing the order – the order must be comprehensive and clear
    c. See also R 6.25, 6.26

- How are they obtained:
    - P goes into chamber ex parte, no notice, all dependent on affidavits that have not been cross-examined on
        - Because ex parte, must be very careful and candid
- What does the order allow?
    - It appoints an independent lawyer – called an Independent Supervising Solicitor, along with a team of minions – as an officer of the Court
    - ISS can storm into a home or business or even law firm of D and conduct a sweeping search of everything, all paper and electronics, and take it away.

Order for Inspection R 6.26 (needed when something physical needs to be looked at)

- Roof or state of a physical object
- R 6.26 Gives court authority to:
    - Order for inspection of property
    - Order for taking samples, make observations, undertake experiments
    - Order to enter land to allow for above
        - *Monsanto v Schmeiser* – P developed and licensed round up canola seeds (herbicide reisistant), D farmer that grew canola, P believed D was growing round up canola without paying license fee, in Alberta would apply for R 6.26 to test P's belief

Model Orders

- Model orders – make clear what has been changed: ~~deleted~~/<u>added</u> – allows opposing party to focus on what is different or new in order

Discovery from Non-Parties R 5. 13

- Can get a court order requiring non-party to disclose documents if you can show record is:
    - Under non-party's control
    - Relevant & material
    - Producible at trial (not privileged)
- Court is concerned about awarding costs and hassle to non-involved parties

Norwich Order (pre-trail)– equitable remedy

- Can get a court to order for information from a non-party (even before litigation starts) to:
    - Identify wrongdoers
    - Find & preserve evidence
    - Trace & preserve assets
        - Like bank info
- Applicant must show:
    - Evidence of a valid, bona fide or reasonable claim
    - Third part involved in acts complained of
    - Third part is the only <u>practicable</u> source of the information available,
    - Third party can be indemnified for any costs
    - Interest of justice favour disclosure
- *Alberta Treasury Branches v Leahy* 200 ABQB 575, cited in *Rogers Communications v Voltage Pictures*, 2018 SCC 38.

Discovery from Public Bodies

- NOT COURT assisted and NOT under the rules
- Slow, expensive and difficult to enforce
- Can often request documents using access to information legislation i.e. *Freedom of Information and Personal Privacy Act*
  - During litigation, FOIPP exception rules do not apply, so police would have to give the info they have on you without redacting some info.
- Pros:
  - Can get disclosure prior to commencing litigation (helpful if you think other side has done something wrong, but do not have enough info to sue)
  - Can get disclosure that goes beyond pleadings (broader)
- Cons:
  - More grounds for denying access, see *FOIPPA* ss 16-29
  - Can be slow, expensive
  - Less effective enforcement remedies (do not have same effective tools i.e. no court order to compel disclosure)

Questioning

Discovery: 2 steps (in that order)

Step 1: Disclosure & Production of Records
Step 2: Questioning

- Used to be called "Examination for Discovery"
- In US called "Deposition"

General Procedure R 5.25, 5.26

- Court reporter present (records everyone, takes notes, swears in witness)
  - No judge etc- no one from the court
- Witness sworn in (i.e. done under oath) or affirmed (non-religious oath) – no default in AB
- Witness questioned by counsel for adverse party
- Witness can be questioned by their own counsel (to provide further explanation/clarification) – it a tactical move if the witnessed gave terrible answer
- Witness can be questioned further by counsel for adverse party
- **Concerns**:
  - Two parties listening to each other and tailoring their evidence – seek court order to exclude one of the parties
  - Risk of a party being there such that it may intimidate the witness, usually it is their litigation however and they have a right to be there for questioning

When Does Questioning Take Place R 5.20

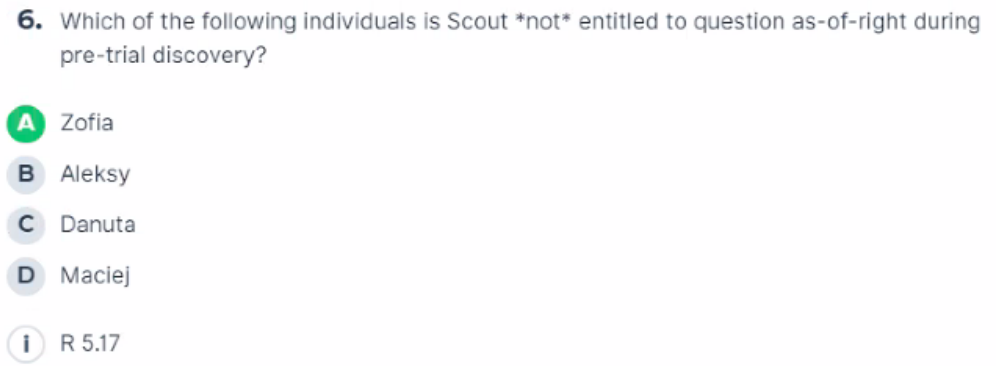
- A party cannot usually question until after their AofR is served
- P: after S/D has been served on P OR time for serving has run out
- D: after S/D has been served
- Practically speaking, always takes place after document discovery (because you want to see the documents before you ask the question)
- You can schedule questioning before Aof R production

Arranging Questioning R 6.15-6.17 – Notice of Appointment

- Technically, if you want to question someone you must serve them with a Notice of Appointment, with a cheque for a "conduct money" allowance R 6.15 – 6.17
    - Money provided by the adverse party
    - The questioning belongs to the opposing lawyer
- "Conduct money" is a per diem for appearing plus the actual cost of getting there, and some other amount like meals.
- If the Notice has been served (typically served on the lawyer, not the party) and the witness does not show up, the court reporter will fill out a certificate you can use to get a court order requiring them to appear
    - The Notice is not a court order, so not contempt if they don't show up
    - But if they do not show up as per order – then in contempt
- But commonly the lawyers work out dates for Questioning and do not require notices of appointment. Nor do they require conduct money, unless the witness is travelling out of town.
- However, if it appears the witness may not appear, you may wish to serve a notice, to paper the records and ensure you may get an order requiring their appearance.

Who Can You Question R 5.17

- R 5.17 includes:
    - Adverse parties
    - Adverse party corp, 1st person is corp representative bc swore AoR (also officers & former officers & former employees)
        - In AB there has the broadest rules to question in this country
    - Litigation rep, and represented litigant if competent to give evidence (can prob show a court a 16 yr old minor is competent vs a young child or coma patient no)
    - Employees & former employees of adverse party
    - Auditors & former auditors of adverse party 5.17(d)
    - **AND** R 5.18 if **KEY evidence** cannot be obtained from parties listed in R 5.17, can get court order or agreement of parties to question a party who "provided services" to the adverse party
        - Requires agreement of parties or court order (very common)
        - Information sought from non-party must be related to the services that non-party provided to the adverse party, *Cogent Group v Encana Leasehold Ltd, 2011 ABQB 335*



        - *Zofia is a shareholder with no role – so no as-of-right entitlement to questioning*

Who is an Adverse Party?

- **Will always be an opposing party** (someone you have made a claim against), **but is broader**, do not have to be opposing parties but **be adverse in interest** i.e. multiple Ds or third parties
    - Need to look at: pleadings, underlying facts & record as a whole
    - If multiple Ds can be aligned in interest or not, if aligned then cannot question each other's witnesses
- *Turta v CPR* – P sued D1 & D2, D1 makes a TPC against X, D1 has right to question X, D2 does not because there is no claim by D2 against X or any other connecting factor that causes them to be opposing parties with conflicting interests
- *CCS Corp v Secure Energy* – question of adverse party is broader, need to look at underlying interests. Procedure: P sues D1 & D2, D1 & D2 do NOT advance claims against each other, P & D1 partially settle, D2 applies for direction

to question D1's witnesses, court allowed (existing Ds can be sufficiently adverse without issuing claims against each other, so can question each other)
- *Golden Estate v Neilson*: claim being advanced by public trustee on behalf of deceased's estate, deceased's mother & deceased's spouse. Ds were granted order to allow questioning of mother and spouse as adverse parties.

Question a Non-Party (not listed in R 5.17) who has Important Info?

- AKA non-part witness – a true witness independent of the action - "No property in a witness" - Can interview a witness, if they are willing
  - They are not party to litigation on opposing party, so you can
  - If you want to talk to a witness from opposing party – call lawyer of opposing party
- How to get a witness on the record? Can serve a Notice to Attend on witness to compel them to attend trial R 8.8, 8.9 (risky do not know what they will say)
- Should you claim against a party for the sole reason of getting discovery (documents & questioning) from them?
  - Risky – can bring an application to strike, which will get costs awarded against you; further *Chevalier* do not have to serve AofR until after application to strike claim determined
- For applications (summary judgment), you can question (ie examine, there a transcript that is filed and on the records – so not really a questioning) them as a witness under R 6.8. Rarely done but useful

Undertakings (promise to do something) R 5.30

- Questions must be relevant & material – new docs can be produce under undertaking
  - Can be enforceable via court order to require compliance under 5.30 – if the party fails to fulfill undertaking
  - If party tries to fulfill the undertaking and can't (here is evidence)– and let OP lawyer – that is okay – no cosequences
- **Must comply with undertaking(when the party's lawyer agreed to that undertaking) OR ask to be relieved by Court**, if not complying with undertaking – the opposing party can get a court order to enforce it - not responding can result in you or client held in contempt of court
  - If getting an undertaking, make sure to clarify it is an undertaking on the transcript

- **R 5.23: party has an obligation to prepare for questioning and bring records likely to be required**
  - R 5.4 corp rep has obligation to reasonably inform him/herself
- 5.30 The choice to give an undertaking is made by party's lawyer, but the actual undertaking made by the witness, so it is different from undertakings in other fields where it's all on lawyers.
- **If witness does not know answer to question, but should have reasonably prepared:**
  - give undertaking to find out answer R 5.30,
  - can be questioned on undertaking after

Undertakings

- **5.30(1)** If, during questioning, a person answering questions

  (a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for questioning, or if as a corporate representative the person had reasonably informed himself or herself (less common), or

  (b) has under the person's control a relevant and material record that is not privileged (**more common – this fills in gaps in discovery**),

  the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.

  (2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

- Undertakings are an essential element of Questioning
- They are used to fill in gaps in evidence or records which are under witness's "control"
  - Ex. In personal injury litigation. Plaintiff claims whiplash and back pain caused by collision

- AoR contains only the treating hospital notes, and a "statement of benefits paid" – list of all insured medical visits P has had
- You notice that 10 of these visits were to back pain specialists, all pre-dating the collision (so not caused by it)
- You ask P, at questioning, if he has ever seen a back specialist before, referring to SBP. Then you request an Undertaking for the P to request the charts of the specialists and give them to you
- Records that are in the possession of (eg) doctors but over which the party has control, are producible (including by undertaking)

- During the Questioning, the Undertaking requests are directed at the lawyer, not the witness, to determine whether they should be granted
- **The lawyer says either:**
  - Yes, we will accept that undertaking
  - No, the undertaking is refused
  - I am taking the undertaking "under advisement"
    - Ie let me think about it and get back to you

Objections R 5.25(2), (3)

- Strategy: tell your client to take a moment before answering question, need to consider whether this is a question to object to
- **Grounds for Objection:**
  - **Privileged information** i.e. "Tell me what your lawyer told you in preparing for questioning today"
  - **Not relevant & material** (too far removed from the issues)
  - **Unreasonable, unnecessary**

    → For a **corp rep**, it would be **unduly onerous** to inform him/herself i.e. go through all employee emails that discuss certain subject
  - Other grounds recognized at law:
    - **Asking for a legal opinion** i.e. "Do you think that driver was driving negligently?"
      - often (annoyingly) lawyers ask witnesses to interpret legal phrases from pleadings
    - **Asking witness to interpret documents** i.e. "Was the default clause in the promissory note triggered by your failure to maintain sufficient insurance over the collateral?"
      - Lawyer: Objection, the document speaks for itself
    - **Asking to speculate on a hypothetical** i.e. "Had this been the case, would you have done so?" "would yiu have borrowed money in 2013 at a higher rate of interest of 28% per annum?"
    - **Asking witness about evidence** i.e. "How do you intend to prove D was using phone during car accident?"
  - Useful resource: "Objections" in Running Your First Questioning (Legal Education Society of Alberta, 2014)

WHAT IF OBJECTION MADE TO APPROPRIATE QUESTION?

- Ask about the ground for objecting, try to resolve at questioning
  - Cannot take question under advisement and provide answers later
- Apply to court to determine validity of objection R 5.25(4)
- In Canada, unlike in the US, the witness does not answer the question objected to

Use of Transcripts R 5.31/Reading In

- Court reporter prepares transcripts with exhibits attached
- R 5.32 NOT FILED at courthouse – protects people's privacy so they may be more forthcoming, however what is read in becomes public record
  - **Contrast with cross exam on affidavit transcripts – transcripts for cross exam are filed – meaning that both parties can use the info from it in the action**
  - **Cross examination is more technical and controlled**
  - For questioning transcripts – the party questioning aka adverse party can ONLY use the transcripts
- Questioning Transcripts: Questioning party (plus other adverse parties that have adopted questions) can "read in" (orally re-enacting the part of transcript) excepts at trial – subject to exceptions (below)
  - Cannot put in excerpts that are so abbreviated or misleading that they would or might be misleading

8. When Scout's lawyer Questioned Aleksy for discovery, Aleksy gave pitch-perfect evidence that helped Garden's case (not Scout's). Garden is applying to summarily dismiss Scout's claim. Can Garden use the transcript of Aleksy's Questioning in support of the application?

A Yes

B No

i R. 5.31.

Reading In Excerpts (*Trail South Development*, 2011 ABQB 151)

- At questioning P makes admission x
  1. At trial, P makes admission x – D cannot read in transcript because it is a consistent statement
  2. At trial, P contradicts admission x – D must challenge P by confronting with transcript from questioning immediately, cannot wait until you are reading in at 3. (rule in *Brown & Dunn*)
  3. At trial, P does not mention x – D CAN read in transcript of P's admission x

- Because the transcript can only be sued by the examining party, Questioning is not too risky
- As examination counsel, you can ask whatever you wish, probe issues, without worrying too much about your own phrasing or asking a question you do not know the answer to (transcripts are not filed at the court)
- After all, the only person who can use the answers is you. The opposing side can't use their own Questioning evidence.

Reading In Excerpt of Corp Witness R 5.29

- P sues Corp D,
- Employee of D questioned,
- Corp rep questioned,
- P wants to read in except from Employee's transcript
  - **Rule**: P must have corp rep acknowledge, under oath, that corp witness evidence = some of corp's evidence (*CDM Direct Mail v Centre For Immigration Policy Reform*)
    - Corp rep has VERY limited grounds for refusing to acknowledge i.e. employee is not a witness of our corp, but a related corp
    - Corp rep has chance to provide additional context
- *CDM Direct Mail v Centre for Immigration Policy Reform*, 2015 ABCA 168 – if corporate witnesses testimony at questioning NOT acknowledged by corporate representative, it is an error for QB Justice to admit it.

Abusive Questioning

- *Holowaychuk v Lopishinsky* – **lawyer performing questioning**
  - repetitious, lengthy questioning;
  - questions were irrelevant and on de minimis issues;
  - lawyer used aggressive & sarcastic tone
- *Landes v Royal Bank of Canada* – **lawyer for witness**
  - unnecessary, excessive interruptions;
  - improper objections "as lawyer, I do not understand";
  - trying to feed client answers

    ➔ It is opposing party's questioning – they have control over situations – breaks, going on and off the record

- **Lawyer As Advocate – Code of Conduct 5.1-2** when acting as an advocate, a lawyer must not
  - (k) make suggestions to a witness recklessly or knowing them to be false
  - (m) counsel a witness to give evidence that is untruthful or misleading
  - (o) improperly dissuade a witness from communicating with other parties or from giving evidence, or advise a witness to be absent

- (s) needlessly abuse, hector or harass a witness

→ Generally, as counsel you should not make any objection at Questioning unless would be willing to stand up and object to the question at a trial in open court.

Remedies

- **R 5.3 If lawyer is acting improper or being abusive, in breach of obligations to be civil** – **end questioning** and apply to court for directions, remedy may be i.e.:
  - No further questioning, or
  - No further questioning without a master or judge or person designated by the Court present
- **Costs** can be awarded against you or your client for improper questioning – *West Edmonton Mall Property Inc*
- Complain to law society for disciplinary proceedings

Communication with Witnesses/Client giving evidence During Questioning

- "It is generally accepted that **a lawyer is not permitted to communicate with the witness during cross-examination** except with leave of the tribunal or with the agreement of counsel" – from code of conduct commentary
- 5.4-1 – a lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive
- 5.4-2 – a lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner

Obligation on Lawyer to Correct Misinformation

- Code of Conduct 7.2-5 if a lawyer becomes aware during the course of a representation that:
  - (b) the client, or someone allied with the client or the client's matter, has mislead an opposing party, intentionally or otherwise, or
  - (c) the lawyer or client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,

    then subject to confidentiality, the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.
- R 5.27 – imposes obligation to correct information provided during questioning that was or has become misleading by way of affidavit
- To handle this in practice:
  - If you think client may have made an honest mistake – interject and say I think my client may have misunderstood the question, afterwards confer with client and if they agree, obligation to correct answer attached to affidavit
  - If misstatement or inaccuracy is related to confidential info, maybe if it is privileged, you cannot step in and clarify privileged info because only client can waive privilege, speak to client afterwards and say they mislead, if client does not agree to disabusing them of the misinformation then you as lawyer have to withdraw

Written Interrogatories R 5.28 (rare)

- Alternative method or substitute of questioning
- Substitute or supplement of oral discovery -only done by agreement or a court order
  - Notices to admit are available as of right – in the action started by the statement of claim (optional for originating application). It is not mandatory – 30% of lawsuits have it. There is no rules and deadlines for sending notice to admit.
- provide written questions to the other side & they provide their answers in an affidavit (eg. Swearing to the truth of answers)
- Only one chance to ask follow questions in writing, or in person **if parties agree.**
- ONLY DONE by agreement or court order
- **If further questioning is needed apply to court.**
- Less effective – gives other side an opportunity to craft answers (the answers are drafted by a lawyer), no opportunity to determine how a witness may appear at trial i.e. sympathetic vs. seem like a liar
  - Parties draft a favourable answer to unfavorable issue
- Similar to the risks in notices to admit and asking for particulars – all answers are drafted by a lawyer with a client consultation – but made more favourable.

Other types of questioning 6.7, 6.8

- **Questioning (cross-examination) on an affidavit, R 6.7**
  - Conducted in the same manner as the standard questioning
  - The difference is that the opening of the questioning starts with asking the witness – will swear that the affidavit is correct that was swon on that date, and your signature, and confirm the context of affidavit are truthful.
- **Questioning in aid of an application R 6.8 (conducted in the form of cross-examination)**
  - Need to keep in mind that the parties are choosing who to give affidavit evidence through. Parties choose based on who they think would be the best witness and who worst.
  - The other party cannot force another side to swear an affidavit for a particular person

Questioning witness before hearing

6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and

(a) *rules 6.16* to *6.20* apply for the purposes of this rule, and

(b) the transcript of the questioning must be filed by the questioning party.

- For example, there is a summary judgement application and opposing party is a company, and the company rep is sworn on affidavit, but you want to question someone who actually sold the deficient product. You can obtain this person testimony using rule 6.8 – risky because it goes on transcript and you do not know the answers they will give – favourable or not to the company.
- Notice of appointment (not a supena)– issues by a party, not the court – for non-party witnesses, so sometimes people do not show up.
- You can question parties for questioning under R 5.17 but only allowed as of right for certain categories of people (current and former employers, reps)
- If the person **DOES NOT** fit into one of the R 5.17 categories → and you want to question them without filing transcript → you need court order or an agreement → otherwise you will need to go through rule 6.8

- **Big Difference:** entire transcript of questioning goes before the court. THE EVIDENCE CAN BE USED BY ANY PARTY

Implied Undertaking of Confidentiality R 5.33

- It is a deemed duty on the parties to keep that information closed withing the proceeding, rather than realised outside of the litigation.
- **Information acquired through disclosure in civil litigation shall ONLY be used in the proceeding unless:**
  - The **relevant court** orders otherwise
  - **The parties agree otherwise, OR**
  - **Otherwise required/permitted by law i.e. imminent risk to public safety**
- Affidavits of Records and standard questioning transcripts are not filed in court (not public records), therefore implied undertaking applies
- If transcript is read in at trial, it becomes part of the public record and no longer subject to implied undertaking
  - Not filed in the court, so do not become public record
- Implied undertaking does not apply to R 6.7, 6.8 (above), which are covered by open court principle
- Implied undertaking does not apply to affidavits, exhibits to them, and cross-examination transcripts, which are filed and become public records.

  → trial is not as popular anymore, these are filed in support of summary judgment applications – therefore public records
- Purpose of Implied Undertaking: encourage people to be forthcoming, we do not allow parties to not answer questions so this provides a form of protection of privacy

Court Application to Relieve Party from Implied Undertaking

- To be relieved from the implied undertaking, you must submit an application to the court which is nominally in control of the record (where the proceeding was happening)

- Basic idea (*Juman*): -The public interest in getting the truth in a civil action outweighs the examinee's **privacy interest**, but the later is nevertheless entitled to some measure of protection. The general idea is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.
- An application to modify or relieve against the undertaking requires the applicant to demonstrate to the court on a BOP the existence of a public interest of greater weight than the values the undertaking is designed to protect. **The undertaking should only be set aside in exceptional circumstances (**e.g., use in another action involving the same or similar parties and issues, statutory exceptions, public safety concerns, impeaching inconsistent testimony or crimes.) Any crime exception requires an application to court.

- Court must balance: TEST
  - Public interest advanced by disclosure, with:
    - *Juman*: Court will lift if there is a statutory override (i.e. *Child, Youth and Family Enhancement Act*), risk to public safety, impeaching witness's testimony
    - *Juman*: detection and prosecution of crimes is not of sufficient public interest to lift implied undertaking rule
  - Public interest advanced by implied undertaking rule: privacy of litigants, full disclosure in civil litigation
    - The court also considers:
      - Are these the same parties in the proceeding you want to take the information from to the proceeding you want to use it in?
        - If yes, the same ppl are fighting – and the element of public exposure is not a concern
      - What is the purpose to which information is to be put?
        - Particularly, if that information is needed for the other party to defend itself against criminal or regulatory proceeding.
- Court held in *Juman v Doucette* that "detection and prosecution of crime is sufficiently important public interest to merit lifting the implied undertaking"
- Other times parties an breach implied undertaking without a court order:
  - Statutory exception *Child, Youth and Family Enhancement Act*), s14
  - Public Safety Risk
- *C*an apply without notice if you think providing other party with notice will result in them destroying or tampering with evidence.
- Can apply if non-party to proceeding i.e. P in lawsuit 1 wants to use transcript from lawsuit 2 (same D in both) to impeach D in suit 1.

Edmonton (Police Service) v Alberta, 2014 ABCA 267

- No implied undertaking in administrative proceedings before the Law Enforcement Review Board (LERB), only a similar duty of implied quasi-undertaking of confidentiality because the process is different from civil litigation:
  - No reciprocal disclosure obligation by person appealing to LERB
  - There is a public interest in transparency of policing that is not present in civil litigation
- Implied quasi-undertaking of confidentiality ceases to apply once LERB hearing concludes
- However, if there is confidential info, a person can apply to seal the record
  - LERB gets the whole record, not excerpts
  - LERB=appeal, akin to judicial review by QB
  - Transparency of police = public good
- **Ratio:** Implied undertaking may apply to administrative proceedings, depends on how much administrative proceedings mimics civil litigation in terms of process & aligned goals/public interests

Questioning Video:

- First: reporter gives witness an option to swear or affirm (no ground need for the choice by the witness)
- Layout: 2 parties on opposite sides and reporter in the middle – implied undertaking, so no public present. No client present for opposing party that is questioning (half of the time the client is there). The witness sit nearest to the reporter.
- The witness has a big book of records in front of him – AoR + disclosure documents – paper or computer is okay
- OP lawyer – let me know if you do not understand the question – so the witness cannot says I did not understand question and go back on their answer + so lawyer does not jump in or feed answers

- OP lawyer – confirms the binding nature of the oath
- Asking the witness to state the name for the record + give the opportunity to pronounce the name
- Background question are common: about general background – this is allowed because it is questioning and not cross-examination.
- Objection: must be done quick – tell client to stop answering and the lawyer must state the ground for objection.
- Using AoR and guide witness through the questioning with it is common
- OP lawyer requested an undertaking by saying that it is not produced but it is relevant and material (can you provide me with terms and condition) from a lawyer – the lawyer agrees.
- Warning by the lawyer: do not interrupt – so the transcript is clean and clear
- Witness cannot ask questions of the op lawyer
- Asking for the commitment from the witness to let know if he remember more – should be phrased as an undertaking to a lawyer – it is for a doc or answer to a question.
- Lawyer should discourage their witness from guessing. But need to be careful when and how they interrupt the witness, so it does not look like guessing.
- Can ask the witness about if they gave that document like an email if the AoR is small, if a lot of docs – ask lawyer whether a specific doc is included.
- Lawyer and the witness can ask for a break. The examining lawyer is being asked and deciding whether the break can be done – the examining counsel tells the reported to be off the record – instructs the reporter.

STOP HERE – QUIZ 3

QUIZ #4

Admissions, Experts & other Evidence

Sources of admissions:

- Failure to defend = admission of facts in pleadings (when you file – there is no issue – same as pleadings – not admitted = denied)
- Facts not admitted in pleadings are denied R 13.12
- Admissions re: authenticity & transmission of documents is admitted by their production (AoR) R 5.15
- Notice to admit

Notice to Admit R 6.37

- Court Form 33 that is served on the other side.
- **Sets out facts/opinion you want admitted**, serve on all other parties
- Notices to admit are available as of right – in the action started by the statement of claim (optional for originating application). It is not mandatory – 30% of lawsuits have it. There is no rules and deadlines for sending notice to admit.
- Receiving parties have **20 days to respond (can be extended by agreement of counsel) in 3 ways** (serve response on all parties):
  1. Admit facts/opinion
  2. Deny facts/opinion & state why (grounds for doing so)
  3. Object to requested admission: state it is an improper admission to seek because it is either
     1) material privileged, or
     2) admissions requested are irrelevant, improper or unnecessary
- Responses are drafted by lawyers
- If you do not respond timely = deemed admission
- Fail to make reasonable admissions = cost consequence → R 10.33(2)(b)
  - Judge will be forced to hear at trial otherwise and penalize if he questions why it was necessary to hear evidence on an issue

Timing

- If you need more than 20 days:
  - Ask the party serving Notice to Admit for an extension

- Confirm in writing
- Why give extension?
  - You have an ethical obligation to grant reasonable requests so long as it does not prejudice your client see *Code of Conduct* s.7.2-1 Commentary 4
  - If you refuse unreasonably, then costs will be awarded against you for the unnecessary court application
- Apply to court for an extension R 13.5

Withdrawing an Admission

Stringer v Empire Life Insurance 2015 ABCA 349

- Facts: lawyer served with Notice to Admit, lawyer was out of country, asked for extension in writing, lawyer for opposing side denied stating it would prejudice his client. Plaintiff replies to Notice to Admit 3 weeks late, seeks application to set aside deemed admissions.
- **Court will consider in withdrawing admissions:**
  - Was admission intentional, inadvertently made or inadvertently permitted to happen due to operation of rules?
  - What explanation is offered for allowing the admission to occur?
  - Has there been delay in moving to withdraw admission? What's the explanation for the delay?
  - Has the applicant provided sufficient evidence that facts may not be true and there is a genuine issue important enough to warrant sending it to trial?
    → Negative consequence: you may need swear evidence from your client – touching the matter you want to withdraw admissions on – then can be cross examined and your strategy can be revealed.
  - Would it cause the other party prejudice that cannot be remedied with costs or other terms?
- In case: P counsel had explanation was out of country, delay was 3 weeks (not a big delay), no prejudice to D because of letter D knew within 20 days that not all facts would be admitted
- **Holding:** ALLOWED. Plaintiff is allowed to set aside deemed admissions.
- **Ratio:** if serving a Notice to Admit do it early in the process, if seeking an extension ask for it early in writing (if they do not give it, then apply to court before 20 day period runs out)

Experts

Expert Opinion

- Litigation privilege attaches
- **Do not need to be filed**, just served at the time of the service. Might be filed down the road if are going to be relied at trial.
  - Reliability – you as lawyer go to a doctor and ask for opinion, they may give you the opinion you want
  - Equity & access to justice – one side with deep pockets may out expert the other side
- Not immediately admissible at trial – **Test for Admissions at trial:**
  - **Step 1:** Logical Relevance (*R v Mohan*)
    1. Relevance
    2. Necessity
    3. Absence of an Exclusionary Rule
    4. Properly Qualified
  - **Step 2:** Legal Relevance – does the probative value outweigh the prejudicial effect of the evidence?
    See *White Burgess*, 2015 SCC 23; *R v Dominic*, 2016 ABCA 114

Expert Reports

- Form 25 – stapled on top of the report
- **Must serve on other party IF party wants to rely on them at trial** R 5.35(1) – concern of trial by ambush
- **Sequence**:
  - (1) party bearing onus (usually P) must serve expert report(s) first R 5.35
  - (2) Other party/parties serve rebuttal, can raise new issues
  - (3) Party bearing onus can serve surrebutal (only to new issues in surrebuttal) R 5.25(2)(c)

- **If objecting to admissibility of report** – best practice is to provide other side with notice of objection before the trial R 5.36
- **Expert reports must be exchanged before a trial date is requested** R 8.34(3)(c)
  - Advise trial coordinator of experts being called to avoid conflict with judge

Types of Experts/Who Files Report?

- **Independent experts (hired guns) Form 25**
  - i.e. medical expert retained to provide opinion evidence for litigation
  - Must provide advance notice of opinion
  - Must be qualified
- **Witnesses with expertise, who were involved in events underlying litigation → Grey area**
  - I.e. treating physician after car accident and now PL sues someone
  - Has knowledge to the events at issue and speaking to them – so technically not hired independently by a PL's lawyer
  - Should provide advance notice of their opinion
  - Prudent to have qualified (but does not always occur)
- **Litigants – no need for Form 25**
  - I.e. doctor sued for negligence, professional engineer employed by corp D
  - no need for proving expert report, can speak to their opinion without one because they are litigants with their experience
  - Advance notice of opinion **not required**
  - Do not need to be qualified
- See *Kon Construction Ltd 2015 ABCA 249*
- In Ontario, expert reports only required for independent (hired gun) experts – *Westerhof v Gee*

Testing Other Side's Expert

- Can question during **discovery process** R 5.37
  - As if expert is an employee of the other party → treat as "evidence of an employee of the party who intends to rely on expert's report" R 5.37(4)
- Can **cross examine at trial** (most important)
  - Party wishing to cross-examine may need to request their attendance, if party proposes to put in report as evidence

→ under the rules it is possible for expert reports to be relied upon as evidence at the trial without the necessity of attendance and testimony of the expert who wrote the report, but you have to notify the other party in writing that it is what is going to happen (because of cross-examination at trial would not be possible

- What if expert changes his/her opinion after reading other side's report?
  - Disclose in writing to the other side R 5.38
  - Similar to ongoing obligations for document discovery & questioning R 5.10, 5, 27 – evergreen discovery rules (have to notify the other party as the discovery things come up)

Using Expert Report at Trial without Calling Expert R 5.39, 5.40 (RARE)

Procedure:

- A party can provide notice to the other side that it would like to have the expert report entered as evidence without calling the expert
- Other parties have 2 months to respond & say:
  - Object to all or part of the report being put into evidence; OR
  - If it would like to have an expert attend for being cross-examined
- **DO NOT file an expert opinion at courthouse unless procedure for admitting it as evidence has been followed** – *Henderson (Estate) v Arnett* – other side can apply to have it purged otherwise

Medical Examination R 5.41

- Is party's mental/physical condition at issue – 3 scenarios –
- if the plaintiff wants to use medical evidence – must submit to examination

- medical rules are just special case of the general expert report rules
  1. Parties can agree on health professional to examine party
  2. Court can order 1 or more health professionals examine party
  3. IF P has been examined by health professional of his/her own choosing "who will or may be proffered as an expert" THEN court can order P be examined by 1 or more health professionals selected by D

IF YOUR CLIENT IS SUBJECT TO A MEDICAL EXAMINATION

- If requested, your client must provide a report of every medical examination previously or subsequently made of the physical or mental condition at issue (even though those would have been subject to litigation privilege – this rule overrides that → D's expert has a right to see those reports to establish own opinion based on those reports)**R 5.44(3)(b)**
- I.e. statutory waiver of any privilage

- **(3)** The party causing the medical examination to be conducted
  (a) must, on request, deliver promptly to each of the other parties a copy of a detailed written report of the health care professional's findings and conclusions, and
  (b) is, on request, entitled to receive promptly from the person examined a report of every medical examination previously or subsequently made of the physical or mental condition of the person resulting from the injuries sustained or the mental or physical condition that is in issue.
  - If you are a P and you have put your medical condition at issue then there is a statutory waiver of privacy on medical records related to the issue
  - D's expert has a right to see P's prior reports that were made
- Concern is your client, P, will be sent to a doctor working for D **so client can elect for one of the following safeguards** R 5.42(1):
  - Have additional healthcare professional present
  - Videotape medical exam
  - Make word-for-word recording
- Court can limit medical exam OR compel party to undergo tests, give samples etc… R 5.44(2), (5), unless
  - R 5.3(1) court can waive any right if expense, delay, danger or difficulty is grossly disproportionate to the benefit
- Your client is entitled to a detailed report by health professional R 5.44(3)

MCELHONE(LITIGATION REPRESENTATIVE OF) V INDUS SCHOOL, 2019 ABCA 97

BACKGROUND:
- Plaintiff injured at school while playing badminton
- Plaintiff and defendant agree plaintiff should undergo vocational testing by psychologist, but disagree on scope of testing, e.g., can psychologist ask about birth control?

ISSUE: Should the court limit the length of an examination or the types of tests carried out by a health professional?

DECISION: No

Court has authority to place such limits on a health professional's examination if there is compelling reason including (but not limited to) a serious risk of injury

CA holds it was an error for the QB justice to place limits on psychologist's vocational assessment because:
- onus to show compelling reason on party seeking to limit medical examination (here, the plaintiff)
- Plaintiff did not produce any evidence

Ratio: the court will respect the wisdom of medical profession
Court has authority to place limits on a health professional's examination if there is a serious risk to the party being examined and a compelling reason to do so

Definition of Healthcare Professional

- Definition in appendix to Rules of Court

- (a) a person entitled to practice a profession as
  - (i) a member of the College of Physicians and Surgeons of Alberta under the Health Professions Act,
  - (ii) a chiropractor under the Health Professions Act,
  - (iii) a dentist under the Health Professions Act,
  - (iv) an occupational therapist under the Health Professions Act,
  - (v) a physical therapist under the Physical Therapy Profession Act,
  - (vi) a psychologist under the Health Professions Act, or
  - (vii) a registered nurse under the Health Professions Act,
- (b) a health care professional who is a medical practitioner, chiropractor, dentist, occupational therapist, physical therapist, registered nurse or psychologist who is regulated, registered or certified in that capacity in another jurisdiction and who is agreed to by the parties or approved by the Court, or
- (c) a person appointed by the Court who is qualified to conduct a medical examination

Adacsi v Amin 2013 ABCA 315

- P sues landlord for injuries sustained during fire
- P's disability might be result of injury OR genetic disease
- Issue: D requires P to undergo blood test to see if she has genetic disease. Can D do that?
- ANSWER: YES
- **Decision:** court can compel under R 5.44(2) for the party to provide a "sample", however there was no affidavit evidence suggesting P is fearful of knowledge from blood test or would have a psychological impact
- *Quaere* – would such evidence changed the outcome – not likely because it would be inequitable and unjust to D to deprive him/her from getting the test done because evidence of fear of finding out about decease (aka harm) is not grossly disproportionate to the benefit

Drapaka v Patel

- R 5.35 P has to provide D with expert report first
- R 5.41 D has right to request examination of P by health care professional
- Issue: can P require D to decide whether to elect to use R 5.41 before P submits expert report?
- **Ratio:** D can wait until after P provides report to decide whether to elect to use R 5.41

Experts - Miscellaneous

- Parties are limited to 1 expert/per issue, unless the court orders otherwise R 8.16
- Court can appoint its own expert R 6.40-43 eliminates expert who is defendant or plaintiff friendly.
- R 10.54 Court can order person be taken into custody for purposes of medical examination if person:
  - In contempt of court
  - Suffering from a mental disorder
  - Likely to cause harm (to themselves, others) etc…
    NOTE: if you suspect party may become violent in court, provide clerks with advance warning so they can arrange to have security personnel in court
- Will have clients undergo medical examination if injury is minor and there is a question as to its seriousness by Assessment by Certified Examiner under *Minor Injury Regulation*, AR 123/2004 of whether or not an injury is a 'minor injury' and thus subject to a cap on recovery of non-pecuniary damages (pain & suffering)

Exceptions for when Non-Adverse Party Can Read-In Excerpts R 8.14

- Usually evidence can be read-in by adverse party that questions witness, but
- **R 8.14** Court can permit a party to read in evidence of witness from questioning, if witness is:
  - Dead
  - Unable to testify in person because of accident, ill health, disability
  - Unwilling to take oath/answer proper questions
  - Other sufficient reason

Questioning/Evidence can be Taken for Future Need (*De Bene Esse*) R 6.21 – speeds things up

- Both parties can use this rule – the opposing party and your party
- Done early in litigation
- Evidence taken in case of future need
  - Witness may die
  - Witness may be too sick to testify at trial
  - Witness may leave jurisdiction
  - Cost & inconvenience of bringing witness to testify live disproportionate to benefit of testimony
  - Other good reason
- Person can be questioned under aoth, transcript kept

Questioning/Evidence Outside Alberta R 6.22 - COURT ORDER

- only issue when the party **does not agree** to questioning OR the party is a true witness so you need a supena
- Can have a witness questioned in another jurisdiction if:
  - Witness is too sick to travel to Alberta for trial
  - Witness likely to die before trial
  - Witness cannot be compelled to attend trial in Alberta
  - Cost & inconvenience of bringing witness to testify live disproportionate to benefit of testimony
  - Other good reason
- Need to prepare court order that complies with Form 31
  - Can request assistance from foreign judicial authority using Form 30 (order compelling attendance)
  - Alberta court under obligation to offer assistance to foreign judicial authorities who wish to question parties in Alberta, R 6.24
- Transcript of questioning provided to clerk of court R 6.23(3)
- Questioning in a foreign country, check with embassy, in an inquisitorial system questioning needs to be carried out by a local judge and country can be sensitive to interference with judicial process

Evidence Other Than Oral Testimony at Trial R 8.17

- General rule at trial is evidence is elicited from witnesses through oral testimony R 8.17(1)
  - Reasoning: judge can observe demeanour, make findings of credibility. Gives adverse party right to cross-examine witness.
- Court can order evidence be provided in another form, in particular:
  - Read Ins: Use of transcript from questioning under R 6.21 (de Bene Esse), 6.22 (questioning outside of Alberta)
  - Use of affidavit evidence
- Court will protect adverse party's right to cross-examine the witness

Apologies – Alberta Evidence Act

- 26.1(1) In this section, "apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.
- (2) An apology made by or on behalf of a person in connection with any matter
  - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,
  - (b) does not constitute a confirmation or acknowledgment of a claim in relation to that matter for the purposes of the *Limitations Act*,
  - (c) does not, notwithstanding any wording to the contrary in any contract of insurance and notwithstanding any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and
  - (d) **shall not be taken into account in any determination of fault or liability** in connection with that matter.

- (3) Notwithstanding any other enactment, **evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability** of the person in connection with that matter.
- (4) This section does not apply to the prosecution of an offence.

But see *Robinson v. Cragg*, 2010 ABQB 743!

Chambers

What is Chambers?

- Chambers – where you go when you need some kind of court order prior to trial
- Also can refer to a court room
- A judge's chambers is his or her private office in the courthouse
- But also refers to a regular courtroom, and it is said to be chambers because of the nature of the matters being heard and the manner in which they are argued
- Generally, **regular chambers** is a courtroom being used for the daily hearing of short, **interlocutory applications** on a list – shorter than 20 mins
- **Special chambers** is a courtroom being used for longer non-trial matters that take 2+ hours

What kind of stuff?

- Pre-trial. Trials don't happen in chambers
- So some examples:
  - Service applications
  - Compelling answers to Qs, Undertakings
  - Getting deadlines, timelines
  - Foreclosures
  - Civil restraining orders
  - Summary judgment! → could be transferred to special chambers if it is taking longer than 20 minutes

Applications on Notice – "notice of motion"

- Default rule → notice is required – do not litigate by ambush
- You have to let opposing parties know when you are making a chambers application by Form 27 and Form 49
- Applicant serves Application (Form 27) "Notice of motion" + Affidavit in Support (Form 49)
  - On all parties & all parties affected by application R 6.3(3)
  - "No evidence, no order" – *First Investors Corp v Quinpak* → *AFFIDAVIT IS A MUST*
  - Application only lists the applicant and the other side is respondent – specific party from who you seek the relieve – do not need to list all Ds
- **How much notice? Timing: 5 days** or more before application is scheduled to be heard or considered R 6.3(3) – meaning 5 full days before application Mar 23 is last date if scheduled for Mar 28
  - March 23 – Day 1/ last day to serve in time → numerical days - does not matter if a holiday
  - March 24 – Day 2
  - March 25 – Day 3
  - March 26 – Day 4
  - March 27 – Day 5
  - March 28 – Application scheduled
  - **Counting days rule is R 13.3**
- Court can vary the time limit (abridge or shorten) **R 13.5** or adjourn the matter
- Respondent must serve reply affidavit "a reasonable time before application is to be heard or considered" R 6.6

- AND/or you can wish to cross-examine the applicant's affidavit first, which will require an adjournment of existing hearing date.
- Notice period for originating applications is longer

Without Notice (Ex Parte) Applications R 6.4

- Can make application without notice if
    - no notice is necessary i.e. application for substitutional service
    - Giving notice might cause prejudice to applicant i.e. Anton Piller orders, civil restraining orders (might aggravate situation), attachment orders (suing on debt, worried party may get rid of valuable property)
- Hearing will be recorded (no matter what) including if only one party is present R 6.13
    - This was previously not always the case ("private chambers")
    - That practice persists in some places, notably Calgary Masters, but is not common because it does not comply with the rule. Why? Open court principles, the info might needed for the appeal, other party should know what has been said in their absence
- **Heightened duty of candour** – Code of Conduct R 5.1-1: must be accurate, candid and comprehensive in presenting the client's case & creates an obligation on lawyer to disclose all material facts known to the lawyer favourable or unfavourable (cannot omit as you would be able to in an on notice application) – would be put in affidavit

Heightened duty of candour, see commentary to *Code of Conduct,* R 5.1-1:

> [8] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

-

Secure 2013 Group v Tiger Calcium

- These were attachment orders/Anoton Piller, ex parte
- "An applicant proceeding without notice to the opposing party is required to act with the utmost good faith and make full, fair and candid disclosure of the facts and this disclosure must include facts which would mitigate against the application"
- "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld"
- "Said another way, counsel is ex parte applications bear a heavy obligation to ensure that appropriate safeguards in place to protect the integrity of the legal system"
- If you don't!
    - Order set aside
    - Indemnify costs
    - Cause of action in tort
    - Professional consequences
- Be candid

Affidavit Evidence

- Affidavit – court documents containing evidence, used when appearing before court and want court to make a decision, witnesses write out and swear on truth of evidence
- Form 49 & **technical rules** R 13.19-13.21
    - Consecutively numbered paras

  - State name & residence of affiant
  - Written in 1st person
  - Sworn before appropriate person (commissioner of oaths or notary public), identify this person & be signed by this person
- **If it exceeds 25 pages**, tab exhibits or consecutively number pages with exhibits. They are stemped and have a name "A" and signed by commissioner of the affidavit.
- **Do not swear an affidavit yourself when acting as a lawyer.**
- **Commissioners for Oaths**: if swearing a doc that will be used in Alberta it is ok, but if to be used in another province will need a notary public
- **Commissioners for Oaths and Notary Publics**: someone takes oath and swears before you, you are signing off that this is done, but you do not know that what they are swearing to is true
- In Alberta, **lawyers and students-at-law are**:
  - Notary publics, *Notaries Public Act* s 3
  - Commissioners for Oaths, *Commissioners for Oaths Act* s 2
  - See *Evidence Act* ss 15-17
- **If clerk is refusing to file** an Affidavit because of an irregularity – get a fiat R 13.38 (endorsed right on doc), allows it to be filed notwithstanding technical deficiency – "Let the within [document] be filed/registered/processed notwithstanding [the technical deficiency]"
- Do not swear evidence submitted to court – potential to be called as witness, results in you being forced off case

8. Scout wants you to apply for Summary Judgment under Rule 7.3. Who should swear the affidavit in support of the application?

A You

B Your assistant

C Scout

i Lawyers should never swear. Assistant affidavits problematic under R 13.18 when applying for final judgment. Party affidavits are best.

Questioning on an Affidavit R 6.7 – right to cross examine of affidavit

- Wide right to cross-examine on an affidavit *Smith v Coperstone Capital*
  - "It is no answer that the applicant will be inconvenienced by any delay where the request to cross-examine us made in a timely way"
  - Questions do not strictly have to be about affidavit. You can ask about the motion in general. But questions must be relevant to the extant application (not just anything) (though if it is a summary judgement application, then a lot of leeway)
- **Transcripts will be filed, so more risky than Questioning**
- **BUT more limited ability** to ask for undertakings than in questioning in discovery.
- **Undertakings appropriate where**:
  - Affiants refer to information/docs in their affidavit
  - Affiants could only know information in their affidavit if they had consulted docs/information
  - The information is important to the issue and having affiants inform themselves <u>is not overly onerous</u> & <u>is going to significantly assist the court</u> in determining the application (*Rose Estate*)

Compelling Attendance at Questioning (Discovery vs Affidavit)

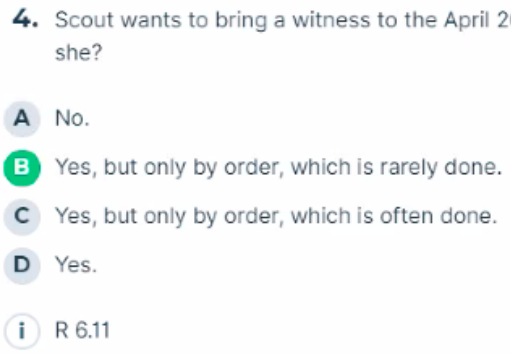
	Questioning During Discovery	**Questioning on Affidavit**

Serve Notice of Appointment	R 5.21(1) Form 29	R 6.15 Form 29
Time for Serving	20 days or more before questioning, R 5.21(2)	5 days or more before questioning
Payment of Allowance	R 5.21, 6.18 Schedule "B" – Amounts	R 6.18 Schedule "B" - Amounts
Apply to court to compel attendance	R 5.21, R 6.38	R 6.38

- Entire transcript is filed for questioning on affidavit R 6.20(5)(b) vs excepts read in for discovery questioning R 5.31

Other Types of Evidence for an Application R 6.11

- A party can rely on other types of evidence, which includes:
  - Affidavits
  - Written transcript of questioning done specifically for application R 6.8 – entire transcript filed
  - Read-ins from transcript of questioning (done during discovery) by adverse party interest R 6.11, 5.31
  - Admissible records in an AOR under R 5.6
  - Answers to Undertakings (prudent counsel should file answers)
  - Answers to written interrogatories
  - Answers to notices to admit
  - Live oral evidence (rare) R 6.11(1)(f) and (g) – if you want to use evidence from another action – associated lawsuit – you can do so with court's permission



Order of Applications in Chambers

- **First**:
  - Adjournments by consent (all parties agree to adjourn) or sine die (adjourn to no date or a date)
    - Can adjourn by phone, fax, online up to 3:30pm the day before hearing, see Notice to the Profession Dec.23, 2015
  - without notice (ex parte)
    - In Masters, often sub service etc
    - In Justice, often civil restraining orders
  - consent orders (application is made, parties negotiate, all parties consent to order, court reviews and considers whether it is appropriate to grant)
  - Note seniority determines order of appearance
- **Second**:
  - the list (scheduled matters): 10 mins or less make application when called,
  - 10-20 mins ask to go to end of the list,

- over 20 mins schedule a special chambers (get a half or full day in front of a master, takes a while to get one, good strategy for delaying by a party) → dueling affidavits, cross-examination – will likely take longer – go to special chambers

Making an Application

- **Stand up!**
- Identify yourself, this is my matter, I represent [party X – my friend [Last Name]]
- Identify any other counsel present, who they represent
- If parties are not present say:
  - Whether they were served (bring evidence if not filed with court already)
  - Do you anticipate them showing up (if so ask to stand matter down)
  - Whether they will be affected by application
- **THE JUDGES DO NOT REVIEW YOUR MATERIALS BEFORE CHAMBERS START**
- What the lawsuit is about (1 sentence)
- What you are applying for (1 sentence)
- Is this being consented to (you will be appearing among first ppl)? Opposed?
- Make your argument

How to Address Judges/Masters

Person Being Addressed	Proper Address
Provincial Court - Judge	**Your Honour** **Madam/Sir**
Queen's Bench – Masters	**Master [Smart, Schulz]** **Madam/Sir**
Queen's Bench - Justice	**My Lord, My Lady** **Your Ladyship/Your Lordship** **Madam Justice [Veit]/Mr Justice [Lee]** **Madam/Sir**
Opposing Counsel	**My learned friend**

What if you miss an Application?

- **R 9.15(1)** a court may set aside, vary or discharge an order (following the application) (final or interlocutory) that was made:
  - Without notice to one or more affected parties
  - Following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing
  - Example: in Chambers if one of the parties is missing, the court will put the matter at the end of the list and try to get hold of the lawyers. If applicant did not show, it is likely to be adjourned sani die
- When application is resolved between the counsel (not court order) or if application is withdrawn and the parties are not proceeding with it → **there is no form that is filed**
- **R 9.15(2)** unless the court orders otherwise, the application must be made **within 20 days** the earlier of (to vary or discharge the order the order against them under rule 9.15(1)(a) order without notice – 20 days to set aside the order that they do not like)
  - The service of the judgement or order on the applicant, and
  - The date the judgement or order first came to the applicant's attention

Chambers Options

- If it can be heard by a judge or master, will be heard by master
- Queen's Bench:
  - Civil chambers – judges and masters
  - Family chambers
  - Commercial list (special judges for this) i.e. corporate insolvency, receiverships
  - See practice Note June 4, 2015 and Notice to the profession re: interim expansion of commercial list powers
- Provincial court also has chambers – call the clerk
  - Civil sits once a week (Tuesday in Edmonton)

Master's Jurisdiction

- **AB has a rule any matter that can go to a Master, must go through a Master**
- Jurisdiction set out in the *Court of Queen's Bench Act* ss 8-16 and notice to profession sets out limits of they can do
- Can hear:
  - **All applications to strike and summary judgement applications are filed in master chambers (the only exception to this is if relief was sought on top of dismissal or striking that was outside of master's jurisdiction like injunctive relief)**
  - Many interlocutory, procedural matters (including ones that resolve the claim i.e. summary judgement)
    - See Notice to the Profession, December 8, 2016
  - Matters by consent s 9(1)(b)
- **Cannot hear** (CQBA s 9(3)):
  - Trials
  - Contempt proceedings
  - Applications for injunctions (mandatory relief) (other than pre-judgement attachment orders under *Civil Enforcement Act*)
  - Things required by statute to be done by a "judge"
- **Master generally does not have jurisdiction to determine disputed or contentious questions of fact** i.e. affidavits with stating opposing facts. **Exceptions:**
  - One party's evidence is destroyed on cross-examination i.e. questioning on an affidavit
  - Evidence is entered rendering other party's evidence completely non-credible
  - Parties agree to have the Master decide the matter *Court of QB Act* (CQBA) s 9(3)(b)
    - *Schaffer v Lalonde* –held that this power should be used broadly

Appeal from a Master

- Appeal from a Master to a Justice CQBA s 12
- **Timing R 6.14(2)**:
  - File notice of appeal within **10 days** of order being **ENTERED and SERVED** (it is different from appeal from Justice to CoA)
    - Entered judgement takes some time – parties can talk and negotiate – so all this negotiation does not count towards the 10 days – only starts after it is entered
    - You need prepare a huge package of document for Special Justice when appealing Master's decision – must be done quickly
    - For appeal of Justice's decisions – the clock starts on pronouncement of the judgment – so way quicker
  - returnable (scheduled to be heard) in a reasonable amount of time not to **exceed 2 months**
- Can only rely on new evidence in appeal if judge is satisfied it is relevant & material R 6.14(3)
- Standard of Review (SOR) = correctness *Bacheli v Yorkton Securities Inc*
- **Benefits of Appeal (basically, do-overs):** not like other appeals – no deference to previous decision because judge has potentially more evidence than master did, allows for party to get a 'second kick at the can'

- you can clean up your case – get new, better affidavit

South Side Woodwork (1979) Ltd – Master Funduk (role of masters)

- there is a pecking order – masters occupy bottom rung can be overturned by judges "does not permit little peckers to overrule big peckers"

Management of Litigation

Case Management Tools

- case management is rare in AB, US – all cases are under management
- In Canada, the lawsuits are mostly party controlled/managed

- Designed to ensure proportionality of legal process. Recall ARC R 1(4).
- The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose them proportional to the reason for granting or imposing it.
- Concerns:
  - Judicial Efficiency – ensure limited resources used for pressing matters
  - Access to Justice – delay & costly process will prevent some litigants from receiving remedies to which they are entitled
  - Peace – resolve disputes quickly, remove source of tension between litigants, and stress & uncertainty cause by ongoing litigation
  - Truth – hard to ascertain what actually happened as more time passes (documents destroyed, memories fade)

Proportionality

- Streamlined process for matters where claim falls under threshold amount *Provincial Court Act* s 9.6(1)
- R 1(4) – when granting a remedy, court will grant on proportional to the reason for granting it
- R 4.1 duty on litigants to manage their dispute and plan for a timely and cost-efficient resolution
- Concerned about access to justice issues – long delay in hearing a claim
- Judicial economy – allocating public resources in a principled way
- Alternative Dispute Resolution (ADR) R 4.16

Reasons For Delay

- Lawyers take on so much work because of billing pressure, client needs, novelty (working on something and new file sounds more interesting); take on too much because they expect many matters will settle prior to trial
- Another reason to not push litigation forward: client interests
- Big emphasis in civ pro is to keep matters moving forward

Case Management Plan R 4.5 – Litigation Plan/Procedural Orders

- The parties can ask a court to give an order aka litigation plan
- Sets out deadlines for:
  - Document discovery
  - Completion of questioning
  - Production of expert reports
  - Estimated trial date (Form 27)
- Usually developed by P, useful to force D through litigation process – if they do not comply, get a court order to comply, if still don't comply then contempt proceedings
- **Required for "complex" cases, optional for "standard" cases**
  - **Within 4 months** of case being classified as complex, parties must agree to case management plan R 4.5
  - In standard case, can propose litigation plan and apply to court to have it implemented R 4.4

Standard vs. Complex Cases R 4.3

- Parties decide, if they cannot (aka disagree), then court decides
- Cases become complex by the agreement of the parties or by obtaining a court order
- Not all complicated lawsuit get designates as complex cases for case management
- Default → standard cases. They do not require litigation plan
- Default: standard case R 4.3(3), if no decision is made within 4 months of S/D being filed
    - If, within 4 months after the date a statement of defence is filed, the parties do not agree on whether the action is a standard or complex case, and the Court does not otherwise order, the action is to be categorized as a standard case.
- Considerations include R 4.3(2) to decide whether it is complex or standard case:
    - $ value of claim(s)
    - # of claims, 3rd party claims
    - # of parties
    - # of documents
    - Expected length of questioning
    - Experts? Medical experts?
- Old terminology: streamlined, long trials, very long trials

Court Assistance with Case Management

- **Court order to "facilitate proceedings" R 4.9**
- **Case conference R 4.10** – sits down with parties to resolve procedural matters, usually with self-rep litigants (thinking they can do trial by ambush). Supposed to be a one or two time thing, but if ongoing then case management
    - One time case management meeting
- **Case management R 4.12** – judge is appointed and will hear all procedural aspects of the litigation

Case Management Judge (most intense version court oversight)

- **SINGLE Case management judge hears ALL procedural** aspects of piece of litigation and conducts conferences with parties to move litigation forward R 4.14
- **Required for:**
    1. Class action proceedings R 4.12(3)
    2. Cases involving civil juries R 8.2(5)
    3. Cases involving family law matters *Family Law Practice Note 5* – allegations of sexual abuse
- **Case management judge does NOT hear trial of matter (by rules – mandatory excuse from conducting trial bc they are not coming in clean, too involved with the case) unless all parties agree, R 4.21**
- See Notice to the Profession and Public, "Civil and Family Case Management" (June 27, 2016) – includes request form for case management
- Case management has been disfavoured in AB – 2010-2020 QB was understaffed and overworked – the court made a lot of changes -reduced availability of ADR (JDR) & case management

Which Cases end up in Case Management?

- **Up to Chief Justice (CJ) or Assistant Chief Justice ACJ** to decide to put litigation in case management, unless falling into required categories, they **will consider:**
    - R 4.13
        - (a) to encourage parties to participate in dispute resolution process
        - (b) to promote and ensure the fair and efficient conduct and resolution of the action
        - (c) to keep the parties on schedule
        - (d) to facilitate preparation for trial and scheduling a trial date
    - From Notice to the Profession (June)
        - Multiple parties
        - High conflict litigants
        - Long delay already
        - Complex issues
        - Many applications

        - A judge recommending appointment of a CM judge
- **Benefits:**
    - Judge is familiar with the case
    - If a litigant is being unreasonable, they will notice
    - Stops a party from dragging their feet
- **Case management judge will not be trial judge**, unless all parties agree because you want trial judge to be unbiased
- Notice to the Profession and Public, "Civil and Family Case Management" (June 27, 2016) includes request form for case management

Composition of the Court of QB

- *Court of Queen's Bench Act*, s 3(1), court consists of:
    - (a) chief judge, called chief justice of the court of QB
        - Recently amended to allow for a second, so may have two in the future
    - (b) 2 associate chief judges, called associate chief justice of the court of QB
    - (c) 65 other judges, called justices of the court of QB
    - (d) the supernumerary judges of the court
- Current CJ – Honourable Mary T Moreau retiring May 2017
- Current Associate CJ – Honourable Kenneth G Nielsen (Edmonton) & Honourable John D Rooke

Case Management Counsel (quasi-Masters – authority between the clerk and the Master)

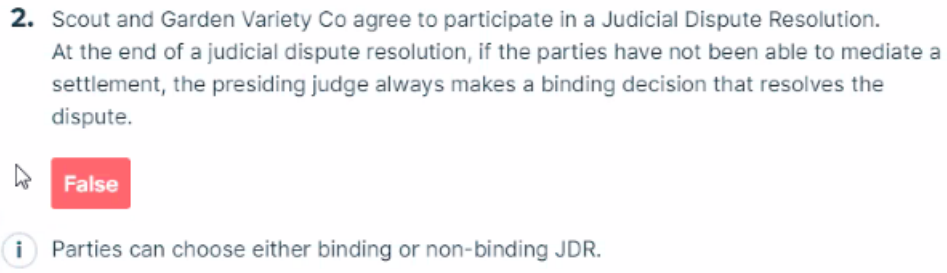
- Their decisions are merely recommendations rather than orders
- Have these because of a shortage of judges, a couple lawyers are paid by province they help schedule conferences to meet with judges and make recommendations to the parties
    - If they make a recommendation and you do not comply, you need to have a good reason for not complying
- Assist with case management
    - Narrowing issues
    - Scheduling
    - Discouraging inappropriate, unnecessary applications
- Other tasks
    - Setting agenda for case management conference
    - Signing orders under s 9.4(2)
    - Preparing consent orders for CM judge to review
    - Vetting applications
- See Notice to the Profession and Public, "Civil and Family Case Management" (June 27, 2016) HERE, *Court of Queen's Bench Act*, s 16.1-16.2

Alternative Dispute Resolution (ADR)

Types of ADR

- **Mediation (non-binding)** – consensual, non-binding, often parties end up with provincial mediator, unless write letter to court stating why you do not want mediation, possible to get mediators through cultural/religious affiliations
    - Settlement/ resolution focused
    - Focused on achieving resolution rather than merits of the lawsuit
    - No annexed to the court, usually lawyers get hired to do it

- **Arbitration (binding)** – often used between employers & unions, commercially (private→avoids class action proceedings). Annexed to the court (JDR), done by justices. Or can get private arbitration performed by retired judges or senior lawyers – more of adjudicative role (adjudication focus)
- **Judicial Dispute Resolution** R 4.17 -4.21 – this is free (mediator or arbitrator paid to be there), judge listens
  - Ppl feel that they got their date in court because judge is there and comments on merits on the lawsuit
  - Judges have different styles of doing JDR and not experts at this like mediation and arbitration.
  - Parties must agree to JDR and to the process that will be followed R 4.18
    - What issues?
    - What parties?
    - Binding or not?
    - Caucusing?
    - What will be provided to judge? I.e. briefs, expert reports
  - **Info provided for and during JDR is confidential R 4.20 and without prejudice and cannot be used in litigation later**
  - JDR judge not involved in subsequent proceedings unless all parties agree R 4.21
  - Booking procedures and JDR request form
    - Priority registration: 1) family litigation, 2) matters previously on wait list, 3) matters certified ready for trial, 4) everybody else
- In provincial court – there are mediators annexed to the court -mediation department (not lawyers), but everyone hates it – they are worse then the alternative **pre-trial conference** which have high resolution rate (judges make the comments on the merits of the suit and tell parties how they might decide it during actual trial)

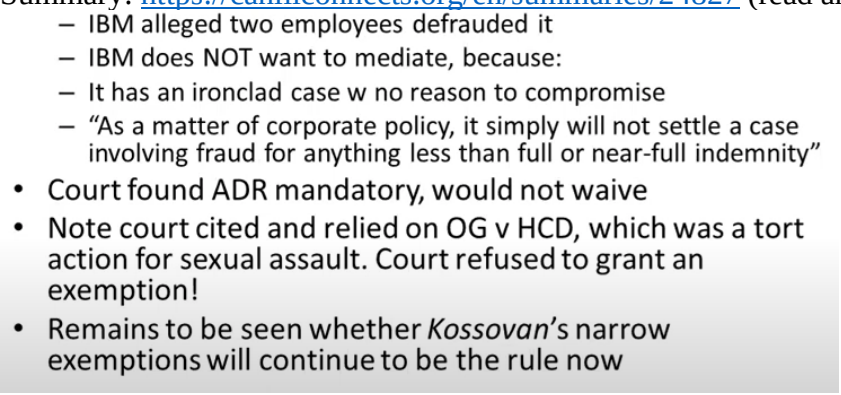


Rule of Court Make ADR Mandatory R 4.16(1)

- it has to be done sometime before trial – so hard to track success rate – if it actually settles it – a lot of money are already spent bc it is done right before the trial
- R 4.16(1): the responsibility of the parties to manage their dispute includes **good faith participation in one or more of the following dispute resolution processes** with respect to all or any part of the action
- This is a requirement to attend ADR and not the requirement to reach resolution
- **Mandatory requirement can be waived if:**
  - ADR tried prior to litigation
  - ADR unlikely to work (you have to get court order to do it, cannot be done under agreement of the parties)
  - Other compelling reason i.e. constitutional litigation hoping to be precedent setting, litigants with history of domestic abuse
- Prior to scheduling trial, litigants needed to show ADR requirement complied with or waived R 8.4(3)(a)
  - Similar requirement when court schedules trial R 8.5(1)(a)
- **Notice to Profession July 2, 2019 – the court indicates that it would pilot enforcing the mandatory ADR requirement again for a period of one year. That has been extended.**

IBM v Kossovan

Summary: https://canliiconnects.org/en/summaries/24827 (read and select what you need – Important case)



The Court reviewed Rules 4.16(2) (a) – (e) and case law from other jurisdictions to examine situations where a waiver of the Dispute Resolution requirement is appropriate, noting that each case must be assessed on an individual basis and that the threshold for obtaining such exemptions is high.
Based on its interpretation of the Rules, its review of the purpose of the Rules, and its review of case law in other jurisdictions, the Court denied the Plaintiff's Application to waive the alternative Dispute Resolution requirement.

[30] New Rule 4.16(2) addresses those instances where the Court may waive the responsibility of the parties to engage in the dispute resolution process. In attempting to determine which types of matters may fall under the exemptions established under Rule 4.16(a)-(e), a summary of the findings of those provinces with mandatory alternate dispute resolution may serve as a helpful resource. A review of these cases, as well as academic commentary, reveals the following:

- The fact that the parties consent to an exemption from mediation is not a compelling reason to grant an exemption: *Ross v. Seib* (1996), 1996 CanLII 7114 (SK QB), 145 Sask. R. 62 (QB) paras. 7-8;

- maintaining a position that one party is simply unwilling to settle the action is an insufficient reason to grant an exemption: *Cassidy v. Westwood Holdings*, [2000] O.J. No. 5396 (Ont. S.C.J.) (Master) at para. 2; *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (Ont S.C.J.) at para. 6;

- an exemption should not be granted on the anticipated strength of one party's claim: *Pelham*, at para. 8;

- a party's belief that he or she may not be able to meaningfully participate is not necessarily a reason to exempt the party, unless that party is incapable or disabled from participating: *O.(G.)*;

- application for summary judgment does not, of itself, entitle an exemption: *Pelham*, at para. 10;

- a complex case that involves such things as a catastrophic claim, a large exposure, multiple defendants, cross-claims, and third-party complaints for indemnity, coverage issues, and other complex obstacles to settlement may qualify for waiver;

- an exemption may be granted where one party lives in a foreign jurisdiction and the expense of attending the mediation outweighs the probable advantages of the session: *Ross* para. 9; but see *Wheataliba Farms Ltd. v. Alhauser*, 2010 SKQB 391, 363 Sask. R. 287, and *Chase* where the courts refused to exempt a party from attendance at mediation, even though the party resided outside of Canada;

- forcing mediation of an individual action before it is known whether a class action would be certified would be unreasonable and unproductive and is reason to grant an exemption: *Dumoulin*, at para. 6;
- issues of abuse or violence where it would be detrimental to the emotional, mental or physical health of either party to participate and a mediator trained to address the parties' concerns is not an option, may qualify for waiver: *O.(G.)*;

[31] More circumstances outside this list will likely arise in which an exemption may or may not be granted. Though exemptions will be addressed on a case by case basis, the threshold for obtaining them is high and parties can assume that they are used sparingly.

Disposition Without A Trial

1. Discontinuance
2. Delay
3. Disposition without Trial (Hryniak's Culture Shift and Strking Pleadings R 3.68)

Resources on the Rules

Legislative Concordances

- Useful for
  - Finding case law interpreting pre-2010 *Alberta Rules of Court*
  - Finding case law interpreting comparable provisions from other Canadian jurisdictions
- Where to find them?
  - Hard copy – Stevenson & Coté, *Annotated Rules*, Volume 3
  - Westlaw
    - Legislative Concordances -> Rules of Civil Procedure
    - Alberta Rules of Court -> Tools "Concordance References"

JSS Barristers Annotations of the *Rules*

- Rules Newsletter HERE
- Cumulative Summary (2020)

Law Society Resources

Toll free: 1.866.440.4640

Local: 587.390.8462

Practice Advisors

Advice re:

- Law Society Rules
- Code of Conduct
- Legal Profession Act
- Practice management
- Marketing
- Technology and systems
- Ethics advice
- Client identification and verification
- Client, staff and lawyer/lawyer relationships
- Scams and fraud alerts

Advisor Link

Names of 2 senior lawyer who can provide substantive legal advice re:

- Bankruptcy and Creditors Rights
- Builders' Liens and Construction
- Civil Litigation
- Corporate and Commercial
- Criminal Law
- Family Law
- Foreclosure
- Immigration
- Real Estate – Residential and Condominiums
- Tax
- Wills and Estates

Queen's Counsel

- Queen's Counsel:
  - The Queen's Counsel designation – commonly referred to as Q.C. – is an honourary appointment given to select lawyers in recognition of their contributions to the legal profession and public life. More info HERE.
  - Refered as my Learned friend
  - See *Queen's Counsel Act*, RSA 2000, c Q-1

Discontinuance, R 4.36-4.37

- The ending of the action, sani die – rescheduling indefinitely of the application within an action
- Plaintiff decides that they don't want to pursue the lawsuit anymore and the D decides not to advance their defence anymore
- **Costs**: Party discontinuing must pay adverse parties costs, R 4.36(4), 4.37(2)(b)

- Unless parties agree otherwise

The process for discontinuing depends on whether you are a defendant or a plaintiff & at what point you want to discontinue

- **Timing for plaintiff:**
  - Before trial date set – discontinue by serving Form 23 on all parties
  - After trial date set, before trial – need agreement of all parties or Court order
  - Once trial has started – need court order (aka permission)
- **Timing for defendant:**
  - Can discontinue defence at any time by serving Form 24 on plaintiff
  - Once D discontinues their defence– it as if they have never filed one
  - The PL can then apply to have the D noted in default or ask for a default judgement
- **Litigation representative?**
  - Must get permission of the court to discontinue (either the case or defence) UNLESS specifically authorized to discontinue in appointing order or instrument, R 2.19
  - Guardianship or trusteeship may include that authorization, but otherwise you legal rep must ask the court for permission
- Discontinuance by plaintiff does not preclude plaintiff from suing on same cause of action again, R 4.36(5) → cause of action estoppel does not apply because there have not been a final determination of the claim. But there are might be limitation periods for PL.
  - Creates potential for abuse of process, *Newel Post Developments Ltd.*

Delay (employed by prosecuted party – D)

- Delay rules are always going to be employed by the Defendant (prosecuted party) against Plaintiff (prosecuting party), but when analysing responsibility for delay, any steps by D that contributed to the delay might be relevant.
- Only weeds out only litigation that is clearly stalled.
- Plaintiffs have a duty to make sure that the action keeps going, the defendants do not have this duty. Defendant have a duty to be cooperative
- It is always the case that the defendant attempts to dismiss the lawsuit -they can use delay rules if possible, plaintiff do not want to dismiss their own lawsuit
- Delay is discouraged before commencing docs are filed by limitation periods
- Delay is discouraged once commencing docs are filed by
  - Specific time periods (ex. Deadlines for SoD or AoR) AND
  - General rules on delay
- **Can get relief in two scenarios (when the other side is causing the delay):**
  1. Where delay has caused prejudice (what happen overall in litigation and its pace) R 4.31
     - This rule is **discretionary** rather than mandatory
     - Commonly applied to the things that are pretty old (shelf life of litigation is 10 years)
  2. Where delay exceeds set time period (currently 3 years) R 4.33
     - Gap based rule – what happened the last time
     - **Court cannot extend the time – the rule does not allow it**
     - **Mandatory** in nature → the court must dismiss the action if nothing happens
     - **This rule does not care about prejudice → it is not a factor**
     - Standstill agreements 4.33(5) – if parties agree to standstill agreement the period for that agreement does not count towards the 3 years – the parties agree to stop the clock by agreement of the parties and can't be re-started when party notifies another party. This agreement also applies under 4.31
     - 4.33(9) – it is not clear whether the parties entered into a standstill agreement – parties disagree – the court may infer the agreement
       - Ex. Here is the statement of claim – give me notice before you do something else (does not amount to standstill agreement)
       - Has to be more than one line to require notice for the court to infer standstill

Delay Causing Prejudice 4.31 (discretionary)

- (1) Based on what's happen overall in litigation, not just the last action -is it much faster or much slower than usual
- (2) Are there are any excuses for why that's happening

- (3) examination whether this delay is prejudiced one of the parties – presumption of prejudice
- Commonly applied to the things that are pretty old (**shelf life of litigation is 10 years**)
- Where claimant has delayed, the adverse party can apply to
  - (1) Dismiss claimant's action, i**f the prejudice is <u>significant (see below)</u>**
  - (2) Other relief
    - Procedural, e.g., set timelines
    - Other, e.g., the court might say that the claimant is no longer intitled to pre-judgment interest for period of delay

- **Significant prejudice** presumed when delay is <u>inordinate and inexcusable (but actual prejudice proven is relevant)</u>
  - <u>inordinate and inexcusable</u>: CONSIDERATIONS (1) the court is going to ask itself what reason PL give for the delay & is that a good reason; (2) how is this case expected to progress in ordinary circumstance (debt matters are expected to be resolved fast, but constitutional cases take a long time)
  - Defendant's slowness may excuse plaintiff's delay. Defendant has obligation under rules to manage dispute & plan for resolution in timely & cost effective way, *TransAmerica Life Canada v Oakwood*
  - Plaintiff's lack of legal knowledge does not excuse delay, *Morrison v Galvanic Applied Sciences Inc*
- Relief is discretionary, court "may" dismiss claim or grant other relief. (Contrast with mandatory relief under R 4.33)
  - On permissive vs. imperative language in a statute, see *Interpretation Act* (AB), s 28(2).
  - The court is not compelled to dismissing PL's claim – they can decide to grant other relief as they see appropriate THIS IS OPPISITE OF DROP DEAD RULE (below) where the court must dismiss the claim after 3 years of inactivity

TransAmerican Life Canada v Oakwood Associates Advisory Group Ltd., 2019 ABCA 276 - application of rule 4.31

FACTS:
- Defendant sells insurance products for plaintiff.
- 2007 - Plaintiff sues for $10M, alleging defendant collected improper commissions from plaintiff (legal claims include fraud & deceit)
- 2017 – Defendant applies to have matter dismissed for delay on the basis of prejudice

PROCEDURE: Defendant applies to dismiss plaintiff's claim under R 4.31.
DECISION: Claim not dismissed.
REASONS:
1. Delay partly defendant's fault.
   - Slow to file S/D, when asked to file responded with repeated requests for "further particulars" despite being giver particulars after the 1st request
   - Slow to answer undertakings after questioned
2. No evidence of "significant" prejudice.
   - Defendant remains employed in insurance industry – d claimed that lawsuit is damaging his reputation – the court did not find sufficient evidence to support that
   - D claimed that witnesses forgot everything bc of 10 year time lapse – but the court said Evidence primarily documentary, so loss of witness testimony not as important

Dismissal for Long Delay (Drop Dead Rule) R 4.33

- AKA the drop dead rule. MADATORY – court MUST dismiss
- **Long delay = 3 years**
  - Pre-2010 = 5 years
  - 2010-Aug 2013 = 2 years
- Doesn't start until earlier of (adjuster's year + 3 years):
  - 1 year after S/C served, or
  - S/D served
- Doesn't include:
  - Time when action is stayed/adjourned by Court
  - Time when parties agree to suspend action – might want to see how bad the personal injury is (permanent?) – to estimate damages or if there is another related regulatory action/ inverstigation
  - Delay provided for in litigation plan
- **Court cannot vary time period** under R 13.5
- 4.33(2) – **entitled to dismiss if 3 or more years have passed without a significant advance in an action**

- What if:
  - Significant step, 3 years pass, D applies to dismiss – granted
  - Significant step, 3 years pass, P takes another significant step and D objects and applies to dismiss – granted
  - Significant step, 3 year pass, P takes another significant step (settlement offer) and D responds substantively (counter offer) , but then later applies to dismiss – R 4.33(2)(b) P can argue that you waived delay, court will look at conduct by how much you actually chose to waive delay

What is a Significant Advance? Functional Approach

- **Functional approach**: did the step move the litigation closer to resolution in a meaningful way having regard for the nature, timing, quality, genuineness and outcome of the steps?

• *See examples in Jacobs v. McElhanney Land Surveys Ltd, 2019 ABCA 220, paras 88-96.*

• **Significant Advance**	• **Not a Significant Advance**
• Conducting a questioning in which you uncover important information	• Conducting a questioning in which you only learn things that you knew previously
• Serving a notice to admit and getting an important admission	• Serving a notice to admit and getting a refusal to admit
• Settlement discussions that narrow issues between parties	• Settlement discussions that do not bring parties any closer together

- See also other examples in cases below

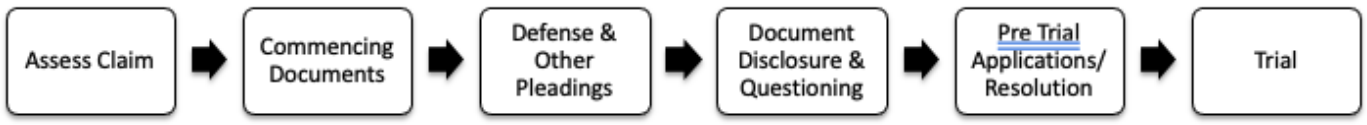
XS Technologies v Veritas DCG Land Ltd

- 2002 action commenced
- 2009 D provides answer to undertakings
- 2013 P provides D with
  - Notice asking corp D to acknowledge written questioning of employee as evidence of Corp D – likened this to a Notice to Admit only significant if they do not respond and you get a deemed admission or they admit
  - Documents listed in AofR & Supplemental AofR (documents had been requested in 2007 & were dated from 2001-02) – docs were very old so hard to say their steps were significant

Standstill Agreement

- Is an express agreement to delay applications so R 4.33 - 3 year period is not going to run
- Be clear when you enter into this agreement – name it as standstill and put the rule R 4.32
- Must advise other parties to litigation of any standstill agreement (i.e., where there are multiple parties & not all of them enter into standstill agreement), R 4.32
- Best practice, from *Brian W Conway Professional Corporation v Perera*, 2015 ABCA 404, para 32:
  - Call it a standstill agreement
  - Reference rule being stayed, e.g., R 4.33
- If other party won't agree to standstill agreement, can apply to court to declare period "suspended" the running of the 3 year period, R 4.33(9)

Overview



Culture Shift – *Hryniak v Mauldin 2014 SCC 7*

Trial is NOT a golden standard anymore

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes…

This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — **proportionate, timely and affordable**.

The court needs to be more willing to dispose of thing before trial → AB responded by grating orders that dispense with lawsuits

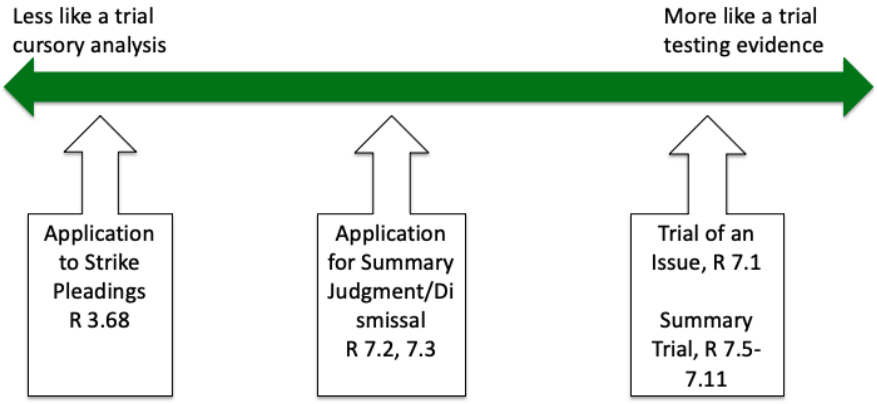
Hryniak v. Mauldin, 2014 SCC 7

Disposition with Trial (the tools)

- Application to strike
- Summary Judgment
- Trial of an issue/question
- Summary trial

the bar is higher, evidence is more difficult under R 3.68

- These tools exist on the spectrum



1. Application to strike pleadings R 3.68 (least like a trial)
2. Application for summary j/dismissal R 7.2, 7.3 (more like a trial)
3. Trial of an Issue/Particular Question R 7.1; Summary Trial R 7.5-7.11 (most like a trial)

(1) Application to Strike R 3.68 – riskier than SJ

- **used when there is something evidently wrong with the client pleading**
- **Do not put any evidence before the court – courts assumes that everything you said is true - the only exception if the facts are manifestly incapable of being proven (*Joly v Peller*) -R 3.68(3) (no new affidavit evidence needed, but other evidence/facts can be used ie pleadings)only applies under 3.68(2)(b) (party has no reasonable defense). If applying under3.68(2) a,c,d,e – need affidavit evidence**

7. Garden Variety Co must file affidavit evidence in support of its application under R 3.68.

A True

B False

i R 3.68(3)

- Court can strike pleadings (and possibly enter judgment), if conditions are one or more of the following **R 3.68(2):**
  - The court can strike out a statement of claim – this means the lawsuit is gone – the plaintiff can start new claim within the limitation periods (otherwise the defendant might have a limitations defence) – but new claim is not barred by cause of action estoppel.

- If Ds pleading are stuck – the defendant gonna get either default judgement or assessment how much they should pay if it is an unliquidated claim.

- (a) Court has no **jurisdiction**
  - Workers Compensation Act or Federal Court can remove jurisdiction from the QB court – so you can apply to strike the claim bc it is the wrong venue
- (b) a commencement document or pleading discloses **no reasonable claim or defense to a claim**
  - **Test:** is there any reasonable prospect that the claim/defense will succeed?
    - Is the claim recognized at law? Law is evolving – so there is some allowance to do so but to a limit
    - Be generous and err on side or permitting novel but arguable claims to proceed to trial because law changes, ***R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42**
    - Key facts are missing or has not been pled (no facts present that are require entitlement to the remedy)
  - Application done without evidence, R 3.68(3)
    - Assume that facts, as plead, are true unless they are manifestly incapable of being proven, ***R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42**
- (c) a commencement document or pleading is frivolous, irrelevant or improper;
- (d) a commencement document or pleading constitutes an **abuse of process**
  - If you are raising cause of action estoppel type of argument
- (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.
- **Other Grounds for striking pleadings in** R 3.68(4)
  - Failure to serve AofR
  - Failure to comply with ongoing obligation to disclose documents
  - Failure to produce documents when ordered to do so by a court and still will not

Joly v Pelletier Ontario 3.68(2)(b) or could be also under (c)

- Plaintiff claims that doctors, medical facilities & government agencies have conspired with US Government to "eliminate him, and interfere with his ability to live freely as a Martian"
- Defendant's bring motion to strike, **granted**
- Grounds:
  - aliens not "persons", no standing to bring a claim
  - key facts to establish tort of conspiracy not properly pled
  - many of defendants not legal entities capable of being sued
  - no damages claimed
  - "patently ridiculous"

Application to Strike 3.68(2)(d)

- A pleading/commencement doc constitutes abuse of process, overlap with (c) frivolous, irrelevant, improper
- *Chutskof v Bonora* – look at entire court history, proceedings can become vexatious even if initially a meritorious claim, **indicia:**
  - Bringing claims barred by collateral attack &/or *res judicata*
  - Hopeless proceedings
  - Escalating Proceedings – adding new parties & new claims
  - Bringing proceedings for an improper purpose (e.g., disciplinary complaints re: opposing counsel)
  - Busybody lawsuits on behalf of third parties
  - Failure to honour court ordered obligations (pay costs, obey orders)
  - Repeated, unsuccessful appeals
  - Repeated inappropriate courtroom behavior
  - Unsubstantiated allegations of conspiracy, fraud, and misconduct
  - Scandalous or inflammatory language in pleadings or before the court
  - Advancing Organized Pseudolegal Commercial Argument (OPCA) strategies

Application to Strike – General

- If a defendant has made an application to strike, pending that application, until that matter is heard D **does not need to file SoD**, so the plaintiff cannot apply for default judgment/noting in default, R 3.42
- Respondent to an application to strike will often bring a cross-application to amend its pleadings
  - We don't think the pleadings should be struck, but in case they are, we would like to amend the pleadings to address the problem that adverse party identified → this is a downside for getting application to strike because the other party can get court permission to amend pleadings → court can even advise how to amend the pleadings
  - Application to amend usually heard first

6. Garden Variety Co brings an application under R 3.68 to strike Scout's pleadings, on the grounds that her Statement of Claim fails to disclose a "reasonable claim." Scout realizes she failed to plead key facts. What can she do?

A File an amended Statement of Claim.

B Apply for leave to amend her Statement of Claim.

C Serve herself with a Notice to Admit Facts

D Serve herself with a Request for Particulars

i Needs leave after pleadings have closed, R 3.62

- **Summary judgment often a better choice** than application to strike:
  - Court has broader scope to dispose of claim/defence (e.g., can decide against a party with a weaker claim, can weight evidence)
  - Court in SJ looks at the evidence, but not for application to strike where it assumes the truth of things said
  - Application to strike does not "finally determine" the issue, plaintiff can issue another statement of claim, whereas summary judgment does & new statement of claim barred by *res judicata*, *Ernst v. EnCana Corporation*
    - If a party wins the SJ- then precluded to bring the claim again by the cause of action estoppel → unlike in application to strike

BUT need to put evidence (affidavit and docs – time and money)before the court on a summary judgment application.
→ So if there is a fatal flaw in the SoC or SoD – application to strike is better because it saved money and time for the client
→ If you need the court to look at your evidence – apply for SJ

(2) APPLICATION FOR SUMMARY JUDGEMENT (SUMMARY J)/ DISMISSAL R 7.2, 7.3

- PAPER ONLY PROCESS based on the evidence from 6.11
- Paper based process
- No viva voche oral evidence but see R 6.11
- When affidavits are too different between the parties – the summary judgement is not appropriate by the Master
- Instead summary trial is appropriate because permits viva voche (oral) evidence
- A summary judgement is a motion brought by one party against another to have a case decided summarily, without going to trial. The motions judge may be asked to decide on specific issues of a case or the merits of the entire case. In either situation, the party bringing the motion must persuade the judge that there is no genuine issue requiring a trial. Either a plaintiff or defendant in a civil suit may make a motion for summary judgement
- When summary judgement (not summary dismissal) SJ is the final disposition of the matter (cause of action estoppel can be used to prevent raising the same claim on the same issues) VS Striking pleadings is not (bc you can still file a new statement of claim re the same dispute and issues)

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
(a) there is no defence to a claim or part of it (defendant);
(b) there is no merit to a claim or part of it (plaintiff);
(c) the only real issue is the amount to be awarded.
A note on terminology:

- "summary judgment" used to describe when Court grants judgment in favour of a party (**brought by plaintiff**) after application
- "summary dismissal" used to describe when Court dismisses claim against a party (**brought by defendant**) after application

- **Good for a situation where D accepts liability, but wants to argue quantum**
- **Test: 7.3**

After SCC *Hryniak v. Maudlin*, Alberta courts split on when summary judgment should be granted.
ABCA struck a 5 member panel to resolve the issue in *Weir Jones Technical Services Inc. v. Purolator*. The majority articulated a two-part test. To succeed the applicant must establish

- (1) The factual basis for their application on a balance of probabilities **AND**
  - PL must provide to the court evidence establishing all elements of your claim
  - D must show that there is no evidence to established PL claim → the evidence established that factual basis of the PL claim does not exist OR D has a defence and establish the factual basis for that defense
- (2) That there is no genuine issue for trial.
  - In assessing whether there is a genuine issue for trial, the court may consider

- Disputes about material facts
- Credibility issues (via testimony appearance in court) (need trial)
- Complex factual issues, esp scientific or medical requiring expert reports (need trial)
- Complex legal issues requiring a full trial record (need trial)
- Problems with quality of evidence
  - Respondent must put "best foot forward", but sometimes all the evidence will be in the applicants control, see e.g., para 168 (granting SJ could cause unfairness in this case – because a party will not engage in the discovery process and build merit for that claim)
    For example, you are sueing the corp defendant . Corp has all evidence. As a PL you need AoR and chance to question to obtain evidence to put together the case. If Corp D apply for summary dismissal as soon as they filed SoD – eliminates chance for discovery process for PL. UNFAIR
    → In case where the application for SJ is also the party who controls the evidence, the court might say that this application is premature and will order discovery and apply again or go to trial → order for min discovery before hearing this application again
  - You are expected to collect and put forward as much evidence as you can

Summary Judgement: The Evidence

Applications are made on basis of affidavit evidence [R 7.3(2)], but can be supplemented with other types of evidence, see R 6.11

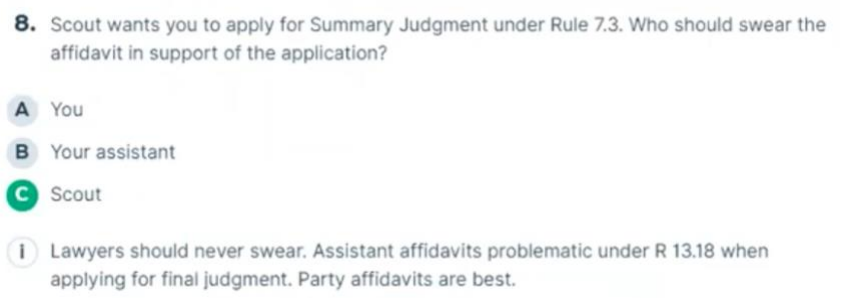
- Application based entirely on admissions or documents? Apply under R 7.2

Application for summary judgment can potentially dispose of a claim/defense, so the Affidavit in support of application cannot rely on hearsay evidence, R 13.18(3)

- **NOT OKAY:** Corp rep of the debtor saying I know this to be true because somebody told me – ex. My financial officer told me that the company paid this on this date
- **OKAY:** Chief financial officer saying – I paid this debt on this date.

Competing Affidavits?

- Was one party's affidavit "destroyed by cross examination"? We paid the debt vs They never paid the debt → the court can resolve this matter by cross-examination process. The court can look at the transcript – and see that one party cannot possibly tell the truth -lying or uniformed on facts
- Are one party's assertions self-serving & unsupported? The court can say that they prefer the evidence from affiant who had support for their assertion. Exhibits are included to support the assertion.



CONDOMINIUM CORPORATION NO 0723447 V ANDERS, 2016 ABQB 656 – DEFENCE WITHOUT FACTUAL/LEGAL MERIT

FACTS:

- Condo Corp having problem with plumbing back-up, expert plumber diagnoses problem: "in-suite laundry"
- Condo Corp (acting through its board) bans in-suite laundry
- Owners of 2 suites refuse to remove laundry

PROCEDURE: Condo corp starts claim, seeks relief including order that owners remove laundry machines (& judgment for fines for non-compliance)

OWNERS' DEFENSES:

(1) We didn't receive notice of ban! [factually without merit]

- BUT one present at meeting where ban passed
- AND they admitted to having received letters advising them of ban

(2) Condo can't remove laundry machines because they are exempt under the *Civil Enforcement Act* [legally without merit]

- BUT Civil Enforcement Act prevents creditors from seizing certain property to satisfy debt DOES NOT limit ability of condo corp to pass bylaws

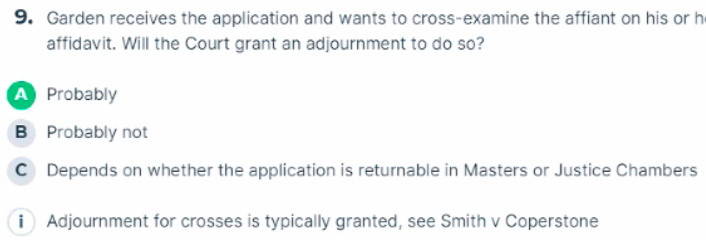
→ if only 2nd defence was present – Condo corp could have strike the pleadings because there was no merit BUT because 1st defence required some evidence to show that the owners received notice –> had to go to summary judgement.

FACTS:
- P & D both make wax jewelry
- P & D involved in dispute, enter settlement agreement whereby D agrees not to make wax jewelry with specific characteristics

PROCEDURE:
- P sued D for breaching settlement agreement

ISSUE:
- Court is being asked to
  - Review pictures of jewelry made by D, and
  - Decide if it has prohibited characteristics set out in settlement agreement

Application for Summary J Unsuccessful (unable to obtain a summary judgement)
Takeaways:
- (1) Cases requiring contractual interpretation are well suited for SJ
- (2) WHAT HAPPENS WHEN SJ APPLCIATION IS NOT SUCCESSFUL: Usually → when app dismissed, matter proceeds to trial. If Pl not success can go to trial and win there (But the only way you can go trial if summary judgement is not appropriate). If D applies for summary dismissal – they can go to trial and get PL claim dismissed
- Adverse party may bring a cross-application and Court may dismiss one and grant other, e.g.,
  - P applies for summary judgment
  - D cross applies for summary dismissal
  - Court denies application for summary judgment, grants application for summary dismissal (or vice versa)
  - OR neither of you win – sending both to trial



BUT *Pyrrha Design Inc v. Plum & Posey Inc*, 2016 ABCA 12 said that even where cross application is not brought, Court can dismiss applicant's summary (judgment/dismissal) application & grant (judgment/dismissal) in favour of adverse party
RECALL issue in the case – does D's jewellery have prohibited characteristics?
- P applies for summary judgment, D does not bring cross-application
- Court finds that jewellery does not have prohibited characteristics, grants summary dismissal in favour of D (i.e., P's claim dismissed)
- Three choices: (1) not enough evidence – send to trial (2) there is evidence of misconduct – grant PL summary judgment (3) no misconduct – summary dismissal (nothing left to go to trial)

CA upholds:
- no surprise to P – D didn't formally ask for summary dismissal but raised it and gave P chance to reply
- Court has authority to do so:
  - *Judicature Act* s 8
  - ARC R 1.3(2) "A remedy may be granted by the Court whether or not it is claimed or sought in an action."

Applying *Pyrrha Design Inc v. Plum & Posey Inc*
FACTS:
- 2001 A gets credit card
- 2001-2009 – A uses credit card regularly
- October 2010 – Last payment on credit card
- August 2014 - Small payment made on credit card in August, no evidence who made it. A claims it was not her.
- 2016 July – Credit card co sues to recover unpaid balance.

PROCEDURE: Credit card co applies for summary judgment.
DECISION: Court dismisses application for summary judgment and grants summary dismissal in favour of A because A has a limitations defence to debt claim.

(3) Trial of an Issue/Particular Question R 7.1

- A party can apply to court that an issue or question be dealt with first, must show potential to:
  - Dispose of entire claim OR
  - Shorten trial OR
  - Save expense OR
- This can be a question of law or fact
- Parties can agree to put a question of law before the court
- Good for "simple, readily extricable preliminary issue" i.e. limitations defense (no need for merits of the claim), standing (an issue whether the PL has standing)
- Court is weighting what is more efficient – if there a lot of overlapping evidence that goes into this preliminary question and larger merits of the case – the are not going to hive off preliminary question – becuase it is inefficient
  - If party wants to establish liability and then if liability established a second trial on damages- will out that if there discrete evidence without much overlap
- Related provision, R 3.71, application to court to separate an action involving multiple parties or claims
- Can use to separate liability from quantum – see *Gallant v Ferries*

Gallant v Ferries

- Applicant wanted to separate liability from quantum, said if a decision on liability may vitiate need for trial, gave no evidence that it may vitiate need for trial, application rejected
- Results in 4 scenarios:
  - P wins on liability, D settles (cost savings)
  - P loses on liability, doesn't appeal (cost savings)
  - P wins on liability, trial on damages (no cost savings)
  - P loses on liability, appeals (no cost savings)
- Also significant overlap on evidence required for both issues

(4) Summary Trial R 7.5-7.11

- Trial on basis of pre-determined evidence (affidavit evidence, expert reports, read-ins from questioning, permit some viva voce evidence)
  - Two stage process. Court asks:

    (1) First stage
    - Is this matter suitable for summary trial? Will a summary trial facilitate resolution of the claim?
    - If yes, the court applies civil burden of proof to dispose of claim
      - e.g., on a **balance of probabilities** has the [plaintiff/defendant] established its [claim/defence]?
    - If no, the matter proceeds to trial

    (2) Second stage: trial

Summary Trial Process

- Party applies to have a summary trial
  - Must provide at least 1 month notice to the other party
  - Form 36
    - Set out what will be determined at summary trial i.e. the whole claim or part of it
    - Set out why this is an appropriate matter to be determined at summary trial
  - Append affidavit & other evidence to be relied on (all evidence)
- Adverse party can either:
  1. Object to matter proceeding by way of summary trial R 7.8 (and wanting to proceed to a regular trial), or
  2. Respond by serving evidence that adverse party will rely on at summary trial (at least 10 days before scheduled hearing) R 7.6

What Makes a Matter Suitable for Summary Trial?

- Factors a court will consider (*Duff v Oshust* at para 24):
  - Amounts involved
  - Complexity of the matter
  - Its urgency – summary trial can deal with matters sooner

- Any prejudice likely to arise by reason of delay
- Cost of taking the case forward to a conventional trial in relation to the amount involved
- The course of the proceedings
- Whether all witnesses or only some were (will be) cross examined in court – if witness credibility an issue, will need full trial because cannot determine on basis of documentation evidence
- Whether there is a real possibility that the defendant can bolster its evidence by discovery of the plaintiff's documents and witnesses
- Whether the resolution will depend on findings of credibility

When Does Judge Decide if Matter Should be Heard by Summary Trial?

- Before summary trial (TEST is SUITABILITY)
  - App for summary trial
  - Respondent objects
  - **Hearing on whether summary trial should be used R 7.8: 1) is issue suitable for summary trial, 2) will summary trial resolve the matter**
- After summary trial (TEST IS JUST/UNJUST)
  - App for summary trial
  - Respondent objects, court hearing, objection dismissed
  - Summary trial hearing
  - **Court can still decide that summary trial not appropriate**, but "perhaps there is a higher onus", see *Manson Insulation*, 2013 ABQB 702 at para 27
    - "It would be unjust to decide the issues on the basis of the summary trial." (R 7.9)

→ Unjust is higher standard than suitability: it easier to argue that it should not go to summary trail if you raise that matter before the trial rather than after the trial

Summary Judgement vs Summary Trial

Conceptually different:

- Summary J: is a trial necessary?
- Summary Trial: a version of a trial. Summary trial is based on restricted evidence whereas traditional trial has less restrictions on the evidence with continued oral evidence

- Practically – summary judgment applications more common than summary trials.
- The Ontario rule the SCC considered in *Hryniak* was a hybrid summary judgment/summary trial rule and this has resulted in confusion in other jurisdictions where these are treated as separate procedures
- Test in *Hryniak/Windsor v Canadian* erodes distinction:
  - Summary j: test is whether there is a reasonable prospect of claim/defense succeeding – test is whether it is plain/obvious or beyond doubt
  - Summary trial: test is civil standard on BofP whether claim/defense is disclosed
- Summary trial = paper trial on the civil standard
- Practically summary j more popular than summary trial
  - If courts begin to enforce ADR requirement, summary trial may become popular again as you can bypass that requirement
- Two stage process for summary trial, must make application then go to hearing; one stage process for summary j

Summary Trail

Three day process

- First day – the court decides whether the summary trail is the way to go – so the parties are ready to argue – but there is a chance that the court will deny summary trial and send the matter to actual trial (a year away) → a lot of wasted effort – so ppl are vary of summary trial
-

** stop here for quiz

Settlement

How settlement works

- In litigation settlement achieved by written correspondence between lawyers, where they set out a specific amount they would like to get in respect of their claim and they are accepting that amount of money and there collateral things that flow from that
  (1) money is inclusive of costs and interest – where the number is global – you say $10,000 all inclusive
  (2) money is not inclusive – $10,000 ++ (plus interest and plus costs)
  → you need to say what that interest number is and cost is
  (3) **legally implied term of settlements and practical necessity for most settlements that they include a release**
  → sometimes releases are not required when the action as part of the settlement is dismissed by the court order because the court order might be as good as the release because it is a dismissal and future action will be subject to res judicata or the facts are very dated (under limitations bar)– the party would likely want to settle without release
  ➔ in most settlements a release will be signed by the party being payed or by both parties
  Lawyers call an **agreement** to **settle** a dispute a "**release**," because in exchange for some act (often the payment of money), one person gives up (or **releases**) his or her claim against another.

- Lawyer's ethical obligations to encourage settlement, Code of Conduct
  - Encourage client to settle on **a reasonable basis** CoC rule 3.2-10 – going to trial is risky, even with a strong case
  - Inform client about settlement CoC rule 3.2-1
  - Get instructions from your client for making offers, accepting/rejecting offers, CoC rule 3.2-4 – have to tell the client about all offers unless the client said that I only going to accept the lowest is … and the highest is .. – so you do not need to get instructions for every single offer
  - Make sure the money is either all inclusive or that plus lawyer costs
- Court approval to settle may be required if:
  - One of the litigants is represented by a litigation representative R. 2.19
    - Unless lit rep is appointed with the ability for them to settle
    - Common- when the party is a minor – court approval might be required and trustee stamen might be needed for that application that they have reviewed the terms of settlement
  - If litigation is a class action proceeding *Class Proceeding Act* s 35

Offers of Settlement & Costs

Basic Premise – loser pays costs (this is not true in the US)

- **If A (the winner) makes a reasonable offer to B (the looser), B refuses to accept it, A may recover higher costs** (in Canada, losing party pays winning party's costs, so recovers from loser)
- **What is a reasonable offer?**: A (winner) makes offer, B (looser) fails to beat the offer at the adjudication of the trial, A's offer was reasonable
- Why use threat of heightened costs to encourage settlement?: settlement saves public resources
- Two types of offers:
  1. Formal Offers – via court form with prejudice (not privileged)(R 4.24-4.30)
  2. Informal Offers a.k.a. Calderbank Offers – made without prejudice **except** as to costs ➔ has to have const consequences as the formal offer but does not have to comply with the formal rules (with prejudice to the costs)
     → if you beat it or don't beat it it has the same cost outcomes as the formal offer
  3. Without Prejudice (privileged) settlement offer – purely between the parties - private and privileged – do not engage costs rules.

Formal Offers R 4.24-4.30

- **Use Form 22**, SERVED (not filed) it on the other side, sets out:
  - Who is making offer
  - Whom it is being made to
  - Terms of the offer
  - Method for acceptance (have fillout a 2nd form and attach to the 1st form)
- **Serve at least 10 days** before application or trial R 4.24(1)
- Offer stays open for shorter of (that is why you would want to use Calderbank Offer – not open for that long period)
  - Until application heard/trail starts

- 2 months, or
- Longer period specified in offer R 4.24(3)

- Need court permission to withdraw offer early R 4.24(4) i.e. make offer and then learn of something that other party did not disclose and you were not aware of
- **Accepting Offer R 4.25:**
  - File offer & notice of acceptance with court (notice of acceptance is attached with the other form)
  - Serve on party that made offer
  - Apply to court for order consistent with offer
- In multi-party litigation, can continue proceedings against parties that do not accept offer
- **Offers on Appeals:**
  - You can make ColderBank or formal offer in advance of an appeal to preserve your costs position for the costs of the appeal.
  - Formal offer procedure available R 14.59
  - Must make offer specific to appeal – *David v Caproco Corrosion Prevention Ltd*

COST CONSEQUENCES R 4.29 (AFFECTS STEPS ONLY AFTER THE OFFER IS SERVED)

- So if the offer is made before the trail – protects your cost position for the cost of the trial and can lead to enhanced cost for the trail itself, but does not affects the cost incurred previous in the action.
- If A makes offer, B doesn't accept and B does not "beat" the offer, A gets double costs **for all steps after offer served**
  - If Party A makes offer, Party B doesn't accept it, Party A gets **double costs** for all steps after offer served in two situations:
    - Scenario 1:
      - Plaintiff offers to settle if Defendant pays $500
      - Defendant does not accept
      - Plaintiff wins $500 or more → P get double costs
    - Scenario 2:
      - Defendant offers to settle by paying $500
      - Plaintiff does not accept
      - Plaintiff's claim dismissed at trial or summary j → D get double costs
  - If Defendant makes offer, Plaintiff doesn't accept it and Plaintiff does not "beat" the offer, Defendant gets **costs** for all steps after offer served, e.g.,
    - Scenario 1:
      - Defendant offers to settle by paying $500
      - Plaintiff does not accept
      - Plaintiff wins but is awarded $500 or less → D saying did not need to go to trial, D gets double party party costs

- **Party party costs**: starting point for calculating costs (tariff basis for assessing costs), do not fully indemnify client for costs maybe cover around a 1/3
- **Full indemnity costs**: cover all costs, typically provision for these in mortgage contracts
- **R 4.29(4): court retains a wide discretion not to double costs:**
  - Court retains discretion not to award costs:
    - (1) when indemnity costs awarded.
    - (2) Is it a genuine offer? (has to have some element of compromise in the offer to be considered genuine)

      Pillar Resources Services Inc, defendants offered to settle on basis that plaintiff discontinues action and all parties bear their own costs = a genuine offer. Element of compromise (defendants bear own costs, albeit nominal $6500). Reasonable offer given relative strength of parties' positions – plaintiff sued after expiration of limitation period.
    - (3) Will consider other special circumstances i.e. misconduct by party who made offer, does not have to be related to offer i.e. failing to comply with court orders, held in contempt at some point

Informal/Calderbank Offers

- Refers to English Case *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA)

- These are made less than 10 days before application/trial or do not comply with technical requirements of Form 22
- Best practice: notify other side that offer is "Without prejudice", except as to costs because there is no formal name in AB rules of Calderbank offer.
- **Court has discretion to award higher costs (double the costs in schedule C) where reasonable informal offer was made & refused. Court will consider:**
  - Awarded to the party who made the offer
  - Fact of offer: whether an offer was made
  - Comparison of offer made vs. final resolution of claim (element of compromise is present)
    - i.e. offer $500, they get $501, better position to say should not have gone to trial, beat offer but not by much
  - Timing of offer
    - *Panagea Estate* – party responded to offer right before trial
  - Recipient's ability to assess offer
    - If offer is made before discovery, party is in not in as a good a position to assess the offer
- Can disclose informal offer, *Bellatrix* "settlement posture may be relevant when determining costs" see SCOPE OF DISCLOSURE – Settlement Privilege

What about Settlement Privilege

Remember the exceptions!
Can disclose communications made in furtherance of settlement to:

- Prevent double recovery
- Communications are unlawful (threats, fraud)
- To prove settlement reached or to determine terms
- **Settlement posture may be relevant when determining costs**

Bellatrix Exploration Ltd v. Penn West Petroleum Ltd, 2013 ABCA 10
See also ARC R 4.28 which confirms the above re: Formal Offers & that is why Calderbank says with prejudice as it relates to costs (so **settlement privilege exception** applies to both Formal and Calderbank offers)

Bellatrix Exploration Ltd v. Penn West Petroleum Ltd, 2013 ABCA 10 (sets a high bar for settlement privilege):
RISKY: An additional exception – to show that settlement negotiations = a "significant advance" in litigation for purposes of R 4.33, see *Paquin v. Whirlpool Canada LP*

Trial

Scheduling Trial – By Consent

- R 8.4 parties request trial date by consent, file Form 37 (we are ready to go; all pre-trail steps are completed)
  - **Mechanics**: how long, # of witnesses, # experts, jury?
  - **Certifications**: pre-trial steps complete or will be completed in a timely way, including:
    - Questioning & Undertakings
    - Expert report disclosure & Medical Exams
    - Pre-trial applications
    - Alternative dispute resolution complied with or waived
    - Other administrative requirements i.e. if need interpreters or flagging judges who might be conflicted off; names of the counsel – if judge used to work at the firm
- R 8.7 **must confirm trial date 3 months before trial** – only need 1 party to confirm sufficiently, so long as no party confirm cancelled
- **Competing policies**: do not want people scheduling trials before they are ready (unfair and prejudicial if there is no adjournment), maximize efficient use of public resources vs. forcing a party to move forward that is happy to drag feet and delay → cannot be too cooperative a system
- **Two Potential Issues:**
  - (1) One party refusing to schedule matter for trial, appears they should be ready – **R 8.5 apply to court to schedule trial**
  - (2) One party certifies matter as ready & then changes their mind – see *Benc v Parker*

Benc v Parker, 2016 ABCA 82 – after form 37 is served – no further steps

FACTS:

- Plaintiff and Defendant counsel sign but do not file Form 37

ISSUE: Can defendant counsel get order compelling plaintiff to undergo medical exam after Form 37 signed, but not filed?
DECISION: No
The completion of a Form 37 constitutes… an undertaking in the throes of litigation by one party to another that absent mutual error or unilateral mistake in completing the Form (in which case an application for relief may be brought before a judge), the plaintiff and the defendant will take no further pre-trial steps

Jury Trial

- Send request to Chief Justice (or delegate) BEFORE THE TRIAL DATE IS SET, R 8.1, 8.2
- Jury trials available, *Jury Act*, s 17: **TEST – must meet one of the points below – jury is rare**
  - (a) an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage, AND/OR
    → actions under $75K must meet (a) subject matter requirement
  - (b) an action founded on any tort or contract in which the amount claimed exceeds [**$75K**], or
  - (c) an action for the recovery of property the value of which exceeds [**$75K**].
- You have to pay clerk to get empanel jury, need to go for jury selection, and need to get a court order to do this from Chief Justice

Witnesses

- Disclosure: witnesses must be disclosed in advance – no litigation by ambush
  - Provide # witnesses & names of expected on Form 37 R 8.4 (form requires the names of witnesses so no conflict with the judge assigned to the case)
  - Update # witnesses when confirming trial date 3 months before R 8.7
  - Disclose names of witnesses R 8.9
    - P – 1 month before trial
    - Other parties – 20 days before trial
- Compelling attendance of witnesses:
  - In Alberta, at least 20 days before trial, serve Form 40 (subpoena) + allowance R 8.8
    - Court can order peace officers to compel compliance R 8.9
  - Outside Alberta, but in Canada – apply to court under *Interprovincial Subpoena Act* to compel attendance

JUDGEMENT & ORDERS

- **Technical requirements** R 9.1
  - See sample order: must have the date entered (filed), show which judge or master pronounced order, location of hearing, numbered paras, preamble (sets out what basis order was made and evidence before the court, who appeared), signed and filed
- **General rule** – successful party prepares order under R 9.2
  - 10 days to prepare draft & circulate to other parties
  - Other parties have 10 days to respond
    - Approve draft
    - Object to draft & provide grounds
      - Valid ground to object: not what court ordered
      - Invalid ground to object: disagree with court order
  - Can request the court waive requirement to seek 1 party's approval of draft R 9.4(2)(c)
  - No response within 10 days? Can enter order
- Submit for signing for the Master or Justice, file at courthouse **within 3 months**, serve on parties R 9.4, 9.5, 9.8
- Judgements and orders do not contain reasons – only the bottom line of what needs to be done.
- **Judgement (for payment of $) lasts 10 years** *Limitations Act* s 11, can renew R 9.21
  → you have 10 years to enforce the judgement
- Order – can happen in the middle of the proceeding. Orders contain judgements.
- Judgement usually at the end of the proceedings. Judgements and orders are used relatively interchangeably.

FUNCTUS OFFICIO

- When final order is entered and the time under R 9.15 has lapsed – the court will characterize the judgement is functus
- Idea is once a judge or master has made a final order they cannot vary the order and the only remedy is to appeal
  - Why? Would lead to inconsistency and would make litigation unwieldy
- *Doucet-Boudreau v Nova Scotia*, 2003 SCC 62
  - After order/judgement is made: further resort to a judge is incompetent, his function is exhausted
  - Principle of functus officio exists to allow **finality of judgments from courts**, which are subject to appeal. This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal

Varying Judgements

- Parties often try to squeez into these categories – because they don't like the judgement they got and do not want to go to the Court of Appeal – the standard of review is deferential → more common in situation of Justices decision, not Master (when appeal Masters to Justice – no deference- like a new case)
- Until order is entered i.e. filed R 9.13, can vary order or reopen to hear new evidence
- **Once entered, Court can vary order to:**
  - Correct mistakes resulting from accident, slip or omission R 9.12 i.e. accidently write $400k instead of $40k
  - Ensure party receives remedy to which party is entitled R 9.14 – court can grant additional orders to make sure remedy is achieved
  - If order made R 9.15(1)
    - Without notice to an affected party or
    - In absence of affected party due to mistake/insufficient notice i.e. power goes off and your alarm does not go off
- Broader ability to set aside, vary or discharge interlocutory orders R 9.15(4)

Lawyer of Record

- Lawyer of Record, R 2.24
  - Name in filed Court documents, e.g., commencement document, pleadings, affidavit
  - Or by appearing in person
  - Effect:
    - Service on lawyer of record = valid service, until representation terminated, R 2.30, R 11.17
    - Obligation to conduct litigation in accordance with Rules, R 2.25
- Party fires lawyer of record – serves notice of change on other parties & former lawyer, R 2.28
  - Hires a new lawyers, or
  - Self represents
  - Need to file affidavit of service for serving the old lawyer and opposing parties (usually the new lawyer does it)
- Lawyer withdraws – serves notice of withdrawal on other parties and former client, R 2.29
  - Need court's permission if trial already scheduled, R 2.30. For recent cases on when withdrawal will be allowed compare *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (withdrawal allowed pending appeal) and *Cengic v. Casro*, 2020 ONSC 986 (withdrawal NOT allowed pending trial)
  - Need to file affidavit of service for serving the former client and opposing parties
- Automatic termination – death, disbarment, suspension etc, R 2.32
- Acting on a limited retainer basis for a client? Must inform court R 2.27. Wise to inform adverse parties.

Costs

- General rule: losing party pays a portion of a winning party's costs R 10.29
- Policies
  - Indemnification – unfairly sued, incur costs and then not be able to recover those
  - Judicial economy – disincentive to bring disingenuous claims
  - Promote reasonable settlement
  - Penalize misconduct/non-compliance – lawyer does misconduct, then lawyer may have to pay
- Courts have wide discretion to award costs R 10.31 (presumption -COSTS ARE DISCRETIONARY – review of them by higher courts are deferentially – so not easily overturned (except Masters decision -no deference))
- Costs usually payable by parties BUT can be awarded against lawyers who engage in serious misconduct R 10.50

- Also lit rep for P liable for costs R 10.47

Indemnification (what do we say when we say costs)

- Costs to get indemnified for:
  - Legal fees (lawyer costs)
  - Disbursements i.e. court searches, service costs
  - Other costs i.e. in house printing
  - Taxes i.e. GST
  - **NOT lost wages or time**
- **Degree of indemnification: IMPORTANT to know names and distinctions between the 3**
  - **Full indemnity** - 100% of the money the client payed to the lawyer even if some of the costs were extraneous aka not necessary to this claim =(called) solicitor and his/her own client costs or solicitor and own client costs
  - **Substantial indemnity** – middle ground (called solicitor -client costs) – 80% (all the money that the party payed to the lawyer were directly relevant and necessary cost to this action and nothing extraneous)
  - **DEFAULT IN AB: Partial indemnity** (called party-party costs as defined by schedule C or schedule C costs) – about a third or less of the actual legal spending

Schedule C (partial indemnity) - party-party costs

- Starting point for calculating party-party costs
- Value of the claim
- Figure out how much claim is worth, then figure out what steps occurred in litigation & add up tariff amount for each step (always involves filing commencement docs)

Item	**I** **Up to and including $75 000**	**II** **Over $75 000 up to and including $200 000**	**III** **Over $200,000 up to and including $675 000**	**IV** **Over $675 000 up to and including $2 million**	**IV** **Over $2 million**
1(1) Commencement documents	$ 1350	$2025	$2700	$3375	$4725
6(1) Uncontested applications	$400	$540	$800	$945	$1080
6(2) Applications without notice to another party	$135	$135	$135	$135	$135
7(1) Contested Application	$675	$1000	$1350	$1685	$2025

R 10.42 - If an action was started in QB, but could have been started in Provincial Court (because amount being claimed < $50,000), costs assessed at not more than 75% of Column I

Court Ordered Costs

- When setting costs, **court will consider** R 10:33:
  - Remedy claimed/received (how much claimed and how much is awarded)
  - Complexity of action
  - Importance of issues
  - Contractual entitlement to costs (like a contract with a bank)
  - Conduct of parties (good & bad), specifically:
    - Refusal to make (reasonably-requested) admissions – settlement rules (refusing to take offer)
    - Taking unnecessary steps

        - Splitting proceedings unnecessarily
- **Also**:
    - Formal Offer (double party-party costs R 4.29), Informal/Calderbank Offer
    - Written agreement on costs i.e. mortgage agreements provide for full indemnity on costs – contractual entitlements to costs – ex. Credit agreement with bank provide the bank with indemnity entitlements as to costs – full indemnity → contractual agreements bind the court and the court has to abide by them
- **Court has many options,** e.g., may order full indemnity costs, party-party costs (Schedule "C"), double party-party costs, part-party-costs at a higher/lower column, lump sump payment

Costs on an Application 10.29

- The looser pays to the winner – pay as they go as per R 10.29 not in the end of the day → only for steps that have a winner and a looser ie applications (not questionings for example)
- **Silence = costs to the winner (rarely observed in practice – better to discuss this) → costs should be addressed verbally at the time of an application.**
- "Each party shall bear its own costs" – neither party gets costs of application
- "Costs in the cause" – waiver or deviation of the R 10.29 - party entitled to costs at end of proceeding, entitled to cost of application – the entitlement to the application costs depends who win the lawsuit at the end of the day and that cost would tallied in the favour of the overall winning party,
- "[Named Party] in the cause" – if named party receives costs at end of proceeding, he/she is entitled to the costs of the application
- "Costs to the [Named Party] in any event of the cause" – named party gets costs of interlocutory steps irrespective of outcome of case, but not until case concludes – exactly in accordance with R 10.29
- "Costs to [Named Party] payable forthwith" – named party gets costs of step right away
- "Costs reserved to the trial judge" – trial judge decides who, if anyone, gets costs of interlocutory step

Review & Assessment Proceedings

- Done by a functionary of the court – review & assessment officer
- **Assessment**: A & B involved in litigation, A wins, how much should B pay to A for costs? (amount not set by the court, so need assessment to figure out that amount)
- **Review (between the lawyer and their client)**: A is B's lawyer, either:
    - B is unhappy with A's bill and would like it reduced, or
    - B has not paid A's bill and A would like to collect
- **Both** are carried out by the Review & Assessment Officers – senior lawyers employed by the Provincial Government
    - In Edmonton, on the mezzanine level of the court house (functionary of the court)
- Important resource: Alberta Court's Review & Assessment Office webpage – includes "Cost Manuals"
- To avoid the assessment and review officer proceeding – come to the application prepared to write in the amount in the order – so the Justice or a Master can sign it.

Assessment

- Bill of Costs R 10.35
    - Form 44
    - Sets out the costs claimed by the winning party for
        - Lawyers fees
            - Starting point = Schedule C
            - If full indemnity, invoice should be attached
        - Disbursements
            - Attach receipts
        - Other fees
        - GST
- Assessment appointment not necessary, officer will just review
    - In default judgement proceedings R 10.36(1)

- If agreed to/approved by party adverse in interest R 10.36(3) – winning party drafts the bill of costs – the other side haggles and then compromise – come to an agreement and then send the payment.
  → it costs money and time to appear in front of assessment officer – you do not get that money back

- Appeal available to QB justice – 1 month R 10.44

REVIEW

- Lawyer OR client can ask for review of account
- **1 year time limit, R 10.10**
  - Increased from 6 months as of March 17, 2020
- Start the review process, R 10.13
  - File
    - Form 22, pay fee
    - Retainer agreement [in a sealed envelope]
    - Invoices subject to dispute
  - Serve on other party at least 10 days before appointment for review – **requires same type of service as a commencement document** – R 10.13(5)
  - If lawyer is served & fails to respond, lawyer forfeits right to payment, R 10.14
  - Review officer's decision can be entered as judgment of court on application, R 10.20 – benefit as lawyer you do not have to sue to collect on bill once you go through review process
- Appeal available to Court of QB Justice – 1 month, R 10.26
- The review process does not mean the lawyer or a client cannot sue each other in breach of contract or file a small claim action
- Lawyer can also apply to "charge" client's property if lawyer's services helped to recover or preserve the property, R 10.4
  - Could be acting for a client and they are fighting over property because you acted for them they end up acquiring property, however, client has other creditors and you are unsecured, so apply for a charging order – acts similar to a garage keeper's lien, entitled to be paid for your work

Review Officer's Considerations R 10.19

- Retainer agreement
- Can review hourly billing, and contingency agreement (payed out based on fruits of their labour – still record your time in case of the review) of payment
- Factors set out in R 10.2
  - (a) the nature, importance and urgency of the matter,
  - (b) the client's circumstances,
  - (c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,
  - (d) the manner in which the services are performed,
  - (e) the skill, work and responsibility involved, and
  - (f) any other factor that is appropriate to consider in the circumstances.
- Note special rules on contingency fee agreements R 10.7, 10.8
  - Contingency agreements are used often in personal injury law, way of providing access to justice for middle class, but open to abuse so special rules apply
  - Tend to work based on number of steps taken from commencing docs to trial, lawyer takes a % of award/settlement increases as more steps taken

Security For Costs

BASICS

- Because of loser pays system – there needs to be assurance that the party can pay that money
- In limited curcumstances, parties can make court applications to require the other side to post the costs upfront to cover a potential cost award – the party with limited assets.
- Security need to be posted before litigation can be continued – if not – the ligation stops or dismissed
- Party (usually defendant) worried that adverse party (usually plaintiff) is judgment proof (no assets, or not in Alberta), because
  - Adverse party has no exigible assets, or
  - Adverse party has no exigible assets in Alberta

  - Possibility of being subject to a costs award ≠ incentive to behave reasonably if a litigant knows (s)he can never be forced to pay the judgment
  - So make party's ability to continue litigation contingent on party providing security
  - If party providing security ultimately successful, gets it back
  - If party providing security ultimately unsuccessful, other side's costs can be paid from security
  - If party fails to provide security for costs by date specified, claim/defence can be dismissed/struck

NOTE: security for costs can be sought by a plaintiff against a defendant though Court's more reticent to grant these orders

Test for Imposing Security for Costs R 4.22-23 – SOURCE of Getting it R 4.22

- There has been some dispute whether 4.22 applies to security for costs awarded against companies – current prevailing view → if you are seeking the security for cost from the company use *Business Corporations Act (*higher bar to meet*),* **not R 4.22**
- Does not apply when seeking security for costs against corporations
- **4.22 TEST:** Court will ask is it just & reasonable to order security for costs having regard for:
    - (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against **assets in Alberta;**
      → **if the party has business here and property – not likely to get security**
    - (b) the **ability of the respondent** to the application to pay the costs award;
    - (c) the **merits** of the action in which the application is filed;
      → if the action is likely to be in your favor – likely to get security
      → if 50/50 – less likely to get security
    - (d) whether an order to give security for payment of a costs award would **unduly prejudice** the respondent's ability to continue the action;
      → UNDULY is important word here.
    - (e) any other matter the Court considers appropriate.
  - Court may also impose security for costs as condition, e.g., when party repeatedly not complying with timelines, party narrowly avoids summary judgment application, party applies to set aside default judgment etc.

Security for Costs – *Business Corporations Act,* s 254: Corporations & Companies

- It applies not to who is applying for security for costs, but applies to whom the order is being thought against
- Use when
  - Application being brought by defendant
  - Plaintiff = corporation
- Test: "[plaintiff] will be unable to pay the costs of a successful defendant"
  - Court in *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66 suggests *BCA* test is a higher threshold than under R 4.22 (e.g., harder for defendant to succeed on security for costs application)
- Companies get more favorable status - this is a harder test to meet – not likely have to put up security.

Security for Costs in Legislation

- Contemplated in other legislation, e.g.,
  - *Public Trustee Act*, SA 2004, c P-44.1, s 30(2)
  - *Companies Act*, RSA 2000, c C-21, s 101(1)(b)
  - *Consumer Protection Act*, RSA 2000, c C-26.3, s 17(4)
  - *Builders Lien Act*, RSA 2000 c B-7, s 48(1)
  - Cannot get security for costs in some situations, see e.g.,
  - *Business Corporations Act* (Alberta), s 191, 200, 231, 243
- Can get security for costs on appeal, R 14.67

Security for Costs on Appeal

- Can get security for costs on appeal R 14.67
- *Koerner v Capital Health Authority*, 2011 ABCA 146
  - Facts: P's claim against doctor struck for non-compliance, P appeals, D apply for security for costs
  - Decision: Court grants security for costs but at a lower amount than D requested for two reasons 1) P has some ability to pay, but also 2) P's likelihood of success on appeal in doubt

Costs and Access to Justice

- Costs meant to reduce the amount you pay for the lawyer

- Self represented individuals can get costs "in appropriate circumstances", R 10.31(5)
- *Pro bono* lawyers can get costs, see *1465778 Ontario Inc. v. 1122077 Ontario Ltd*, 82 OR (3d) 757 (CA)
- **Advanced costs** - an order requiring Party A to pay litigation costs of party B
  - Litigation re: division of matrimonial property, where 1 party has title to all the assets
  - Statutory basis –
    - Oppression Action - *Business Corporations Act*, s 243(4)
    - Some regulatory Proceedings, e.g., *Environmental Appeal Board Regulation*, 19(3)
  - Rowbotham Order (a Charter remedy) – Alberta resources HERE
  - Public interest litigation- *BC Minister of Forests v Okanagan Indian Band*, 2003 SCC 71
    - **Protective costs order** – limits costs liability of litigant if litigant ends up being unsuccessful, see e.g., *Farlow v. Hospital for Sick Children*, 2009 CanLII 63602 (ON SC)
- Useful resource: Christopher Bredt & Heather Pessione, "Advanced Costs Awards: A Critical Analysis" (2015) 34 Nat'l J Const L 31

Miscellaneous Terminology

- **Adjournment *Sine Die*** – adjourn indefinitely
- **Advisor link** – provides substantive legal advice if you have an ethical concern
- **Affidavit** – court documents containing evidence, used when appearing before court and want court to make a decision, witnesses write out and swear on truth of evidence
- **Court Vary Time Periods Rule** R 13.5 – Court has ability to vary/extend time periods, absent language denying the court this ability in regards to a particular rule i.e. R 3.26
- ***Ex Parte* application** – without notice application, party making application has a heightened obligation to disclose all facts, supporting and un-supporting (not allowed to omit facts that are not favourable)
- **Hearsay** – evidence based on information and belief, can include in affidavit unless it is an application to dispose of a matter
- **Judicial review** – administrative arm of the state sets up all sorts of tribunals, but want court oversight of that executive branch so sometimes there is an appeal process to directly appeal to the court of appeal, but if no process then you can ask a court to judicially review, use an originating notice and the court examines how administrative decision makers are and aren't supposed to act.
- **Legislative Concordances** – useful for finding case law pre-2010 Alberta Rules of Court, finding case law interpreting comparable provisions from other Canadian jurisdictions
- **Notices to the profession and practice notes** – every once in a while you will get these, stating we have something really important that you should know, you can find old notices to the profession on court of queens bench website under announcements, practice notes are somewhere else on website
- **Practice advisor** – call if you have an ethical concern, do not provide substantive legal advice
- **Preservation order** – order to prevent property from possibly being destroyed/damaged
- **Queen's Counsel** – at least 10 years as lawyers, referred to as Q.C. – is an honourary appointment given to select lawyers in recognition of their contributions to the legal profession and public life
- **Stay Funds of Court Order** – when there is money in court and trying to establish entitlement to money, but have not established it yet
- ***Viva Voce* Hearing** – used when you have affidavits saying opposite things, judge cannot make a finding of credibility on an application that only uses affidavit evidence so use this type of hearing i.e. used in applications for civil restraining orders