Chapter 1: Purpose and Intention of the Rules of Court	
The Alberta Court of Queen's Bench Rules of Court **provide a structure for the litigation process leading to a civil trial** in Alberta's superior court. As the case excerpts below indicate, the challenge of the modern Rules is to **provide for an adversarial litigation process while simultaneously promoting efficient and cost-effective access to justice.** The foundational purpose and intention of the Rules is expressly set out in **Rule 1.2.**	**RULE 1.2 Foundational rule of court:** Most civil litigators are familiar with this b/c it can creep up on them at some point in the litigation spectrum • **As officers of the court, this rule says, WE WILL SEEK COST EFFECTIVE AND TIMELY RESOLUTION OF CLIENTS MATTERS IN COURT** Broad sweeping statement, but there is substance… why? because that rule 1.2 in accordance with SCC in ***Hryniak v Mauldin*** stated there must be a see-change in how litigators do business → **provide guidance to lower courts how to ADJUDICATE MATTERS IN A TIMELY, COST-EFFECTIVE, EFFICIENT AND FAIR MANNER FOR THE ISSUES IN DISPUTE.** • ***Hryniak v Mauldin:*** This case dealt with a **summary judgment** (useful tool for litigators and their clients to be able to seek truncated adjudication before the court **– a way to cut off protracted litigation proceedings and is guided by a test** • **Test for plaintiffs** →Summary judgment is brought by plaintiff → plaintiff is seeking a judgment early on from the court in their favor because they believe the law and facts favor them and the defense has no meritorious defence aspects. • **Test for defendants** → Can also be sought by the defendant as frivolous and without merit and promote abuse of process and seek an order for **summary dismissal** • **2 kinds of summary judgment** (party bringing it has the onus) • **Summary judgment** (brought by P) • **Summary Dismissal** (brought by D because unique to D) • Note: summary judgment test and summary dismissal test are the same, but burden lies on different parties → Summary judgment case (***Hryniak v* Mauldin**) talked about a see change about how litigation should be conducted on cost effective timely basis so courts are in a good position to adjudicate and arrive at disposition at the issues in dispute, those types of matters should be summarily decided in keeping with **Rule 1.2** Robust test to decide which cases will go forward and which will be dismissed and are governed by the **"DROP DEAD" Rule** • ***Drop Dead rule*:** If you go to litigation firm, you will deal with someone litigating and needs to know if they are **within the 3 years (within the drop-dead period where it is in 3 years)** → **you have 3 years to "significantly advance" the action or else they "SHALL" dismiss this action upon application** • Reason for that is that the court doesn't want proceedings to drag on for years (dilatory proceedings) • **Dilatory proceedings**: lengthy, languishing court proceedings that are typically **ripe for dismissal action** • Dilatory definition: languishing, something that languishing • REFERRED TO AS: • Pre-2010: **Application for Want of Prosecution** • NOW: **Application for Dismissal for LONG DELAY:** 3 years or more delay/inactivity

	• **Application for dismissal for INORDINATE DELAY:** more than 3 years -- up to 10+ years or more delay/inactivity → this delay is usually at the hands of all parties (blame assigned to all parties)

***C(L) v Alberta*, 2011 ABQB 12**
 	
GRAESSER J:—
Rule 1.2 is clearly intended to guide the interpretation of the New Rules and might be described as the New Rules' guiding principles. Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues. **Rule 1.2 may be described as the lens through which all Rules must be interpreted**. I expect that where there are **competing interpretations, the interpretation closest to the intentions expressed in Rule 1 will prevail**. However, **there are competing interests identified in Rule 1.2: a fair and just result does not automatically equate with a timely and cost-effective one**. Our system has long entitled a defendant to know the case it has to meet, which often requires extensive discovery that is both time-consuming and expensive**.** However, limiting discovery in the interests of timeliness and cost effectiveness may be viewed as impairing a party's entitlement to a fair and just result.
	Advertence to rule 1.2
	• **Rule 1.2 dictates all other rules – it is fundamental to all rules**
	• case can be identified as **standard suit** or **complex suit**
	  • If the case is complex, you can identify it as such to the court
	  • sometimes if one party goes to dismiss the case early and the claim is without merit, the standard is high and the onus remains on the defendant to meet the test for summary dismissal to achieve dismal
	  • Sometimes, however, court is not in position to dismisses the case because there are controversies on facts or duelling affidavits, and both sides cannot agree on the material facts, the magistrate, justice or master cannot allow summary dismissal and the case proceeds to trial.
	• At trial the trier of fact, trial judge, determines the findings of fact based on evidence offered by parties at trial
	• The court also determines **credibility findings** on these points.
	  • If the court doubts credibility of one of the parties swearing competing affidavits…that's another reason why the court may not be poised to say it can grant a fair and just adjudication on the record before the court.

GRAESSER J:— (Con't)
Litigation remains an adversarial process. The New Rules still contain requirements with respect to pleadings and allows a defendant the opportunity to apply to dismiss an action based on deficient pleadings: **Rule 3.68.**
 	
A defendant is not required to assist the plaintiff in making its case against the defendant.
 	
While the New Rules contemplate greater cooperation among counsel in moving an action along towards dispute resolution and then to trial if necessary, **the New Rules do not contemplate that the parties must agree to short-circuit or jump over processes to achieve a timely and cost-effective result**
	Rule 3.68: Rule for applications to strike on the basis or face of the pleading (no affidavit evidence allowed on rule 3.68 application) → motions/applications to strike on the face of the pleading itself
	  • Affidavit evidence not permitted on **Rule 3.68** application to the court
	  • Old terminology: motion to strike
	  • now: **APPLICATION TO STRIKE**
	  • Even with the new rules, there is still an adversarial process. Defence not obliged to make out the case for P on their behalf. P must still prove the elements of the action they are pleading in their suit against the D. But under the new rules, moving to greater cooperation btw counsel (which was lacking in the past)
	  • Lawyers are not to be rude as a courtesy to other lawyers (**rule 1.2 of court**) and the judge here is getting at the reality that we must deal with opposing counsel courteously to deal with matter in a timely and cost-efficient manner → **duty of civility of lawyers**
	  • Many lawyers don't abide by this basic courtesy – duty to be courteous and not rude
	  • **This rule REQUIRES counsel to further this objective**

GRAESSER J:— (Con't) The clear wording of the Rule itself contemplates an application being made to "**identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense**"***	***Get a gainful admission from other side with respect to a material fact at which is at issue in dispute. If they will admit this fact, saved on court time (trier of fact won't have to decide fact on that point). If you do go to litigation, and run a trial, always good to talk to opponent about creating together **Agreed Book Of Statement Of Facts,** so that the court doesn't have to make finding on each facts, but rather they are readily agreed to. Such can shorten trial time.

There is no timeframe set out in **Rule 1.2.** **Rule 1.2(3)** would appear to make the <u>existence of an action the only pre-condition to making an application</u>, although in my view, it would be premature for an application to be made if the parties have not first made an effort among themselves to identify the issues in dispute and to determine the quickest way of resolving the dispute at the least expense	Also an **Agreed Book Of Exhibits**: tendering exhibits which are agreed to, typically the whole book is listed as 1 single exhibit Idea of truncating court time is because of rule 1.2 – the foundational rule
GRAESSER J:— (Con't) **Rule 1.2(3)** contemplates that both substantive and procedural matters be addressed: the issues to be resolved presumably relate to the elements of the plaintiff's claims and the defendant's defences. I would suggest that the days when the defendant could file a defence in the old form, namely that "*the Defendant denies all allegations in the Statement of Claim and puts the Plaintiff to the strict proof thereof*", are over. **Defendants will be required to disclose their position and state their defences sooner rather than later. But defendants are still entitled to defend actions against them vigorously and to maintain any and all defences that are not unreasonable or frivolous and can withstand a summary judgment application**. They are also entitled to insist that the plaintiff follow proper procedures and comply with the Rules of Court.	**"the days when the defendant could file a defence in the old form, namely that *"the Defendant denies all allegations in the Statement of Claim (bare denial) and puts the Plaintiff to the strict proof thereof*", are over" -** • Boilerplate language that used to be used in statements of defence, but what is important is that if your going to insert such bare language denial, incorporate more of denying all allegations, but **meat of defence is that the time is taken to respond to some of the allegations your able to respond to with your own set of facts. Today SoD are more inclusive of particularity as to facts plead in SoD** o Used to be a time defence would file bare denial defences, they would deny everything, but they would do so in a vague way… they wouldn't respond to every allegation in SoC, but rather a blanket denial of every allegation of fact in Statement of Claim (bare denial). It is not wrong to file bare denial, but isn't useful for purposes of Rule 1.2 to identify the real issues of dispute
Hryniak v Mauldin [2014] SCC 72 Increasingly, there is recognition that a culture shift is required in order to **create an environment promoting timely and affordable access to the civil justice system.** This shift entails **<u>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</u>**. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.	Culture shift = idea of the need for a see change to how we fairly and justly adjudicate matters on the record at the time the matter is brought. • How to fairly and justly adjudicate -- can the court adjudicate in a way that promotes just fair and proportionate judgement on the allegations pled -- results should be tailored accordingly • (ie. **summary trials**, there is a restricted procedure. In a summary trial, lets have a trial to have a trial on an issue (either fact or law) BUT once court determines this you have reduced court time. • Can have a **summary judgement** on a liability issue (ie. who is at fault and not how much it will cost → (1 day trial on liability alone) common in insurance; if no question that the insured is liable, only concerned with the damages) • Proposals are aimed at producing a proportionate result for justice on this matter • **Summary judgement/summary dismissal/summary trial** are all tools to try and comply • **Access to justice issues:** culture shift and proportionate procedures produce greater access to justice for those engaged; Culture shift important because proportionate procedure going to

	meaningfully increase access to justice for litigants who were caught in the web of justice system
Nafie v Badawy (2015) ABCA 36 Application for leave to appeal to SCC dismissed [2015] SCCA 128 However, **despite "scarce judicial resources, Courts must not cast aside established procedures and practises expressly prescribed by the rules for the sake of expediency.** Quicker access to justice must not mean accepting less stringent practises which diminish the quality of a judicial process such that fair and proper adjudication is, or is seen to be, compromised": *ibid*. •••	Important statement from CoA in 2015→ **statement is a caution to guide lower courts in that although they can adjudicate and dispose of matters on the record BUT is it a just and fair determination** – a call made by adjudicator that there is no one size fits all, and is sometimes challenging for the court to make a decision for summary judgement/dismissal [this is done case by case decision that is made] • **DO NOT grant these remedies** (summary dismissal or judgment) **for sake of expediency**, still need to listen to everything to determine if the applicant has met the test for either summary judgment or summary dismissal • **<u>Access to justice does not always mean quicker justice</u>**
Windsor v Canadian Pacific Railway Ltd (2014) ABCA 108 The theory that disputes eventually "went to trial" was always something of a legal fiction. Even when the court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, **it was well known that trials were a rarity**. ***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 procedur**e. 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".	• **Trials and cases still a rarity** – reality these days that trials don't happen often - both parties counsel always worried about settlement before trial (compromises held stay in accord with Hryniak and Rule 1.2) • **trials rarely happen because think of Rule 1.2 because diligent counsel are thinking about if this is an opportunity for settlement, even on the evening before trial, counsel can think of settlement.** • Myth of the trial does have merit • Per Yiu: Cannot recall anyone that has run lengthy trials at his office recently and these are quite rare
Allen v Alberta (Minister of Seniors and Community Supports) 2015 ABCA 238 The reasonable expectation of the bench, the bar, and the public is that **procedural deadlines are imposed to further the administration of justice, not to thwart it.**	Interesting because if you are dealing with procedural deadlines under the rules of court, there are orders you can obtain to enforce dealings for procedure. • Can obtain court orders to enforce them for procedure. • **Counsel on top of their files can agree on timelines with opposing counsel and don't need a court order. If the other counsel is not agreeable or impossible, may need to apply to court for them to become compelled to follow procedure in the court order.** **Otherwise (without order) the 90 DAY RULE FOR AFFIDAVIT** – once the first defence is filed and serviced, **<u>plaintiff has 90 days to get client in to swear affidavit of records</u>** (entire production of relevant and material records to be turned over to defence if your client is plaintiff) being turned over to the defense, and the **<u>defense then has 60 days to turn over their records to plaintiff</u>**. • Timelines are written in Rules of Court. • Counsel and clients do miss these, but can write to the other side and remind these parties that these were due, if this fails can apply to court to apply for a "date certain" (date certain = specified date)

Chapter 2: Jurisdiction **See rules part 1**	

In order for a court to adjudicate over a civil dispute, **the matter in dispute must fall within the jurisdiction of the court.**
 	
Jurisdiction relates to**:**
(1) the topic or subject matter of the claim,
(2) the territory where the claim is brought, and
(3) ***forum conveniens (convenient forum)***
	• Every **statement of claim will have a judicial center/venue to file a pleading** (esp. a commencement pleading such as a statement of claim) where you want this to be heard (ie. Edmonton vs. Lethbridge → can address judicial venue or center with a test)
	  • We are going to come across case law where other side said no, the venue shouldn't be Edmonton, should be Lethbridge, because XYZ, and now you have a dispute, so there's a test to selecting appropriate judicial center
	  • Examples:
	  • Motor vehicle cases: where the injury or loss occurs is where the suit will be filed; or where the contract was breached or accepted – those factors can govern where the proper center is
	
	• ***Forum conveniens*** – if dualling jurisdictions there is a test to govern *forum conveniens* and it is linked to jurisdiction and examined via test

A. Court of Queen's Bench
The Alberta Court of Queen's Bench is a court of plenary jurisdiction within the territory of the province of Alberta. As decided by the Judicial Committee of the Privy Counsel in *Board v. Board* (1919), this means that **the subject matter jurisdiction of the Court of Queen's Bench is limited only to the extent that a statute expressly gives exclusive original authority over a particular subject matter to another court or tribunal**.
 	
Examples of statutory provisions which derogate from the Court's plenary authority include the *Federal Courts Act*, s. 18 and the *Workers Compensation Act*, s. 23.
 	
See Alberta's *Judicature Act*, RSA 2000, c J-2, ss 1, 2, 3, 4, 5, 8 and 10 and the *Federal Courts Act*, RSC 1985, c F-7, ss 17 – 26.
	• **Plenary Jurisdiction (***board v board***)** vs **non-plenary/subject-matter** = certain statutes that explicitly state what the jurisdiction is of a tribunal or court under this legislation
	
	• See ***Alberta's Judicature Act***, RSA 2000, c J-2, ss 1, 2, 3, 4, 5, 8 and 10 and the ***Federal Courts Act***, RSC 1985, c F-7, ss 17 – 26.
	  • ***Alberta's Judicature Act***,
	  • ***2(1)*** *The Court has generally all the jurisdiction, powers and authority that before its organization were by any law, order or regulation vested in, or capable of being exercised within, Alberta by the Supreme Court of the North-West Territories.*
	  • ***(2)*** *The Court has all the jurisdiction, powers and authority that were by any law, order or regulation vested in, or capable of being exercised by, the Surrogate Court of Alberta immediately before the coming into force of this subsection.*
	
	EXAM: May ask 2 questions TOPS on jurisdiction and this is all that is required for this court

C. Specialized Tribunals and Judicial Review **Statutes may place authority for dispute resolution regarding specific matters in the hands of statutorily created tribunals**. **The jurisdiction of such tribunals is statute-specific** and may have the **effect of limiting the jurisdiction of the court.**	Judicial review available to litigants Specialized tribunals – WCB governed by Workers Compensation Act of AB • Sets out all powers of that act

Examples of such specialized tribunals include the Workers Compensation Board, the Surface Rights Board, and the Land Compensation Board. **Typically the decisions of these tribunals are subject to review by the courts** (i.e. judicial review on administrative law grounds), **but are generally not fully re-litigated at the court level.** **Proceedings before tribunals are NOT USUALLY GOVERNED BY THE RULES OF COURT**	**Creatures of statute created to hold administrative tribunals - more narrow scope of hearings dictated by statutes** • Workers comp board • *metis settlements act* → specialized tribunal gains power through the act (there a few tribunals that gain power through acts) • Appeals: Under workers comp, for example, the act sets out the types of matters that can be heard on appeal, under *WC Act* and *Metis Settlements Act*. AB metis settlements tribunal has a restricted jurisdiction under the *metis settlements act* re matters it can properly hear • *Surface rights act* governs all of the powers of the *Surface Rights Board*
D. Rules See Alberta's *Judicature Act*, RSA 2000, c J-2, ss28.1-28.3 and s 29. **EXAM:** NOT RELEVANT FOR THE FINAL EXAM … but may ask tops 2 question on jurisdiction (s. 2-5) → Specifically, **s. 28** and **s.29** will not be tested on exam; just know jurisdiction **(s. 2)** for exam purposes	• **s. 28** is dealing with Lieutenant Governor in Council authority to make Rules of Court under *Judicature Act* • Rules of Court committee that updates rules (sometimes ask the bar to provide their comments on rule changes) • Ministerial regulations **(s. 28.3) –** minister may make regulation respect court-annexed dispute resolution process • Extra-curial Orders **(s. 29)** • special jurisdiction of judges
E. Rule Enforcement 1. Justices, Masters and Court Officers The Alberta **<u>Rules of Court are enforced by Justices of the Court of Queen's Bench, the Alberta Court of Appeal, and, ultimately, the Supreme Court of Canada.</u>** In addition, some rules **<u>may be enforced by special officers of the Court of Queen's Bench called "Masters</u>**." The jurisdiction of a Master is set out in Alberta's *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, ss. 8 to 16 (most notably s. 9). Generally, **the decision of a Master can be appealed to a Justice of the Court of Queen's Bench justice, whose decision can be appealed to the Court of Appeal.** In order to appeal a decision of the Alberta Court of Appeal to the Supreme Court of Canada on a matter of civil law (including a matter involving enforcement of civil procedure rules), **the Supreme Court of Canada must grant leave to hear the appeal** (*Supreme Court Act*,	*Alberta's Court of QB Act* dictates the jurisdiction of Justices, Masters, and Court Officers Double check court because different judges have different jurisdiction (master v justice) Practice point: Masters in particular have very limited jurisdiction – be clear if getting instruction if it's for master's chambers (or justice chambers) to grant that type of relief (if not, then can assume justice of QB would, but may also have to check) ▪ Right of appeal from masters up to QB and from there to the CoA if needed ▪ **Appeal period for a masters order is likely less than 30 days and there are timelines that must be abided by to get to CoA.** ▪ Upon appeal, you can go to SCC if you meet the **requirements (test) for leave to SCC**: (*Supreme Court Act*) 1. **<u>Issue of public importance</u>** BUT most matters have a dimension of national importance (so not necessarily national importance only but public importance)

R.S.C. 1985, c. S-26, s. 40). As of 2014, Alberta's *Court of Queen's Bench Act* also creates court officers called **Case Management Counse**l (see ss. 16.1 & 16.2). ▪ These court officers <u>cannot issue Court Orders or otherwise adjudicate on matters of civil law</u> or civil process, but they <u>provide assistance in managing civil cases as requested</u> by the Chief Justice or as provided for in the Rules of Court.	2. Needs to be an **<u>issue of law</u>** that relates to public importance that impacts all Canadians Case Management has lots of power and <u>manages issues between parties</u> - governed by this act and help further the Rule 1.2 (costly & timely resolutions). As provided for by chief justice or Rules of Court. Governed by home statute, in this case Court of QB Act.
2. Contempt of Court See Rules Part 10, Division 4, Subdivision 2. _____ ***Cary v Laiken*****,** 2015 SCC 17 Cromwell J: **Contempt of court "rest[s] on the power of the court to uphold its dignity and process ... The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect":** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931. It is well established that the purpose of **a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order**": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20. The common law has developed to recognize **two forms of contempt of court: CRIMINAL CONTEMPT and CIVIL CONTEMPT**. **The distinction,** which the parties to this appeal accept, **rests on the element of public defiance accompanying criminal contempt**: see, e.g., *United Nurses*, at p. 931; *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, at p. 522. **With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive**": R. J. Sharpe, *Injunctions and Specific Performance*(2nd ed. (loose-leaf)), at para 6.100. **However, ONE PURPOSE OF SENTENCING FOR CIVIL CONTEMPT**	In what context do we see courts enforcing their process → ON **<u>FINAL EXAM</u>** WE MAY SEE court enforce its process: • Contempt of court AND/OR Vexatious litigants • in what context do we see the court enforcing its process? • Two places we can identify readily: • 1) contempt of court and • 2) vexatious litigants

IS PUNISHMENT FOR BREACHING A COURT ORDER: (Note: very common!) *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655, at para. 117. **Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct (Note: for punishment and deterrence):** Sharpe, at para 6.100.	contemnor = person in contempt
2. Contempt of Court See Rules Part 10, Division 4, Subdivision 2. _____ ***Cary v Laiken*****,** 2015 SCC 17 Cromwell J: **Civil contempt has three elements which must be established beyond a reasonable doubt:** *Prescott-Russell Services for Children and Adults v. G. (N.)* (2007), 82 O.R. (3d) 686 (C.A.), at para. 27; *College of Optometrists,* at para. 71; *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210, at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204, at para. 47; *Soper v. Gaudet*, 2011 NSCA 11, 298 N.S.R. (2d) 303, at para. 23. **These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases**: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11. **The FIRST ELEMENT is that the order alleged to have been breached "MUST STATE CLEARLY AND UNEQUIVOCALLY WHAT SHOULD AND SHOULD NOT BE DONE**": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 32262 (Ont. S.C.J.), at para. 40**. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear**: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. **An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning**: *Culligan*	**EXAM: WAS ON PAST FINALS (NEED TO KNOW**): Civil contempt has three elements which must be established beyond a reasonable doubt: ▪ **The first element is that the order alleged to have been breached "MUST STATE CLEARLY AND UNEQUIVOCALLY WHAT SHOULD AND SHOULD NOT BE DONE"** • This requirement of clarity ensures that a party will not be found in contempt where an order is unclear (*NOTE: if vague, they will not be in contempt)*

Canada Ltd. v. Fettes, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21 **The SECOND ELEMENT is that the party alleged to have breached the order MUST HAVE HAD ACTUAL KNOWLEDGE OF IT:** *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It **may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine** (*ibid.*). Finally, **the THIRD ELEMENT is that 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:** *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.). at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.	• The **second element is that the party alleged to have breached the order MUST HAVE HAD ACTUAL KNOWLEDGE OF IT**: • important because when we talk about the important access to justice case *Pintea v Johns* of SCC • Involved individual who was found to be in contempt by Case Management Justice, upheld by majority at appeal, and then this was reversed at the SCC • **need ACTUAL KNOWLEDGE or it may be INFERRED if the facts allow such (not implied, or constructive knowledge)** • **Note:** may be possible to infer knowledge in the circumstances or contemnor may attract liability on the willful blindness but will get back to us about implied vs inferred and why one is allowed. Inferences set it apart from implied knowledge • case management in *Pintea* likely thought there was enough knowledge to fulfil the inferred knowledge (HE WILL GET BACK TO US ON THIS) • **The final element MUST BE INTENTIONAL FAILURE OR INTENTION TO DO THE ACT that has been prohibited by the order** • **Key is not unintentional but must be intentional by contemnor** **FINAL EXAM:** in the past, he has done a fill in the blank, or a mix and match, true/false, or a short answer about one of the prongs of the test • COULD BE ON 1 OR 2 QUESTIONS ON FINAL -- HE NOTED/EMPHASIZED THE **"ACTUAL KNOWLEDGE REQUIREMENT"** • Will probably see something about contempt of court because court confirmed in Pintea that actual knowledge is required
2. Contempt of Court See Rules Part 10, Division 4, Subdivision 2. _____ **Cary v Laiken,** 2015 SCC 17 **The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders**: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663, at para. 7. As this Court has affirmed**, "contempt of court cannot be reduced**	Judicial discretion should be exercised with restraint when issuing orders for civil contempt → Enforcement power of the court of last resort

to a mere means of enforcing judgments": *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p.1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991] R.D.J. 249 (Que. C.A.). **Rather, it SHOULD BE USED "CAUTIOUSLY AND WITH GREAT RESTRAINT": *TG Industries*, at para. 32. IT IS AN ENFORCEMENT POWER OF LAST RATHER THAN FIRST RESORT**: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.	
2. Contempt of Court See Rules Part 10, Division 4, Subdivision 2. _____ **Cary v Laiken,** 2015 SCC 17 For example, **WHERE 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:** see, e.g., *Morrow, Power v.Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open **the possibility that a JUDGE MAY PROPERLY EXERCISE HIS OR HER DISCRETION TO DECLINE TO IMPOSE A CONTEMPT FINDING WHERE IT WOULD WORK AN INJUSTICE IN THE CIRCUMSTANCES OF THE CASE.**	Work an injustice" - be mindful of this wording – must work an injustice in the circumstances of the case
2. Contempt of Court See Rules Part 10, Division 4, Subdivision 2. _____ **Cary v Laiken,** 2015 SCC 17 **(3) The Required "Intent": It is well settled in Canadian common law that all that is required to establish civil contempt is proof BEYOND A REASONABLE DOUBT OF AN INTENTIONAL ACT OR OMISSION THAT IS IN FACT IN BREACH OF A CLEAR ORDER OF WHICH THE ALLEGED CONTEMNOR HAS NOTICE**: *Prescott- Russell*, at para. 27; *College of Optometrists*, at para. 71; *Sheppard*, at p. 8; *TG Industries*, at paras. 17 and 32; *Bhatnager*, at pp. 224-25, Sharpe, at para 6.190. The Court of Appeal followed this approach. As it noted, to	**NOTE: BURDEN = BEYOND A REASONABLE DOUBT for civil contempt (<u>not</u> balance of probabilities)**

require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (2013 ONCA 530, at para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: para. 62; see also *Sheppard* and Sharpe, at para 6.200.	
NOTE: Alberta courts have held that **a party in contempt cannot access the court to participate in litigation unless the contempt is purged** (see *Schmidt v. Wood* (2012) ABCA 235). In *Pintea v. Johns*, 2017 SCC 23, the Supreme Court of Canada confirmed that in order for a court to hold someone in **civil contempt for failing to obey a court order, "the common law of civil contempt" requires proof "beyond a reasonable doubt" that the person in question had "actual knowledge" of the court order.**	Yiu's example: Insurance matters. On for defense. P didnt show up to questioning multiple times. They got an order citing the P in civil contempt and that P was held in custody on a civil matter (P was shackled - ***need to purge P's contempt***). Awkward and violent to be in a court in this circumstance given it was civil court. → **Serious consequence for disobeying court orders** Pintea accused of not attending case management meetings because he claimed he changed addresses but didnt notify court and kept getting notified at the wrong address. Case management justice found he was in civil contempt, and the majority at appeal affirmed this, BUT the SCC said that beyond a reasonable doubt (BRD) was not met - Pintea did not have actual knowledge. `1

Chapter 3: Costs and Fees	
A. Lawyers' Charges See *Rules Part 10, Division 1.* **B. Court Fees** See *Alberta Rules of Court,* Schedule B – Court Fees & Witness & Other Allowance. **C. Recoverable Costs of Litigation** See Alberta's *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21. See Rules Part 10, Division 2 and Schedule C – Tariff of Recoverable Fees.	C. Look at it yourself - See Alberta's *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21 Schedule C SEE BOTTOM OF RULES OF COURT in Volume 2 The Tariff: governs "party and party costs" - Divided into columns. Starts with column 0 up to 5. **Depending on the amount of damages claimed, you can seek back a portion of the costs if you are successful** (party and party costs -- defined/set by the tariff). • If you win your lawsuit, you get your money back under schedule C (typically like $200 filing fee or something – **schedule c costs**) • Different from **solicitor client costs** **Solicitor-client costs** are based on full indemnity: to make the other side whole with respect to legal fees • pay all their costs - very rare in Alberta to get this over and above schedule C. High evidentiary bar to prove successful litigant should be entitled to full costs over and above party and party costs
***Tiger Calcium Services Inc v Secure 2013 Group Inc* 2018 ABCA 110** --- IV. Analysis *A. Types of Costs Awards Generally* [12] Courts have broad discretion when awarding costs: Alberta Rules of Court, AR 124/2010, r 10.29–10.31. While different and sometimes inconsistent nomenclature is used, four types of costs are typically awarded: **1. PARTY AND PARTY COSTS** a. **Party and party costs** – determined in accordance with the tariff in Schedule C of the Rules and **awarded in the majority of cases. THEY GENERALLY COMPENSATE THE SUCCESSFUL PARTY FOR A PORTION OF THE LEGAL FEES INCURRED**. The court may specify that the **amount paid is a multiple, proportion or fraction of any of the amounts in the tariff**: **rule 10.31(3).** These costs are comparable to "ordinary costs" in British Columbia and to "partial indemnity costs" in	4 types of costs typically awarded →**Exam: know types of costs for final** 1. Party and Party costs **Default rule** → For a successful litigant = party and party costs and follows Schedule C of rules (partial indemnity costs)

Ontario: Mark M. Orkin, The Law of Costs (Aurora, Ont: Canada Law Book, 1987) (loose-leaf 2017 supplement), ch 1 at 3-4.

---

2. LUMP SUM COSTS

b. Lump sum costs – **fixed at a set amount**: **rule 10.31(1)(b)(ii)**

---

3. SOLICITOR-CLIENT COSTS

c. Solicitor-client costs – **PROVIDE FULL INDEMNITY FOR ALL LEGAL FEES AND DISBURSEMENTS REASONABLY INCURRED TO THE PARTY TO WHOM THEY ARE AWARDED**. They are comparable to "special costs" in British Columbia and to "substantial indemnity" costs in Ontario: Orkin, ch 1 at 3-4. They are also called 'solicitor and client costs' or 'party and party costs payable on a solicitor and client basis'.

→ **Solicitor-Client Costs Generally**

[15] Solicitor-client costs are generally awarded only when there **has been reprehensible, scandalous or outrageous conduct by a party:** *Young v Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3 at 134, 108 DLR (4th) 193. They **are only awarded in rare and exceptional circumstances, and may be available if misconduct occurs in the course of litigation**: *FIC Real Estate Fund Ltd v Phoenix Land Venture Ltd*, 2016 ABCA 303 (CanLII) at para 4, 403 DLR (4th) 722. A careful analysis of the facts is required: para 5. FIC Real Estate at paragraph 4 **endorsed circumstances that may justify such an award:**

a. blameworthiness in the conduct of the litigation;
b. when justice can only be done by a complete indemnification for costs;
c. when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive proceedings, when the misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
d. when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts

2. Lump Sum Costs

Lump sum paid by unsuccessful party and is fixed

Example: court could order lump sum amount of 10k and this is the amount fixed and payable to the successful party)

3. Solicitor-client costs

- Clients often think success = all legal fees paid. Need to advise clients on the costs that can be awarded and that the default rule is NOT this rule (get a portion of their legal fees back, but not full – party & party costs is default rule)
- Full legal fees = full indemnity fees
- **Disbursements are ALSO included in this set of costs**: out of pocket expenses born by firm (faxing, printing, photocopying, courier, etc.)
- **Bill of cost provided to court sets out your hourly rate and disbursements** (both taxable and non-taxable)

RARE to be awarded!

Other considerations for solicitor-client costs to be awarded (just considerations not mandatory factors)

c. Ie. D makes a bare denial - will see you in court and are taking a principled position to this and will spend as much money as possible to fight this and that their claim with completely without merit/is bogus.

that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion; e. positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs; f. litigants found to be acting fraudulently and in breach of trust; g. fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and h. an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges. **4. SOLICIITOR AND OWN CLIENT COSTS** d. Solicitor and own client costs **– allows a solicitor to recover from a client "frills or extras" authorized by the client which the client should reasonably pay its own solicitor, but which "should not fairly be passed on to third parties who become responsible for those expenses":** *Luft v Taylor, Zinkhofer & Conway,* 2017 ABCA 228 (CanLII) at paras 77–78. When they exceed solicitor-client costs because they include **services requested by a client that go beyond the reasonable fee** and disbursements incurred for all steps reasonably necessary within the four corners of the litigation, such an award is only justified in the most exceptional circumstances.	d. Ex. Party goes through questioning, was supposed to turn over all docs during questioning and then at trial they turn over other/additional material disclosure that should have been disclosed at the time of questioning (prolonged trial - other side has to examine and maybe question based on this disclosure) → court can undertake a cost sanction e. Deterring others from this conduct (punitive aspect) f. e. civil fraud is proven on the BoP and court finds this, this can be grounds for S-C costs g. If you are found to have induced a breach of contract (is a tort) and presenting a misleading statement of account and it is found out it could go to court exercising discretion to make S-C costs owed **Note: Not mandatory list of factors but court will consider** 4. Solicitor and own client costs Para 77-78: refers to the fact that these type of costs are EXTREMELY RARE and really are restricted to a finding of a CONTRACTUAL PROVISION expressly providing that defines this and where lawyer and client have agree to this going to be rare if ever a court awards these absent agreement Generally speaking: these are not awarded often
Costs Against Former Counsel [22] **Rule 10.50** contemplates that a lawyer who engages in serious misconduct may be ordered to pay costs personally. The threshold is high and the discretion to do so must be exercised cautiously: (leading case) *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 (CanLII) at para 25, [2017] 1 SCR 478. Guidance is provided at para 29: **an award of costs against a lawyer personally can be justified only on an EXCEPTIONAL BASIS WHERE THE LAWYER'S ACTS HAVE SERIOUSLY UNDERMINED THE AUTHORITY OF THE COURTS OR SERIOUSLY INTERFERED WITH THE ADMINISTRATION OF**	**Cost awards are typically against an unsuccessful party BUT where a lawyer engages in serious conduct, the court may sanction that lawyer** • **Facts**: Jodoin was representing a number of clients and learns the name of the justice is someone who is in conflict and should recuse themselves. Raise motion, there is an adjournment and Jodoin wanted to thwart proceedings. Another judge steps in and Jodoin raises an objection against and he was found to be attempting to thwart justice and was cited personal costs against him -- lawyer is in such trouble that they are exposed to cost awards and when lawyers may be liable for their actions • **Recent Edmonton Case:** Priscilla Kennedy was subject to personal costs award recently and went up to ABCA. Reversed QB decision to expose her to costs - she was NOT exposed personally. It was found that if this stood, those in the legal profession would be on edge due to the exposure to this amount of money

JUSTICE. This **high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.** Thus, **a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.**	• **Note**: cost decisions require permission from the ABCA to hear this and determine that the case has arguable merit before it can be heard by the panel. This was of such importance to the profession at large and that permission should be granted to appeal the personal costs award

Chapter 4: Professional Responsibilities	

A. Lawyer of Record
See Rules Part 2, Division 4.
 	
B. Undertakings
See The Law Society of Alberta Code of Conduct, s 7.2-14
	Lawyer of Record
	• See Rules Part 2, Division 4.
	  • READ THIS SECTION OURSELVES IF WE HAVE TIME
	• **There needs to be a lawyer of record for any civil litigation proceeding and you get on the record by filing a commencement document (aka statement of claim or originating application). These documents will see "address for service and contact information of the party filing this document"**
	  • To get on the record you fill in this information
	• Lawyer of record changes or client wants a new lawyer → still the lawyer of record until you file one of two things:
	  • a **"notice of withdrawal of lawyer of record**" that is filed and served to the client (note: still lawyer on record for 10 days after the affidavit of service on your client)
	  • OR the **new successor counsel receives the file** and **you place them on a trust condition that they must serve you with a "notice of change of lawyer of record"** (aka the successor lawyer files with the court and this is then served to former counsel)
	  • **Note**: Important because in civil proceedings when you inherit a file, you need to reach out to other counsel that you have been retained and that you will serve the old lawyer of this
	Undertakings
	See The *Law Society of Alberta Code of Conduct*, s 7.2-14
	• 7.2-14: **A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.**
	  • Commentary: [1] **Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms**. If a **lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated** clearly in the undertaking itself. In the **absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personall**y. The **use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility**
	
	NOTES re: Undertakings:
	• Practice rule: Don't agree to undertaking unless you can fulfill it (before you accept to grant opposing counsel an undertaking, think long and hard)
	• **Since the undertaking promises are so serious, you should not agree to an undertaking unless you can fulfill it** (must meet promise made to other side).
	  • If you are uncertain about getting this, suggestion is that you agree to only "exercise reasonable, best efforts" - not a promise to come through but rather to do your best. Can also take this undertaking under advisement

C. Code of Conduct In all phases of civil litigation and in all dealings with a client, the public, other members of the profession, tribunals and courts, lawyers and students at-law in Alberta are required to act in accordance with *The Law Society of Alberta's Code of Conduct*.	• Transactional work + undertakings: real estate law - will not release money until AtoE have been completed. No money can be released until the other side gets (ex. Clear title and mortgage stuff) Re Commentary of code: lawyer is liable and see above about best efforts • If you cannot meet and fulfill a trust condition, you should amend these to something that can be fulfilled - do not want to breach a trust condition. If you are bound to trust conditions, you need to study the wording and if you have concerns about fulfilling them and let the other lawyer know you cannot comply (say why) + propose amended conditions. Do not proceed until you can proceed amicably (trust conditions are rare in rules of civ pro aside from settlements) **Code of Conduct** • **When you are articling, you are a notary public and a commissioner of oaths - can notarize documents and commission documents as part of your position** *Pillar* Case: If there are unnecessary costs one side subjected another to, then this can be considered by court in granting full indemnity or enhanced costs

Chapter 5: Commencement of an Action	
	Note: We **NO LONGER CALL THEM ACTIONS** in AB the are **KNOWN AS CLAIMS** under Rules of Court.
Rule 3.2 – How to start tan Action **3.2(1)** An action may be **started only by filing in the appropriate judicial centre** determined under rule 3.3 (a) a **statement of claim** by a plaintiff against a defendant, (b) an **originating application** by an originating applicant against a respondent, or (c) a **notice of appeal,** reference or other procedure or method specifically authorized or permitted by an enactment.	**Under Rules of Court says how to start an action, only by filing per Rule 3.2(1) and Rule 3.3.** • Can file any number of documents to commence (see a, b ,c) Statement of Claim filed in **ABQB** as opposed to Provincial Court **must be over $50,000** [**final exam]** • Jurisdictional limits in ABQB is $50,000 and above (may be amended (rumors currently)– no timeframe for order → he will let us know if Rules do change) • jurisdictional limits in **Provincial Court up to and including $50,000** • **Statement of Claim is default** **Originating Application (OA)** – example – injunction • if you have a client who is on the protect line and they want them removed from picket line, they're seeking injunction, the other side has to file an OA for injunctive relief. • **injunctive relief =** is going to court, seeking some injunction. • **Injunction** = is an equitable remedy available to an applicant who is seeking 1 of 2 different kinds of injunctions • (1) **prohibitory injunction**: going into court on client's behalf to restrain/prohibit the respondent from doing something – refrain them from doing something • (2) **mandatory injunction:** opposite to prohibitory injunction, requires defendant/respondent to take positive step to do something; it requires a positive step to be taken • Ex: in one case, a Dr sought injunction from the court to require AHS to continue to pay his weekly salary while he was being investigated for professional discipline charges, he asked court to continue to be paid, this is a positive step, to do something. **Prohibitory Injunction Test (3 part)** 1. Whether there is a serious issue to be tried 2. Irreparable harm done to applicant if injunction isn't granted? 3. Balance of Convenience – Applicant has to argue that in absence of injunction being granted, they are more prejudiced than the respondent if the injunction is not granted **Mandatory Injunction Test (3 part)** 1. Whether there is a strong prima facie case against the respondent 2. Irreparable harm done to applicant if injunction isn't granted? 3. Balance of Convenience – Applicant has to argue that in absence of injunction being granted, they are more prejudiced than the respondent if the injunction is not granted **Remember**→ Key: 2nd and 3rd branch are the same for both tests; the first branch of each is modified

(2) A **statement of claim must be used to start an action** unless (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, in which case an originating application may be used to start the action. **(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 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. **(4)** If an enactment authorizes, requires or permits an appeal or reference to be made to the Court and provides a procedure, the appeal or reference must be made in the form prescribed by the enactment or, if no form is prescribed, then in a form consistent with the procedure or in Form 5.	**Note**: Both tests have been litigated and judicially interpreted (*Modry v Alberta Health Services*) **Judicial review** almost always commenced by Originating Application filed with the court. **Note**: The test for **prohibitory injunctio**n is the same test for a **stay order** for decision/order of the court that you are appealing • if you get judgment not in your client's favor and you want to appeal but the order requires you to pay money or something to the other side, while you are filing your appeal, your bound to terms of order issued form the court, so the way around that it is to ask court to issue stay order pending appeal to higher court (usually in most cases CoA) **Note:** Most often we see judicial review or adjunctive relief **Notice of Appeal** – can commence if appealing under some enactment. • Under QB Act you have 30 days from day of pronouncement from date of order. • With respect to costs, if there is a cost decision ordered by the court, does a litigant have automatic right to appeal cost decision to CoA? o We require permission from the court to appeal cost decision of QB justice to the CoA (3 judges) → **need permission** 3.2(2)(f) –or example, if the parties wish to put forward reference to the court for issue of law, where there is an enactment that provides for this type of appeal, you can proceed in that fashion. **EXAM**: may put this type of scenario in MC and have us identify which of the following applies to commencing lawsuits in respect of Rule 3.2. • Don't have to tell him, he will probably tell us in MC if hes asking us to what applies and what does, he'll give us Rule number, otherwise, don't have to identify the Rule for him. <u>He cares about content of the Rule</u>. **Rule 3.2(4)** – for example if your filing Notice of Appeal to CoA on Civil Lit file, there is a **Notice of Appeal form** you have to file with the court to get your appeal filed.

(5) If an enactment authorizes, requires or permits an appeal or reference to be made to the Court and does not provide a procedure, the appeal or reference must be made by originating application in Form 5. **(6)** If an action that is started in one form should have been started or should continue in another, the Court may make any procedural order to correct and continue the proceeding and deal with any related matter. AR 124/2010 s3.2;143/2010	**Rule 3.2(6)** – **if you start an action using form X but you should've used form Y this rule suggests that your action could continue but its at the discretion of the court whether they permit your action to be transferred over to another form**. • Not an automatic right that a litigant has to switch the format of their claim once its filed but a procedural order at the discretion of the court that the court could correct the error and allow the court to continue.
Area of limitation statutes! **Limitations Act**	*Limitations Act, RSA 2000, c L-12* **Exam:** WE HAVE TO KNOW THIS STATUTE FOR THE FINAL **The first question we ask is what is the limitation period, is the client within period to bring a claim (in any consult for civ lit file)** • Relevant sections: s. 3 - **Limitation periods** **3(1)** Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within (a) **2 years after the date on which the claimant first knew, or in the circumstances ought to have known,** (i) that the injury for which the claimant seeks a remedial order had occurred, (ii) that the injury was attributable to conduct of the defendant, an (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or (b) **10 years after the claim arose, (ultimate limitation period in AB)** **whichever period expires first,** the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim. **Note**: (b) Is a more verbose way of saying the defendant has complete limitations defense to a plaintiff's claim if the claim is brought outside of 2 years generally speaking. • Example: MVA – date of accident clear. Jan 25, 2021, count 2 years ahead and if they are even a day over 2 years, the claimant will be **statute barred.** • File well in advance of 2 years IF POSSIBLE – sometimes not possible to file a lot of time in advance because still waiting for their injuries to heal, and expert reports, etc. If you can, recommended to position ourselves well in advance of 2 years to file, because **2 YR LIMITATION IS A HARD LIMITATION IN LAW.** ○ → If you miss the 2 years to file, this is a matter of professional negligence. • PR – professional discipline process, all practicing lawyers required to carry liability insurance, this insurance provider is ***Alberta Lawyers' Insurance Association*** (ALIA).

- ALIA appoints lawyer to represent lawyer who has missed limitation period and has to file/report to Law Society that they missed limitation period to file → matter of professional negligence.
    - In AB lawyers have E&O insurance – ***ERROR AND OMISSION INSURANCE***.
        - Limit he thinks is 1 million, can be bumped up to 2 million.

Limitations issue can be hotly debated prilmary issuue at any trial, because if party is arguing limitation defence wins, then game over. Unless you appeal the limitations decision to CoA and plaintiff wins.

EXAM: Important to know s. 3 of Limitations Act for Final.

Ultimate limitation period (10 years)

- example – moldy condo – client bought residential condo, didn't know there was black mold until they took possession and in one case was weeks later they discovered the mold infestation. The owner may not have known about the mold, wouldn't have known until they took possession and noticed damp wall or something. Home inspector didn't know about it either, they were concealed. Could see how the 10 years would apply because the claimant didn't know that proceeding was warranted or either that they had a claim, years into possession of home.

Warrants bringing a proceeding: we just don't know if you have good enough facts in your possession as claimant to file lawsuit against defendant – may have partial facts. <u>Want to wait to have all the facts that would merit at that time bringing a proceeding.</u> Could be a tribunal decision that denies request, etc. May be correspondence that grounds your claim to warrant bringing a proceeding.

Limitations Act s. 6

- **Note**: going to be talked about later but have to know for final – **EXAM** → add a claim to existing claim after you have filed

Claims added to a proceeding

6(1) Notwithstanding the expiration of the relevant limitation period, **when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.**

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) **the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,**

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied, and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

s. 6 is when you add a claim to an existing claim after you have filed.

- So lets say you file in 2021 your Statement of Claim, goes to discoveries in 2023, in disc. You learn facts through examining other sides client that they reference a third party you have never heard of who appears to be fair game for exposure to liability (another playing in this cast of characters) if your client instructs you to file suit against this new party, then you are bound by s. 6 of *LA*. **WHERE THERE IS AN ADDED CLAIM, THE ADDED CLAIM HAS TO BE RELATED TO THE "CONDUCT, TRANSACTION OR EVENTS THAT WERE DESCRIBED IN THE ORIGINAL PLEADING**" because you are asking the court to amend the original claim to add a new party after limitation period is likely expired. So if the 2 years has expired on you the time discoveries is held, a new defendant should be brought into the law suit, make the application to the court under s. 6 but the **TEST IS THAT YOU MUST ENSURE THE PROPOSED AMENDMENT IS RELATED TO THE "CONDUCT, TRANSACTION OR EVENTS THAT WERE DESCRIBED IN THE ORIGINAL PLEADING" AND HAVE TO ENSURE YOU ARE DOING SO WITHIN THE LIMITATION PERIOD.**

	• More on this but already should turn our mind to how we add defendants to a lawsuit where original claim is filed and we learn something in discovery about potential new defendant and want to add this defendant to the claim. • A lot of counsel deal with s. 6 when adding defendants or substituting parties in statement of claim once original is filed and pleadings is closed (filed and served and defences all filed and served, in rules talks about Replies should go with this definition of "closed"). **If you learnt this information at discoveries, then the limitation period basically renews.** • If you can apply *Discoverability Rule applies*. • If other side said you could have learnt this though due diligence etc., then clock not really restarted. Plaintiff would have to show court you didn't know this information. • <u>Qualified ability of plaintiff to rely on discoverability to rule to reinitiate limitation clock based on evidence they learn in discoveries/questioning.</u> **Discoveries now means questioning in new rules.**
Boyd v Cook, 2013 ABCA 27 [4] We have decided to uphold the limitations defence. Before we explain ourselves, we should put this whole question into context. **Limitations statutes exist for a purpose. They are not mere tidiness, nor a trick to give defendants windfalls or bargaining points. Limitations legislation, so-called "statutes of repose" exist to give some certainty in their lives to all those who may at some time be sued. That is not only true of businesses and professional people, but also ordinary citizens who can ill afford the mental and emotional stress of threats or lawsuits. It is a nuisance and an expense to have to keep voluminous records in perpetuity. Allowing large potential threats to hang over heads for a generation sterilizes capital and impoverishes businesses.** What is worse, it is unjust to sue people once their former ability to defend themselves has evaporated. In many types of claim, a *prima facie* case is easy to prove.	**CLASS NOTE**: The highlights are his emphasis, not to be taken as courts emphasis, its what he wants <u>US</u> to focus on based on the decision. Most important to appreciate for the **final exam.** This highlighted people have to get on with their lives; should not be able to linger over people. Businesses typically only keep records for so long so (10 years for law firms he thinks, some exceptions). **Should not be subject to an indefinite period to get sued.**
[5] And any attempt to compromise competing goals and to adopt some hybrid mechanism, often may be worse than simply deciding the limitations issue initially, no matter who wins that issue. Trying preliminary issues about discoverability or related questions can simply lengthen and fragment litigation, draining both sides' purses without producing any substantive result for either. A legitimate issue may have to be tried whatever the expense, but there is no such issue here.	This is a comment about that there could be a preliminary issue on limitations mentioned at trial, but even before trial you want to further *Hyrniak v Mauldin* by truncating the proceeding and have the court predetermine if there is a viable limitations defence beforehand. There may be a trial of an issue before the trial proper.
[28] 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**	Important step that comes out of interpretation of the *Limitations Act* as to state of knowledge that claimant/plaintiff has to have to ground their claim and warrant proceeding being brought.

reasonable person in the same circumstances. We do not see what room that leaves for assessing the credibility of the plaintiff Mr. Boyd, in this case. His actual state of mind in mid-June at best is one alternative arm of the test. What the reasonable person would have known or discovered with some diligence, could equally start the limitation period running

- Not a subjective test, the common law when we adjudicate limitations issues relies upon and has for some times told us the **test is objective, what they knew or what they ought to have known in the circumstances. They have actual knowledge of certain facts that would warrant bringing the claim, or ought to have known certain facts that would warrant bringing the proceeding**.
    - A grey area where if you are asking trier of fact to rule on this as preliminary issue, it will be a judgment call made by ToF (Trier of Fact) and factual finding is going to be one of mixed law and fact. You have a test under the limitations act, but in order to apply the test, ToF has to consider two versions of what they consider to be applicability or non-applicability of s. 3 for instance of *LA* and that requires looking into factual matrix.

What is the standard of review for mixed fact/law? – (admin law question) overriding and palpable error (for errors of mixed fact/law yes).

- If we are talking about standard review analysis, what is the standard review for questions of mixed fact/law?
    - You do have overriding palpable error but also a standard of review for what of questions of mixed fact/law
        - correctness (yes for questions of law) but for mixed fact/law it is reasonableness. Per *Vavalov* decision.
- **So reasonableness is standard of review for questions if mixed fact/law and for just questions of law it is correctness**
    - used to have reasonableness simplicitor but that is no longer a category.

Dash Distributors Inc. v Powlik.
[2012] A.J. No. 1310

MASTER SCHLOSSER:—
Under the old Rules, litigants were supplied with four vehicles to get into Court: Statement of Claim, Originating Notice, Petition and "Special Application" (old Rules 394, 395). The Petition became vestigal when it was no longer used in divorce proceedings. **The main choices were Statement of Claim or Originating Notice. The Special Application was a catch-all for those unusual situations where there was a remedy but no clear procedure.** It at least got you into Court for advice and directions about how to proceed.

Master Schlosser is a "guru" in AB court for rule interpretation etc

Used to be 4 vehicles to get into court – SoC, Originating Notice, Petition (P) and Special Application (SA)

Old Rule 410 was permissive. It said when proceedings could be commenced by Originating Notice. **Both old and new Rules allow the procedure to be converted if a wrong choice is made.** The new Rules have done away with two of the four modes of transport. **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 me**t. Other than doing away with the Petition and the Special Application, not much has changed.

Special Application was a catch all – see above. This was the old rules how things went. The old rules was permissive

For clarity, the new rules came into force Nov 1, 2010**. New rules have done away with 2 of 4 modes of transport (P & SA)** – Statement of Claim is "all terrain vehicle" and originating application remains

EXAM: Don't have to know anything about petition or old special application for Final

In appropriate circumstances, an Originating Application may be more conducive to expedient resolution of a matter. It gets you into court on a specific date to have the matter heard and, where the use of it is appropriate, it dispenses with many of the steps that would follow if a Statement of Claim were chosen as the commencing document. **The emphasis of many of the new Rules is to keep matters moving and to shorten the horizon for the resolution of a matter brought by a Statement of Claim. However, with a Statement of Claim you only get a trial date when you are ready to complete a Form 37.** That is a long way and many steps removed from the commencing document. **The procedure for a matter commenced by Originating Application is not open ended. But, the price of being able to pick a court date from the outset is that the matter has to be capable of summary determination**. It is an exception to the rule that a dispute will be resolved at trial if it is not settled along the way.	Two readily available examples where we see OA being utilized is in respective to injunctive relief and judicial review. **Form 37** is also known as *CERTIFICATE OF READINESS* where both sides to action say their ready to go to trial and furthermore, you are identifying to the other side how many witnesses (expert and non-expert witnesses) you are going to call and how long you intend trial to take. • If you are going to trial, and your matter is being scheduled, they wont schedule for trial till the parties certified they have participated in some type of ADR process (**judicial dispute resolution** – judicial conference, mediation conference without prejudice (off record) with ABQB justice – justice participates to the extent to try and help parties resolve matter by way of negotiated agreement), **private mediation** is another common ADR process. **<u>ADR process options:</u>** **Judicial conference** – JDR briefs exchanged, and justice participates to the extent that they try to help parties resolve the matter by way of negotiated agreement. If there is a negotiated agreement it is recorded by the justice at that time and the matter is subject to any number of terms for the settlement. One standard condition is that Plaintiff must file discontinuance of claim without cost basis (Pl doesn't ask for costs to discontinue action against Def.). Full and final release is another common condition (D pay P x amount of dollars and in orders for lawyer to realse money to client P has to sign aa full and final realse to D releasing D from all future claims against D – capture all claims in law and equity thereby stopping all future actions) • Standard release language very tight – captures all claims in law and equity of any kind. Insulates the plaintiff from any kind of further action by the defendant **Private mediation –** you hire a mediator and they exchange mediation briefs, mediators appointed by agreement and mediator makes a ruling. That decision of mediator may or may not be binding (parties can chose to have binding or non-binding, without prejudice, off record, conditions of settlement are recorded, mediation settlement) **Negotiation between counsel for parties** **Arbitration -** typically written into parties contracts, if dispute arises, arbitration clause is invoked, and when invoked parties will agree to arbitration and arbitrator and arbitrator will issue binding decision (parties are agreeing to a contractual agreement) if parties cannot agree to arbitrator parties can apply under arbitration act to have an arbitrator appointed too the case **Exam**: what types of ADR? **JDR, private mediation, arbitration** and **negotiation**

Chapter 6 – Parties	
A. Persons Lacking Legal Capacity ➨ See generally *Rules Part 2, Division 2 and R. 10.47*	A number of scenarios in which the question of who can sue or how do we sue is dealt with in this section → *part 2 division 2, rule 10.47*
Person lacking legal capacity: Deceased Persons and Infants **1. Deceased Persons** ➨ See **Alberta's *Survival of Actions Act*, RSA 2000, c S-27 and Alberta's *Fatal Accidents Act*, RSA 2000, c F-8**	These are the **types of persons who lack capacity** **Deceased Persons** → Deceased person obviously lacks capacity. Have to have regard to *Survival of Actions Act* and *Fatal Accidents Act* _____ *Survival Actions Act, RSA 2000, c S-27* **Definition** **1** In this Act, "cause of action" means (a) the right to bring a civil proceeding, or (b) a civil proceeding commenced before death, but does not include a prosecution for the contravention of an Act, regulation or bylaw. → express definition of cause of action under this Act **Cause of action survives for benefit of estate** **2** A cause of action vested in a person who **dies after January 1, 1979** survives for the benefit of the person's estate. • specific date – a person who dies before this date, their cause of action doesn't survive for the benefit of their estate have to be after Jan 1, 1979 ○ **Exam**: be aware on the final exam of this date to determine if the SAA applies **Cause of action survives against estate** **3** A cause of action existing against a person who **dies after January 1, 1979** survives against the person's estate. • **Example**: MVA and defendant driver dies, they were born in 1990, does the cause of action against that person survive against that person's estate? Yes because the person died after Jan 1, 1979 **Cause of action deemed to exist before death** **4** **If a cause of action** for damages suffered by reason of an act or omission **would have existed against a person had that person not died at or before the time the damage was suffered, the cause of action is deemed to have existed against the person before the person's death**. • So this is a deeming provision under SAA. If the cause of action would've existed against the person had they not died, at or before the time the damage was suffered, the action is deemed to have existed against the person before the person's death

Recovery of damages

5(1) If a cause of action survives under section 2, only those damages that resulted in **actual financial loss (key)** to the deceased or the deceased's estate **are recoverable**.

(2) Without restricting the generality of subsection (1), the following are not recoverable:

(a) punitive or exemplary damages;

(b) damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities;

(c) damages in relation to future earnings, including damages for loss of earning capacity, ability to earn or chance of future earnings.

(3) Subsection (2)(c) applies only to causes of action that arise after the coming into force of this section.

Note:

- important section to be aware of – what kind of damages can be recovered in SAA action? We are told here – must be actual financial loss for SAA claims. In SAA action cannot claim punitive or exemplary damages, similar to compensatory damages (b), similar to non-pecuniary damages (c)

EXAM: in the past he has given students – typically you will see 1 fact pattern dealing with SAA or a fact pattern dealing with FAA. The whole factual matrix of the fact pattern is centered on 1 of these 2 important pieces of legislation. Will have to see if the SAA or FAA applies or none applies. We will be asked to do some legal memo on veracity of SAA or FAA by supervising partner who asks for our opinion on whether SAA or FAA applies, both applies, or none applies. On each last 2 fact patterns were on both settings and last year students had option of doing one of two long answer questions where the fact patterns were just pick 1 of 2 because we are writing remote. This year we will have to engage the SAA OR FAA but likely not both.

Fatal Accidents Act, RSA 2000, c F-8

Definitions

1 In this Act,

(a) "**child**", except in section 8, includes a **son, daughter, grandson, granddaughter, stepson and stepdaughter;**

(b) repealed 2002 cA-4.5 s36;

(c) "**parent**" includes a **father, mother, grandfather, grandmother, stepfather and stepmother**.

(d) repealed 2002 cA-4.5 s36.

Exam: for final, fact pattern may engage dialogue interactions between child and parent, for particular reason, why he would be referring us to facts dealing with child or parents, this is tailored because of what types of individuals can even claim under FAA

Action for damages

2 When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

- what you can even sue for under the FAA
    - What this means – when someone dies, and the cause by (1) wrongful act, (2) neglect, or (3) default that if death didn't happen the person injured wouldn't been able to claim damages and that person who is liable if death had no ensured is liable regardless that the person died.
    - **Exam**: question likely be either wrongful act or neglect

Exam: When you read fact pattern, immediately think does this fit within the definition of s. 2? Make sure you have regard to this particular section when doing analysis of FAA claim. Does it fit s 2? Have to identify, before you can get to damages, have to identify if it meets the definition for action for damages under FAA or not to begin with. First hurdle, did the person die by wrongful act, negligent, default? (s. 2) if yes, then go to different parts in the act…. What can you get? Look at damages?

Damages

7 If an action is brought under this Act and if any of the following expenses and fees were reasonably incurred by any of the persons by whom or for whose benefit the action is brought, then those expenses and fees, in a reasonable amount, may be included in the damages awarded:

(a) **expenses incurred for the care and well-being of the deceased person** between time of injury and death;

(b) **travel and accommodation expenses** incurred in visiting the deceased between time of the injury and death;

(c) **expenses of the funeral and the disposal of the body of the deceased**, including all things supplied and services rendered in connection with the funeral and disposal;

(d) **fees paid for grief counselling** that was provided for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person deceased.

EXAM: Damages available under FAA v SAA – be able to switch between the two legislation during the EXAM. Under FAA types of damages that can claim are expenses under s. 7 (a,b,c,d.) Unique feature is that you can claim damages under s. 8.

Damages for bereavement

8(1) In this section,

(a) "child" means a son or daughter;

(b) "parent" means a mother or father.

(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, **shall award damages for grief and loss of the guidance, care and companionship of the deceased person of**

(a) subject to subsection (3), (amount is) **$82 000 to the spouse or adult interdependent partner of the deceased person**,
(b) **$82 000 to the parent or parents of the deceased perso**n to be divided equally if the action is brought for the benefit of both parents (i.e. 42,000 for each parent), and
(c) **$49 000 to each child of the deceased person.**

(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner **if the spouse or adult interdependent partner was living separate and apart from the deceased person** at the time of death. (have to be cohabitating)

(4) Repealed 2002 cA-4.5 s36.

(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate. (so, if the spouse, parent or child of someone who died and have an action for money, their action for money doesn't survive their death)
(how did they get to $82,000? He doesn't know.).

EXAM: on exam, damages will be asking most likely what types of damages in your view are recoverable based on the acts presented in respect to the individuals identified as prospective plaintiffs in a future action

- hopefully very obvious based on the question what he is asking – go back and look at FAA or SAA

In the fact pattern we get it won't be obviously on its face but when you go back and read the statutes you will be able to identify which legislation it falls under.

2. Infants

- Claims involving minors are governed in part by provincial statutes including the ***Minors' Property Act***, SA 2004, c M-18.1, and the ***Public Trustee Act***, SA 2004, c P-44.1.

NOTE: When a settlement is reached on behalf of a minor, the Court may approve the same on application

- see s 4 (1) of the ***Minors' Property Act***).

Infants

Claims governed by *Minors Property Act* when involving minors

_____

Minors Property Act

Settlement of minor's claim

4(1) In this section,

(a) "claim" means a claim that, if proved in a court of competent jurisdiction, would result in a money judgment as defined in the *Civil Enforcement Act*;
(b) "indemnity" means an agreement by a minor's representative, given in connection with a settlement of the minor's claim, to compensate a person for liability or costs incurred by that person in the event that a claim is subsequently made by or on behalf of the minor regarding a matter covered by the settlement;
(c) "representative" means the guardian or litigation representative of a minor who has a claim.

(2) If a representative has agreed to a settlement of a minor's claim, the Court may, on application, confirm the settlement if in the Court's opinion it is in the minor's best interest to do so.

	• doesn't say the court MUST confirm the settlement, but MAY (i.e. if in best interest of minor **(3) A settlement of a minor's claim is binding on the minor only if the settlement is confirmed under subsection (2).** • only legally binding if confirmed by court under ss. 2 **(4)** Any money payable to a minor under a settlement that is confirmed under subsection (2) must be paid (a) to a trustee appointed by the Court under section 10 who is authorized by the appointment or by the order confirming the settlement to receive the money, (b) to the Public Trustee, or (c) as the Court directs, if the total amount payable to the minor under the settlement does not exceed the amount prescribed by the regulations. **(5)** An indemnity given by a minor's representative is void • if the minor child requires representation for injuries suffered in the accident, but before trial the child's claim is settled, what is the applicable act that applies? Minor's Property Act. This is the section that deals with settlement of minor's claim. Key here is ss. 2 and ss 3. Court may approve if in minor's best interest, doesn't have to just because application is filed. **When you have a minor in a court action, the minor will likely require a litigation representative**. • The minor litigant cannot self-represent. They need litigation representative to prosecute their claim. If a lawyer is representing the infant's interest against the parents, and it was the parent's wrongdoing that caused the accident, conflict can arise. So typically child must get outside counsel.
3. Persons of Unsound Mind Claims involving a person of unsound mind are governed in part by provincial statutes, including Alberta's ***Public Trustee Act,*** SA 2004, c P-44.1, and ***Adult Guardianship and Trusteeship Act***, SA 2008, c A-4.2.	This is not wills/estates course so generally have regard to these statutes. **EXAM:** ON final probably not going to be tested on these, maybe just mention exactly what's on the slides – what statues apply to persons of unsound mind and those advancing claims on behalf of those of unsound mind.
4. Appointment and Role of Litigation Representative • See the *Family Law Act,* SA 2003, c F-4.5, ss 20(2) and 21(6)(j). • E.g. Fatal accidents involving a parent of a minor child and child is injured will often require the appointment of a litigation representative if the matter proceeds to litigation. Note: insurance would act for parent typically but child would need outside counsel to put forward a claim against parent	Procedure to appoint a litigation rep. to act on behalf of P **Exam**: May come across this on exams, in short answer or MC section. • What options would be available to minor child as per representative is a claim was pursued against a parent who was the driver • **You could anticipate a fact pattern involving this type of scenario on the Final Exam.**

LC v Alberta (Metis Settlements Child & Family Services, Region 10), 2011 ABQB 42 GraesserJ: There is no requirement under old Rule 58 or new Rules 2.11(a) or 2.14(1) that the next friend be a parent or guardian of child. **New Rule 2.14(1) dealing with litigation representatives speaks of an "interested person", although that term is not defined in the Rules of Court. It is a defined term in the new *Adult Guardianship and Trustee Act* (not necessarily a relative or friend) but I am not aware of any definition of an interested person as it relates to an infant. I see no reason, however, to interpret the words differently for the purposes of the Rules of Court than under the *Adult Guardianship and Trustee Act*.** There was nothing in the old Rules of Court dealing with the resignation or replacement of an existing next friend or litigation representative.	What Graesser has to say is particularly relevant to appointment of litigation reps. • **Important take away** is that the new rule 2.14 dealing with lit reps, <u>speaks of interested person, doesn't confine definition to any particular type of individual like relative or friend.</u>
It is unclear as to the status of the defendant in an action to object to someone's appointment or replacement as a next friend or litigation representative. Because the next friend/litigation representative is generally responsible for the costs of the action, a defendant might in appropriate circumstances seek security for costs. **A defendant might object to the appointment of a next friend/litigation representative who has been declared to be a vexatious litigator (should say litigant) under the *Judicature Act*, R.S.A. 2000, c. J-2, or where the next friend/litigation representative might be in a conflict of interest *vis-a-vis* the defendant**. But otherwise, it is not clear to me that it is any of the defendant's business who the next friend is.	**Security for costs** – application made to a court and court uses discretion to impose X amount of costs on plaintiff because court has concern the plaintiff is impecunious and would have no ability to otherwise pay for a cost award if they lost the lawsuit so the defence can ask upfront that the court requires plaintiff post security for cost and if they don't by specified date, the plaintiff action is usually stayed till they can post security. Graesser is affirming there is a **right by defendant to object to proposed appointment for a next friend or lit rep and its no-one's business who this individual is as long as they meet the requirements.**
Where the next friend is not the parent or guardian of the child, the parent or guardian certainly has the status to object. In appropriate cases, the Public Trustee could step in (or be appointed by the Court), and as noted by Thomas J. in *C.H.S.* (*supra*) at para. 29, **the Court's *parens patriae* power allows the Court to protect the interests of those who cannot protect themselves. I do not read *C.H.S.* as requiring that there be a formal resignation signed by the existing next friend, or that the parent or guardian or existing next friend, before a new next friend can be appointed.** There may be circumstances where the replacement of an existing next friend is sought, over the objections of the existing next friend. Or the existing next	Not simply because someone makes application to be appointed as lit rep, **that does not mean the parent/guardian cannot object to that proposed appointment, they can,** and here Graesser said in appropriate cases, public trustee could step in or be appointed by the court or step in. ***Parens Patriae*** – standing in the place of a parent. • Court does have this power **Note**: not an automatic appointment…that if parent/guardian opposes the lit rep being appointed they can do so under the rules.

friend may have become disabled, or disappeared, or otherwise unable to carry on. There are potential conflict issues between E.M.P. and her mother which make it important that E.M.P. have an independent next friend or litigation representative. I realize that parents are often next friends for their children in actions where the parents may be plaintiffs in their own right. But those are situations where the parents will self-appoint and not look to the Courts to make the appointment. **Where the Court is required to make the appointment, different considerations apply. Appointing a next friend or litigation representative who is already a parent's attorney under a power of attorney may put the next friend or litigation representative in an impossible position if there is a conflict between the parent's and the child's interests**. **NOTE:** In this scenario, it is recommended that counsel approach outside counsel to represent the interests of the child.	Conflicts – example – car accident, infant injured, parent driver → The two interests are in conflict, so both side needs separate representation. Even potential conflicts may give rise to separate representation for the parties. **Exam:** in final exam scenario I might give u a potential conflict scenario and ask what is the appropriate course of action you would recommend to the prospective client where there is a conflict of interests or potential conflict of interest
	Important statement in casebook dealing with s. 106 of *LPA*. _____ *Legal Profession Act* **Practice of law (Who can/cannot practice law in the province and who is exempted)** **106(1)** No person shall, unless the person is an active member of the Society, (a) practise as a barrister or as a solicitor, (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction, (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort. **(2)** Subsection (1) does not apply to the following: (a) a student-at-law in respect of anything permitted to be done by the student-at-law in the course of the student-at-law's service under articles or under the rules made pursuant to section 105; (b) a person who holds an authorization granted under section 48 in respect of services provided within the scope of the authorization and in accordance with the rules under section 48, or a person who is deemed by the rules to hold an authorization under section 48 in respect of services provided in accordance with the rules; (c) a professional corporation in respect of services performed while it holds a permit under Part 8 that is not under suspension;

Champagne v Sidorsky, 2012 ABQB 522 JONES J:— ••• A litigation representative, with nothing more, does not have the ability to represent a party before the court. **The status of litigation representative, under any rule of the *Rules*, does not circumvent the requirements of section 106(1) of the *Legal Profession Act*. Only a party themself, a lawyer, someone granted audience by the Court, or someone operating under an express exception to the rule requiring counsel may commence or continue an action before this Court.** The litigation representative might be the captain of the ship, but they may not row the boat.	(d) a person employed by an active member or professional corporation pursuant to a resolution of the Benchers under section 108 in respect of services provided by that person within the scope of that person's employment and in accordance with the resolution; (e) a university law student in respect of services permitted to be provided by that student by the rules that are provided in accordance with the conditions prescribed by the rules; (SLS – legal authority – for ability to appear in court as SLS student is this exception) (f) a notary public in respect of services provided by the notary public in the exercise of powers conferred on the notary public by law; (g) a public officer in respect of any acts performed by the public officer within the scope of the public officer's authority as a public officer; (h) a person who acts on the person's own behalf in an action, matter or proceeding to which the person is a party; (i) a person in respect of the preparation by the person of a document for the person's own use or to which the person is a party; (j) an officer or employee of a corporation, partnership or unincorporated body in respect of the preparation of a document for the use of the corporation, partnership or unincorporated body or to which it is a party; (k) a person licensed as an insurance adjuster under the *Insurance Act* in respect of services provided by the person as an insurance adjuster; (l) a person permitted by statute to appear as the agent of another person before a justice of the peace, the Provincial Court or a provincial judge in respect of services provided by that person as an agent; (m) a person holding professional legal qualifications obtained in a country outside Canada in respect of services permitted to be provided by that person in accordance with the rules in giving legal advice respecting the laws of that country. **(3)** Subsection (2)(l) does not include a person who is disbarred. _____ **A corporation cannot self-represent in court, through or via a director, it is not going to meet definition/requirement of s. 106(1)**
B. Trust and Estate Proceedings *See Rules 2.1.* Actions by or against personal representatives and trustees ➨ 2.1 **An action may be brought by or against a personal representative or trustee without naming any of the persons beneficially interested in the estate or trust**.	Old wording was executor/executrix but more were seeing **'personal representative'** who is individual appointed under last will and testament to administer estate after the deceased/testator has passed and they're responsible for dealing with liability and assets of the estate for purposes of probate, etc. This rule talks about how a personal rep could have exposure to an action and generally speaking an action would only lie against personal rep if they were somehow engaging in personal misconduct such as fraud but they are not immune from suit. PR that is why when you decide who you want to appoint

	in your will its best that you reach out to the individual you want to see if they agree to it because there can be situations if the estate is mishandled there could be negligence on the PR and they could be exposed to liability. Same thing can happen to trustee. **Exam:** 1 question on final about trustees/reps and how do we commence action and personal rep/ trustees or may refer to rule and indicate in MC Exam Q what is true re personal reps/ trustees
C. Business Entities **1. Corporations** See Alberta's *Business Corporations Act*, RSA 2000, c B-9, ss 208, 210, 227 and 295	A lot of litigation work, scope involves, corporate defendants.
s. 208 – Revival *Business Corporations Act* **208(1)** If a corporation is dissolved under this Part, any interested person may apply to the Registrar within 5 years after the date of dissolution to have the corporation revived. **(1.1) A corporation may not be revived after the expiry of 5 years from the date of dissolution.** **(1.2)** Notwithstanding subsection (1.1), a corporation that was dissolved before the coming into force of the *Unclaimed Personal Property and Vested Property Act* may be revived at any time up to 5 years after the coming into force of that Act. **(2) Articles of revival in the prescribed form and documents relating to corporate names that are prescribed by the regulations must, unless otherwise provided by the Registrar, be sent to the Registrar.** **(3)** On receipt of articles of revival and the documents referred to in subsection (2**), the Registrar shall issue a certificate of revival in accordance with section 267.** **(4) A corporation is revived on the date shown in the certificate of revival** and, subject to any reasonable terms that the Registrar may impose and to rights acquired by any person prior to the revival, the corporation is deemed to have continued in existence as if it had not been dissolved.	**What can happen with corporation that has to be revived** – a corporation can be dissolved, struck from the registry, there may be situations where a revival is possible, and this is one of them under s. 208 **Dissolution can happen for many reasons** – if there is a dissolution then look to s. 208 if in the future the corporation wish to revive it. **Cannot be revived after 5 years from dissolution date.** (important time frame to be aware of). • Exception – ss 1.2 – obscure piece of legislation we don't have to know full/at all really for exam, suffice to say we have this exception. **How do we revive a dissolved company – s. 208(2)** • Before 5 year mark hit and via a prescribed form **s. 208(1)(4) is what happens once you have the certificate of revival**

s. 210 – Revival **210(1) Any interested person may apply to the Court within 5 years after the date of dissolution for an order reviving** (a)a body corporate dissolved under section 273, (a.1) a body corporate dissolved under this Part, (b) a body corporate that was dissolved under the *Companies Act* or its predecessors before or after the coming into force of this Act and that was not at the time of its dissolution a not-for-profit company as defined in section 273(1), or (c) a body corporate that was dissolved by reason of the operation of subsection (7). **(1.1) A body corporate may not be revived after the expiry of 5 years from the date of dissolution.** **(1.2)** Notwithstanding subsection (1.1), a body corporate that was dissolved before the coming into force of the *Unclaimed Personal Property and Vested Property Act* may be revived at any time up to 5 years after the coming into force of that Act. **(2)** An applicant under subsection (1) shall give notice of the application to the Registrar and the Registrar is entitled to appear and be heard in person or by counsel. **(3) An order under subsection (1) may revive the body corporate** **(a) for the purpose of enabling it to apply for continuance under section 274, or** **(b) for the purpose of carrying out particular acts specified in the order, and the order shall state that the revival remains in effect for a specific time limited by the order.**	Have regard to ss (1.1) Ss 3 – (b) is important
On Revival… The **TAKEAWAY** from these provisions is that **a litigant may be required to apply to the Court in order to revive a Corporation that has become inactive in order to sue it as a named corporate defendant.** This will be **done by way of Court Order** and very often the Alberta Corporate Registry will not oppose the application but simply will consent to the same**.**	

2. Partnerships
See Rules 2.2 to 2.4.

Actions by or against partners and partnerships
2.2(1) An action by or against 2 or more persons as partners may be brought using the name of the partnership.

(2) Subrule (1) also applies to an action between partnerships having one or more partners in common.

Suing individual partners
2.3(1) In an action against a partnership in the partnership name, if a party intends to enforce a judgment or order personally against a partner, the party must serve the partner with

(a) the commencement document, and
(b) a notice stating that the person was a partner at a time specified in the notice.

(2) The person served is presumed to have been a partner at the time specified in the notice unless the person defends the claim separately by denying that the person was a partner at the specified time.

(3) An individual partner whether or not served with a notice under this rule may defend the action separately from the partnership.

Disclosure of partners
2.4(1) If an action is brought by or against a partnership in the partnership name, any other party may serve a notice to disclose requiring the partnership to disclose in writing the names of all the partners constituting the partnership at a time specified in the notice, and their current addresses.

(2) The partnership must comply with or dispute the notice to disclose within 10 days after service of the notice on the partnership.

(3) If the partnership disputes the relevance of the time specified in the notice to disclose, the partnership may apply to the Court to determine the matter, in which case the onus is on the partnership to show why the information should not be disclosed.

Exam: These rules specifically on partnerships because final maybe 1-2 questions max about how to sue a partnership in AB
→ Question likely pertaining to highlighted portions because we should focus on these.

2.4 example: **(1)** Dentons being sued, the party suing could issue notice to disclose to Dentons requiring partnership to disclose in writing all of the Denton partners constituting the Partnership. And they would have to at a time specified including their addresses. **(2)** 10 days to disclose name and addresses of partners.

(4) If the present address of a partner is unknown, the partnership must disclose the last known address of the partner.	
3. Sole Proprietorships **Actions by and against sole proprietors** **2.5(1) If a person carries on business or operates as a sole proprietor under a name other than the person's name, the person may bring or be the subject of an action in that name.** **(2)** If an action is brought by or against a person in the person's business or operating name, a party may serve a notice requiring the person to disclose, in writing, the legal name of the person carrying on the business or operation. **(3)** The person on whom the notice to disclose is served must comply with it within 10 days after the date the notice is served.	Will impact and figure at some point in our practice. Sole Proprietorship: J Smith doing business as JA Auto Body Shop The consequence of that is, that people think the person has a lot of liability, yes they do. Sole proprietors who are sued have exposure to liability whereas corp vehicle is protected by limited liability by way of corporate veil. Sole proprietor we are opening up the SP to all personal liability and would sue as named JA o/a JA Auto Body Shop **EXAM:** On exam, how would you describe this particular prospective defendant if you were drafting Statement of Claim. Call upon us to remember this dialogue about how do we describe certain individuals/businesses. For Sole proprietor, usually in the name such as JA o/a JA Auto Body Shop **EXAM:** Also be mindful of what s. 2.5 says – simply that the rule clearly states that if a person carriers on sole proprietor, the person may be/bring a subject of an action in that name.
D. The Crown *See Alberta's Interpretation Act, RSA 2000, c I-8,s 14* ➨ See Alberta's *Proceedings Against the Crown Act*,RSA 2000, c P-25, ss 8-14, 17, 23 and 25; ➨ Canada's *Crown Liability and Proceedings Act*,RSC 1985, c C-50, s 23; and ➨ Canada's Crown Liability and Proceedings (Provincial Court) Regulations, SOR/91-604, s 7	**Crown immunity** **EXAM:** Have regard to the legislation but don't need to study inside out the sections on this slide are sufficient. *Interpretation Act* **Crown not bound** **14** No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty. _____ *Proceedings Against the Crown Act* **Proceedings against Crown** **8** Except as otherwise provided in this Act, all proceedings against the Crown in any court shall be instituted and proceeded with in accordance with the relevant law governing the practice in that court. **Appeals, etc.** **9** Except as otherwise provided in this Act, all enactments and rules of court relating to appeals and stays of execution or proceedings, with all necessary modifications, apply to proceedings against the Crown. **10** Repealed 2013 cS-19.3 s16.

Documents and questioning
11 In proceedings against the Crown, the *Alberta Rules of Court* as to production and inspection of records and questioning apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a record or to make answer to a question in questioning on the ground that the production of it or the answer would be injurious to the public interest.

Designation of Crown
12 In proceedings under this Act, the Crown shall be designated "Her Majesty the Queen in right of Alberta".

Service on Crown
13 A document to be served on the Crown shall be served by leaving a copy with the Minister of Justice and Solicitor General or the Deputy Minister of Justice or any barrister or solicitor employed in the Department of Justice and Solicitor General.

Trials
14 In proceedings against the Crown, the trial shall be without a jury.

Injunctions
17(1) When in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may, instead, make an order declaratory of the rights of the parties.
(2) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown but may, instead, make an order declaratory of the rights of the parties.

Interest
23 A judgment debt due to or from the Crown bears interest in the same way as a judgment debt due from one person to another.

Execution or attachment
25 No execution or attachment or process in the nature of execution or attachment shall be issued out of any court for enforcing payment by the Crown of money or costs.

Crown Liability and Proceedings Act

Taking of proceedings against Crown

- **23 (1)** Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency.

	• **Marginal note:Service of originating document** • **(2)** Where proceedings are taken against the Crown, the document originating the proceedings shall be served on the Crown by serving it on the Deputy Attorney General of Canada or the chief executive officer of the agency in whose name the proceedings are taken, as the case may be. _____ *Crown Liability and Proceedings Regulations* **Examination for Discovery** **7** Subject to sections 37 to 39 of the *Canada Evidence Act*, where, under the provincial rules, there is provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery, such officer or servant of the Crown or an agency of the Crown, as the case may be, as may be designated for the purpose by the Deputy Attorney General or after such designation by order of the court, may be examined for discovery during an action subject to the same conditions and with the same effect as would apply to the examination for discovery of the officer or servant of a corporation.
Canada v Thouin, 2017 SCC 46 ➨ **I. Introduction** C. GASCON AND R. BROWN JJ.:-- **1 <u>Crown immunity is deeply entrenched in our law. The Court has held that to override this immunity, which originated in the common law, requires clear and unequivocal legislative language.</u>** Over the years, both Parliament and the provincial legislatures have gradually placed limits on this immunity in order to draw the legal position of the Crown and its servants closer to that of other Canadian litigants. This is true in, among other areas, that of civil liability. Ultimately, it is up to the courts to give meaning to legislative provisions that narrow the limits of the immunity and to determine its scope, where necessary. **2** The issue in this appeal is whether, under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("CLPA"), the obligation to submit to discovery in proceedings in which one is not a party applies to the federal Crown ("Crown"). **More specifically, we must determine whether a chief investigator from the federal government's Competition Bureau ("chief investigator") may be required to submit to discovery under the rules of civil procedure that apply in Quebec in proceedings in which neither the Crown nor the chief investigator is a party.** If so, we must then determine whether, in ordering the examination on discovery of the chief investigator, the Superior Court and the	Helps us understand crown immunity when it comes to civ lit. "deeply entrenched" underlined section is key. **EXAM:** May appear in some fashion in MC or short answer question dealing with this passage in this case. Crown isn't named party to any of the proceedings – regardless, should they not be subject to discovery? This is setting the stage for the issue that the court grappled with.

Court of Appeal erred with respect to the principles governing civil procedure in Quebec, including that of proportionality **3** For the reasons that follow, we are of the view that the courts below erred in their interpretation of the CLPA. Provincial rules on discovery do not apply to the Crown in proceedings in which it is not a party. The chief investigator may therefore refuse, on the basis of the Crown's immunity from discovery, to submit to the examination on discovery at issue in this case **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.** **VII. Conclusion** **43** Section 27 of the CLPA does not clearly and unequivocally lift the Crown's common law immunity from discovery in proceedings in which the Crown is not a party. In the instant case, that immunity meant that the Crown could not be required to submit to discovery under the Quebec rules of civil procedure. **In the absence of a clear and unequivocal expression of legislative intent (i.e. written in statute), it is not open to the courts to depart from a recognized common law rule in this regard.** The chief investigator could refuse, on the basis of the Crown's immunity from discovery, to submit to the examination on discovery at issue in this case. **44** We would therefore allow the appeal, set aside the decisions of the courts below and dismiss the respondents' motion for the examination on discovery of the chief investigator, with costs to the appellants throughout.	Court concludes this in their analysis… **Clear statement that provincial rules on discovery don't apply to crown in proceedings crown isn't party.** They say this that common law immunity still apply **EXAM:** Probably asked 2 questions about crown immunity – what is required to subject crown to discovery in a proceeding in which the crown isn't named as party.
E. Related Issues 1. **Class Proceedings & Representative Actions** ➨ **See Rules 2.6, 2.7, 2.8, and 2.9** ➨ **See Alberta's *Class Proceedings Act*, SA 2003, c C-16.5** **Exam**: 2.6(1) be aware bolded about to get representative action started and with respect to 2.8 & 2.9 what the courts powers are with respect to affidavit of records and class actions	**Representative actions** **2.6(1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.** • **Example:** representative action example - UCP situation where the UCP party there was a news piece about the fact that several thousand members personal information was compromised because of a stolen laptop stolen from a vehicle? The point is that well you have all these thousands of pieces of information being compromised, can they sue the UCP party for this breach of privacy and confidentiality? All it would take in theory would take is one person to be designated "representative plaintiff"

	(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act. **Amendments to pleadings in class proceedings** **2.7** After a certification order is made under the *Class Proceedings Act*, a party may amend a pleading only with the Court's permission. **Questioning of class and subclass members** **2.8(1)** If under section 18(2) of the *Class Proceedings Act* the Court requires a class member or subclass member to file and serve an affidavit of records, the Court may do either or both of the following: **(a) limit the purpose and scope of the records to be produced and of questioning;** **(b) determine how the evidence obtained may be used.** **(2)** If a class member or subclass member is questioned under section 18(2) of the *Class Proceedings Act*, the Court may do either or both of the following: **(a) limit the purpose and scope of the questioning;** **(b) determine how the evidence obtained may be used.** **Class proceedings practice and procedure** **2.9** Despite any other provision of these rules, the Court may order any practice and procedure it considers appropriate for a class proceeding under the *Class Proceedings Act* to achieve the objects of that Act. **EXAM:** For final just have regard to the area in red under s. 2.6 about how to get representative action started and also know for the exam what the courts powers are with respect to dealing with affidavits of records and questioning when there is a class action.
2. Representation before the Court **Self-represented litigants** **2.22 Individuals may represent themselves in an action unless these rules otherwise provide.** **Assistance before the Court** 2.23**(1)** The Court may permit a person to assist a party before the Court in any manner and on any terms and conditions the Court considers appropriate. **(2) Without limiting subrule (1), assistance may take the form of** **(a) quiet suggestions,** **(b) note-taking,** **(c) support, or**	**EXAM:** This is something we really have to know inside out.!! → Because it is so relevant to advocacy that were seeing before the courts especially during COVID. Know s. 2.22 – self rep rule (source for why self reps can self rep) Know s. 2.23 – at least 2-3 questions dealing with this rule on the exam. under s(3) types of scenarios where there is authorized practice of law, representation, so no assistance can contravene this section. Understand and be able to reference these subrules when address question about assistance before the court.

(d) addressing the particular needs of a party. **(3) Despite subrule (1), no assistance may be permitted** **(a) that would contravene section 106(1) of the *Legal Profession Act*,** **(b) if the assistance would or might be disruptive, or** **(c) if the assistance would not meet the purpose and intention of these rules.**	
Park Avenue Flooring Inc. v EllisDon Construction Services Inc., 2016 ABQB 327 Rowbotham JA: ➨ 4 The present law in Alberta is well settled. This court does not have the discretion to allow a non-lawyer to represent a party in court where that representation contravenes section 106 of the *Legal Professions Act*: see *Lameman v. Alberta*, 2012 ABCA 59, 522 A.R.140 (Alta. C.A.); *908077 Alberta Ltd. v. 1313608 Alberta Ltd.*, 2015 ABCA 117 (Alta. C.A.); *Chapman Estate v. Ramjohn*, 2015 ABCA 34 (Alta. C.A.); leave to appeal dismissed, 2015 ABCA 58 (Alta. C.A.); leave to appeal dismissed 2015 CanLII 52175 [2015 CarswellAlta 1533 (S.C.C.)]; and *Real Estate Strategies Group Inc. v. Prairie Communities Corp.*, 2016 ABCA 286 (Alta. C.A.) at para 11.	The dicta simply from Rowbotham is that the "…" (above) **CoA came down pretty heavily on this one and said a non-lawyer to represent a party in court where that representation contravenes section 106 of the *Legal Professions Act*:** Especially in regards to corporate litigants This case affirms that a **corporate litigant requires legal counsel.** If not, the other side should be raising it right away that the opponent (corporation) doesn't have counsel, or may have to apply to court to have counsel appointed to proceed with litigation.
3. Vexatious Litigants ➨ **See Alberta's *Judicature Act*, RSA 2000, c J-2, ss 23 & 23.1 and** ➨ **Alberta`s *Family Law Act*, SA 2003, c F-4.5.**	**Exam: One of his favorite topics (hmm maybe on exam?)** Ever evolving area of law, frustrating area of law because at some point inevitably, we encounter potentially a litigant who is vexatious. **Definitions** **23(1)** In this Part, (a) "clerk of the Court" means (i) in the case of the Court of Appeal, the Registrar or Deputy Registrar of the Court, (ii) in the case of the Court of Queen's Bench, a clerk, deputy clerk or acting clerk of the court of the judicial centre in which the proceeding is being instituted, and (iii) in the case of the Provincial Court, a clerk or deputy clerk of the Court; (b) "Court" means (i) the Court of Appeal, (ii) the Court of Queen's Bench, or (iii) the Provincial Court. **(2)** For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

2007 c21 s2

Application

23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that

(a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or

(b) a proceeding instituted by the person may not be continued,

without the permission of the Court.

(2) An application under subsection (1) may be made by a party against whom vexatious proceedings are being instituted or conducted, a clerk of the Court or the Minister of Justice and Solicitor General or, with the permission of the Court, any other person.

(3) The Minister of Justice and Solicitor General of Alberta has the right to appear and be heard in person or by counsel on an application or a Court's motion under subsection (1) or (4).

(4) The Court may at any time on application or on its own motion, with notice to the Minister of Justice and Solicitor General, make an order under subsection (1) applicable to any other individual or entity specified by the Court who in the opinion of the Court is associated with the person against whom an order under subsection (1) is made.

(5) An order under subsection (1) or (4) may not be made against a member of The Law Society of Alberta or a person authorized under section 48 of the *Legal Profession Act* when acting as legal counsel for another person.

(5.1) Subject to the *Alberta Rules of Court*, any party to a proceeding under subsection (1) or (4) before the Provincial Court, the Court of Queen's Bench or a single justice of the Court of Appeal may appeal an order under subsection (1) or (4) to the Court of Appeal.

(6) Subject to the right to appeal an order made under subsection (1) or (4), the Court of Appeal or the Court of Queen's Bench may make an order made under subsection (1) or (4) binding on any one or

	more of the other Courts referred to in section 23(1)(b), but an order under subsection (1) or (4) made by the Provincial Court is binding only on that Court. **(7)** A person against whom an order has been made under subsection (1) or (4) may apply to a Court for permission to institute or continue a proceeding in that Court and the Court may, subject to any terms or conditions it may impose, grant permission if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding. **(8)** With respect to an application under this section before the Court of Appeal, the matter may be heard by a single justice. **(9)** Nothing in this section limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground
Hill v Bundon, 2018 ABQB 506 **A. The Legal Authority for This Proceeding** [49] The application to have Daniel Hill declared a vexatious litigant and made subject to court access restrictions was made under *Judicature Act*, ss 23-23.1. Historically, there had been an erroneous belief that Canadian courts lack the authority to implement court access restrictions outside a particular action, except where authorized to do so by legislation. [50] UK appellate courts have corrected that misapprehension: *Ebert v Birch & Anor*, [1999] EWCA Civ 3043 (UK CA); *Bhamjee v Forsdick & Ors (No 2)*, [2003] EWCA Civ 1113 (UK CA). Instead, **imposition of court access restrictions is a component of the Court's inherent jurisdiction to control its processes**: *Hok v Alberta*, 2016 ABQB 651 (CanLII) at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63 (CanLII), leave to appeal to SCC refused, 37624 (2 November 2017); *Ebert v Birch & Anor*; *Bhamjee v Forsdick & Ors (No 2)*; *Tremblay v Charest*, 2006 QCCA 204 (CanLII) at para 6, 147 ACWS (3d) 413, leave to appeal to SCC refused, 31410 (22 June 2006); *Ayangma v Canada Health Infoway*, 2017 PECA 13 (CanLII) at paras 62-63, leave to appeal to SCC filed, 38030 (28 March 2018); *Gichuru v Pallai*, 2018 BCCA 78 (CanLII) at paras 74-81. [52] The result is that for the Court of Queen's Bench of Alberta, the *Judicature Act* procedure is: **...obsolete, or at best duplicative of the authority vested in the Alberta Court of Queen's Bench as a consequence of its inherent jurisdiction to control**	Court access restrictions – fancy way of saying you want limited ability for this litigant to do XYZ This court access restriction is a part of court's inherent restriction to control its process – have to know this. Start to get a feel for this language. Slight admonition vis-à-vis the Judicature Act says really its duplicative of what we already know because this **authority is invested in the ABQB because of its inherent jurisdiction.**

its proceedings, and mitigate and minimize abuse of its processes. (*Templanza v Ford*, at para 99)

[53] Abusive litigant control is also more effectively achieved by exercise of the Court's inherent jurisdiction, since the Court's inherent jurisdiction provides "... a more robust, functional, and efficient response to control of problematic litigants....": *Templanza v Ford*, para 103; see also *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 (CanLII) at paras 42-79, 283 ACWS (3d) 55; *Alberta Lawyers Insurance Association v Bourque*, at para 14; *Toller v Hnatiuk*, 2018 ABQB 430 (CanLII) at para 31.

Question: (he really liked it) – Free men on the land – this would apply to free men on the land – free men on the land are individuals who repudiate any legal authority whatsoever. They come to court and point finger and say they are subject to no authority, not to the Queen's authority, no one has authority over me. This is classic type of litigant who is often deemed vexatious. Wants us to read (lengthy) *Meads v Meads* (not required for course)

B. Court Access Restrictions

[55] Court access restrictions are potentially warranted where a person's litigation history includes
any "indicia" of abusive litigation, which are reviewed in ***Chutskoff v Bonora***, 2014 ABQB 389 (CanLII) at para 92, 590 AR 288, aff'd 2014 ABCA 444 (CanLII):

1. collateral attacks,
2. hopeless proceedings,
3. escalating proceedings,
4. bringing proceedings for improper purposes,
5. initiating "busybody" lawsuits to enforce alleged rights of third parties,
6. failure to honour court-ordered obligations,
7. persistently taking unsuccessful appeals from judicial decisions,
8. persistently engaging in inappropriate courtroom behaviour,
9. unsubstantiated allegations of conspiracy, fraud, and misconduct,
10. scandalous or inflammatory language in pleadings or before the court, and
11. advancing Organized Pseudolegal Commercial Argument ["OPCA"] strategies.

EXAM: Indicia going to be asked on exam - ALL FAIR GAME ON EXAM, WILL ASK 1-2 QUESTIONS ABOUT THESE INDICIA Either as M/C; T/F or SA (maybe long answer but probably not)

- **1. collateral attacks,**
  - This is where litigant tries to come back thru a diff venue for a similar cause of action whent he original venue already ruled against that litigant. Instead of appealing, they commence another action at QB. Lose right of appeal because they wait to long and then file at Qb - collateral attack on Prov court decision
- **2. hopeless proceedings,**
  - Seen where there is double cast upon a litigant filing a claim that is frivolous. Tool used is usually rule 3.68 - application to strike. Test to determine if this action is meritorious is if applicant has shown the claim is frivolous, vexatious or hopeless for the allegations plead in the civil claim or statement of claim
  - Court intervenes in a constant repetition of litigants filing the same hopeless proceedings, they can apply to court for restriction on access
- **3. escalating proceedings,**
  - Litigant is brining a grievance to an appeal level, are not happy and file further proceedings even though chance of success is extremely low (pretty much 0%) - escalation where they wont have succes
- **4. bringing proceedings for improper purposes,**
  - Bringing proceeding against chief justice because you saw their name on a document at somepoint and feel they need to be named in your action against another judge.
  - Ties into point 11
- **5. initiating "busybody" lawsuits to enforce alleged rights of third parties,**
  - Ex. Lawyer: priscilla Kennedy subject to personal costs against her and accused for bringing claim as a busybody on behalf of her client. This litigation was found fivilous and court sanctioned her w 5 figure cost penalty. Kennedy chose not to

	accept this ruling and applied to CoA. Cannot get right of appeal on a cost award, and she needed to seek leave to CoA and to do this, need to apply to a single judge first. Kennedy got permission to be heard by CoA panel of justices, and found the lower court erred by sanctioning her with large award ○ Element of frivolity - cannot get caught in the web that constitute busybody litigation → oath you swear when becoming a lawyer is that you will not seek out frivolous lawsuits • **6. failure to honour court-ordered obligations,** ○ Civil contempt orders - party fails to order court order to perform an act by date certain and if they are in breach, need to consider this when sanctioning actor • **7. persistently taking unsuccessful appeals from judicial decisions,** ○ Trying to launch appeal (tied into #4) and doing it persistently - litigant is never happy, file notice of appeal to get into CoA even though the litigant is always ruled against • **8. persistently engaging in inappropriate courtroom behaviour,** ○ Ex. at CoA, Yiu recalls colleagues story where litigant came to CoA and was persistently engaging in inappropriate Court room behaviour. Chief justice was speaking and the litigant turned back and started to walk to court room doors. Dont turn back to justice and litigant was known for inappropriate appeals ○ Can also be belligerent individuals, profanity, not respecting opposing counsel, etc. • **9. unsubstantiated allegations of conspiracy, fraud, and misconduct,** ○ When unsubstantiated allegations of this things, these can be factors in awarding court access restrictions against litigation. If alleging these things, it is imperative we assess and ascertain the evidentiary basis in forwarding these -- applies in admin claims, or any claims • **10. scandalous or inflammatory language in pleadings or before the court, and** ○ Overlaps other factors (ties in with #11). Examples of this include freeman of the land - if reading a pleading filed, inflammatory language is used and this litigant is refusing compliance with authority and dont care what court has to say • **11. advancing Organized Pseudolegal Commercial Argument ["OPCA"] strategies. (meads v meads addresses this and helps understand this)** ○ See in Meads v Meads ○ These are individuals that dont recognize authority, think they are untouchable and the courts have no jurisdiction over them ○ Clerk of court generates vexatious litigants list each day ○ Subject to court access restrictions • [56] **Additional indicia categories** are defined in other subsequent Canadian court decisions: ○ **1. using court processes to further illegal activities** ▪ Not permitted, if you do this, you face likely court restrictions, but also will be in hot water with CJS • **2. "judge shopping"**

	▪ Litigants who know how particular judges decide on certain cases - phrase used is judge shopping where a litigant strategically chooses what judge hears their case bc historically this Judge favors X party (ie. 90% of the time, this judge favors the plaintiff in personal injury lawsuits SO lawyer ensures they get this judge) ▪ Occurs with P and D • **3. indicating an intention to engage in future abuse of court processes** • If they send correspondence and continue for as long as it takes to have matter fully heard regardless of cost - abuse of court process ▪ Should be read with other indicia and add texture to other indicia • **4. litigating with a political focus and to highlight and correct perceived government shortcomings, rather than asserting a right recognized in law** • Politically motivated litigants looking to be accusatory of gov't shortcomings, court will consider this. If they dont allege a right prejudiced and want to attack gov't, the court doesn't like this and will go to discretion to sanction litigant with access restrictions • **5. minimizing or dismissing litigation defects and abuse on the basis the person is a self-represented litigant**; AND • Due to Pentya v Johns, there has been a movement ofr the principles of self represented litigants and be mindful of. Courts are saying that self repped litigants; saying they want to minimize litigation defects and abuse of process of self reps. • **6. employing proxy actors to circumvent court orders, court access restrictions, impede litigation, and improperly communicate with the court** • **Important**: sending someone else in to speak to or try to circumvent existing court orders on behalf of actual litigant is prohibited. If you have actors circumventing access restrictions, or impede litigation or communicate improperly, this will go to decision to sanction them • General communications with court: if you re a litigant in a civil litigation and you want to communicate with judge before trial, no party should do this unless they notify the other side they will approach the judge OR that they copy the otherside on correspondence with the other court → CANNOT communicate unilaterally with the court. Need to be copied to opposing counsel or let them know and then right the court advising them of this. [58] When **considering court access restrictions**, a court may **refer to other external evidence**, including: • **1. activities both inside and outside of the courtroom** (Bishop v Bishop, 2011 ONCA 211 at para 9, 200 ACWS (3d) 1021, leave to appeal to SCC refused, 34271 (20 November 2011); Henry v El, at paras 2-3, 5); • 2. **the litigant's entire public dispute history** (Thompson v International Union of Operating Engineers Local No 995, 2017 ABCA 193(CanLII) at para 25, leave to appeal to SCC refused, 37974 (7 June 2018)), including:

	• Ex. Run Court house search on litigants name as a P or as a D → can do both; try to get courthouse search on other side to find out what they have been involved in legally
	• a) litigation in other jurisdictions
	  ▪ If they are ligitiating in ONT, hire an agent to do a courthouse search on this litigant in this jurisdiction
	• b) non-judicial proceedings (Bishop v Bishop, at para 9; Thompson v International Union of Operating Engineers Local No 995, at paras 24- 25; Canada Post Corp v Varma, 2000 CanLII 15754 (FC), 2000 CanLII 15754 at para 23, 192 FTR 278 (FC); West Vancouver School District No 45 v Callow, 2014 ONSC 2547 (CanLII) at para 39); and
	  ▪ Ex. Have they been involved in administrative proceedings
	• c) public records that are a basis for judicial notice (Wong v Giannacopoulos, 2011 ABCA 277 (CanLII) at para 6, 515 AR 58);
	  ▪ Judicial notice: court recoginzes an uncontested fact available in public domain that is not of controversy
	• **3. whether the person has previously engaged in abusive litigation conduct, and/or was declared a "vexatious litigant" or made subject to court access restrictions**: Canada Post Corp v Varma, at para 24; Canada v Olumide, 2017 FCA 42 (CanLII) at para 37, [2017] GSTC 17.
	  • If you do courthouse search, may come across previous vexatious litigant order and what restrictions this person is subject to
	
	Meads v Meads fleshes out OPCA litigant

Re: Gauthier 2018 ABCA 14 (footnotes omitted) [2] One aspect of the September 13, 2017 order dismissed Mr. Gauthier's application for permission to file documents in the Court of Queen's Bench. He wished to commence an action alleging that the police had no right to stop him from driving without insurance and while unauthorized. Mr. Gauthier claims that he is "immune from police action". The clerks, as directed bya pre-existing order, refused to file his documents. … [12] The applicant says he is unable to find a lawyer to represent him. He claims that this is because lawyers are afraid to act for a person who wishes to appeal a decision of Associate Chief Justice Rooke. Mr. Gauthier asserts that lawyers believe that their careers will be hurt if they act for him.	No Member of LS acted for him

[22] The record contains no evidence to support Mr. Gauthier's claim that court staff obstructed him. The September 13, 2017 order clearly states that the applicant was not entitled to file this application unless represented by a member of the Law Society. No member of the Law Society (express order)acted for him. Court of Appeal registry staff extended a courtesy to him by filing this application to request permission to appeal notwithstanding the requirement that counsel represent him. [23] In summary, the applicant is out of time and he does not meet the criteria for extending time to appeal. [24] I deny Mr. Gauthier's application for permission to appeal. It is therefore unnecessary to address the additional relief he sought	
4. Intervenors • See Rule 2.10 • Intervenor status 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.	How do intervenor gain status to intervene in an appeal of decisions
University of Alberta v Alberta (Information & Privacy Commissioner), 2011 ABQB 389 (footnotes omitted) Common Law Principles There is nothing in the language of the rule that suggests that the common law principles that have developed in regards to intervenor status are not applicable. Wittmann C.J. recently discussed the law regarding intervenor applications in R. v. Hirsekorn, 2011 ABQB 156, and set out the following general common law principles: 1. An intervention may be allowed where the proposed intervenor is specially affected by the decision facing the Court or the proposed intervenor has some special expertise or insight to bring to bear on the issues facing the court (Papaschase Indian Band v. Canada (Attorney General), 2005 ABCA 320 at para. 2);	**Exam**: Know these principles (1) Important part of the test -- wording says the intervener must be *specially* effected and must need some *expertise or insight* ○ To get intervener status, both these prongs of the test must be satisfied -- if so move on

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 status may also be granted where the proposed Intervenor's interest in the proceedings may not be fully protected or argued by a party (United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)), 2002 ABCA 243 (at para. 2)). 4. 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).	(2) Restricted to appeal cases, cannot introduce fresh evidence see Palmer test (4) The Court should take a two-step approach to determine an Intervenor application: ○ **1. determine the subject matter of the proceeding** ▪ Court will consider what is the topic ○ **2. determine the proposed Intervenor's interest in the subject matter** ▪ Whether the intervenors purpose fits within the topic being litigated

Chapter 7: Pleadings (General Rules)	
Division 3 **Pleadings – Rule 13.6 – General Requirements** **Pleadings: general requirements** **13.6(1)** A pleading **must be** (a) **succinct**, and (b) divided into consecutively **numbered paragraphs**, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer. **(2)** A pleading must state any of the following matters that are relevant: (a) **the facts on which a party relies**, but not the evidence by which the facts are to be proved; (b) **a matter that defeats, or raises a defence to, a claim of another party**; (c) **the remedy claimed**, including (i) **the type of damages claimed**, (ii) to the extent known, **the amount of general and special damages claimed**, or if either or both are not known, an estimate of the amount or the total amount that will be claimed, (iii) a **statement of any interest claimed, including the basis for the interest, and the method of calculating the interest**, and (iv) **costs, including any known special costs**.	Division 3 is where we find general requirements for a pleading. 13.6 is the starting rule were we have to consider what are the different elements that must be contained in a pleading. Draw attention to these particular rules and subrules. Note the MUST BE for 13.6(1). Succinct – plain language. 13.6(1)(b) – Canadian bar has encouraged communication via plain language He pulled up the sample pleadings – statement of claim – what the rule is getting at is on the left hand side of pleading, all paras numbered consecutively, its by paragraph as the rule recognizes. Going by organization. Recommends use headings. Lays out this is what my case is all about and this is what is important…Headings helps give a roadmap and context to the players, etc. 13.6(2) – some important considerations. • The facts cannot be evidence (i.e. actual email sent to the defendant would be considered relevant material in disclosure stage but in commencement stage, not relevant so don't include). Cannot attach email evidence. Can say on XX date I sent an email to the defendant outlining the agreement to be entered into. Facts that party is going to rely on. In respect of any type of pleading, not just statement of claim. • Must state matters that defeats or raises a defence to a claim of another party o You have to state the claim you are pleading. • You have to state "remedies sought by applicant" or something like that. Claims for damages but also specific types of damages o General – non-pec damages o special - pec damages ▪ out of pocket expenses ▪ Special damages are broad (incurred to marshall case) o Punitive damages o Loss of income claim/future loss of income claim o loss of housekeeping claim o Loss of future earning capacity **Exam:** On final may ask MC about types of damages recoverable by litigant in AB and type of interest that may be recoverable You may not know the quantum of damages when you file commencement documents but have to put an estimate **Prejudgment interest for pecuniary damages**

	• Pec v non-pec : **non-pec means cant quantify** (general damages for pain and suffering). **Pec damages can be quantified.** • Interest rates for prejudgment interests are different for pec v non-pec. • Post judgment interest. **Costs recoverable** – not specifying the costs are solicitor-client costs where we want full costs back unless we specific its "Cost on a full indemnity or on full solicitor client indemnity basis" • Costs generally speaking doesn't specify you want full indemnity costs, going to be party and party costs under Schedule C. He's going to post Schedule C
Rule 13.6(3) **(3)** A pleading must also include a statement of any matter on which a party intends to rely that may take another party by surprise, including, without limitation, any of the following matters: **(a) breach of trust;** **(b) duress;** **(c) estoppel;** **(d) fraud;** **(e) illegality or invalidity of a contract, including the grounds;** **(f) malice or ill will;** **(g) misrepresentation;** **(h) payment;** **(i) performance;** **(j) release;** **(k) undue influence;** **(l) voluntary assumption of risk;** **(m) waiver;** **(n) lack of capacity or authority;** **(o) wilful default;** **(p) tender of payment;** **(q) a limitation period;** **(r) a provision of an enactment.** **(4)** If the defendant proposes to produce evidence about the plaintiff's reputation in mitigation of damages, the defendant must include in a pleading the facts on which the defendant intends to rely.	What are the types of matters that you can include in a pleading so that the other side isn't taken by surprise. Certain matters you have to state in the specific pleading. **Exam:** This could show up on the final in the form of MC (e) Illegality or invalidity of the contract has to be specifically plead So this list all has to be specifically plead (g) Misrep – 3 kinds: Innocent misrep, negligent mis rep, fraudulent/intentional misrep. • Innocent is the least bad. Where there has been inadvertent communication to the other side, the type of misrepresentation isn't intentional. o Ex error in document because of typo, and misled the other side, they could sue based on innocent misrep and seek damages, they could ask for different types of remedies. Degree of intention isnt relevant for innocent misrep. • Negligent misrep – defendant knew or ought to have known that representation that was made to the plaintiff would be reasonably relied upon and that the plaintiff as a consequence of reasonably relying upon the misrep has suffered some kind of injury. o Ex. Seller representing to buying in real estate contract that property is habitable. Made in writing through CPS. Plaintiff takes possession on day 1, on day 2 they notice the basement walls are damp. There is a big stain on carpet that's damp. Wouldn't have known that because when they viewed, there was a box that covered the stain. You have potentially negligent misrep by the seller to the buyer as to the habitability of that property. **Have to prove if you're the plaintiff the elements of negligence in respect to misrep.** • fraudulent misrep is even more difficult evidentiary wise. Means you believe the defendant intended to mislead.

	○ Could try to say it was intentional misrep because they intended to cover the stain. • Have to be careful that you ensure you have strong evidence the seller intended to deceive the buyer as to habitability Bonus points – if you come to class, listen to lectures, there will be times when he will say on the fly that this could be a potential bonus point on the exam. **Exam:** What he just told us about 3 different types of misrep could come up as potential bonus question on the exam (l) Voluntary assumption of risk – (bonus) – volenti non fit injuria (latin) **Exam:** volenti would be the bonus mark. • Example of Volenti where someone gets into a taxi and the taxi driver is smelling of alcohol and you get into the cab cuz you have been waiting forever and it's the first one you could get. Then you think well the house isn't far so you get in with the drunk driver. He smashes the car. Defense will argue that the plaintiff contributed to your own injuries by voluntarily assuming the risk of getting into the cab with the drunk dude. Could well have contributed to your injuries. This goes to the issue of mitigation, • contributory negligence is that you the plaintiff bear a portion if not all liability for your injuries because you voluntarily assumed the risk of getting into the cab. (o) ex: wilfully defaulting on mortgage (n) If lack of capacity must be explicitly put into pleading (p) Tender of payment • **Exam;** not on exam (q) If pleading LP defence, plead Limitations Act in defense
Rule 13.7 – other requirements **Pleadings: other requirements** **13.7** A pleading must give particulars of any of the following matters that are included in the pleading: **(a) breach of trust;** **(b) fraud;** **(c) misrepresentation;** **(d) wilful default;** **(e) undue influence;** **(f) defamation.**	**Must give particulars on any of the above that's being pleaded.** (e) Not so easy to discern if there is a case of undue influence • these types of trials is a finding of fact made by trier of fact after deliberation of the evidence from both sides. (f)Defamation – two types: slander and libel • slander – oral • libel – written Defence to defamation – truth defense (absolute/complete), know this defense for **exam**

Rule 13.8 – Other Contents **Pleadings: other contents** **13.8(1)** A pleading may include all or any of the following: (a) alternative claims or defences; (b) a statement of a point of law, and if so, the facts that make the point of law applicable; (c) a matter that arose after the commencement document was filed. **(2)** A general or other remedy claimed by a party need not be claimed in a pleading.	This is a permissive rule (not mandatory) *(b) Fatal Accidents Act* – facts of case meet criteria for advancing FAA claim, would have to plead the types of damages (very specific under FAA) so as matter of law plead sections of this act in damages that pertain to your client (c) typuucally after filed you can include as many amendments as you want up to 1 year after file, cause otherwise you service limitation period is expired. Note: Can you get around the 1 year service limitation? Yes and you can apply to court for 3 month – it is permissive and in discretion of court
Rule 13. 9 – Defence of Tender **Defence of tender** **13.9** Tender before action may not be pleaded as a defence in an action unless, before the defence is filed, the defendant pays into Court the amount alleged to have been tendered.	Example: builders lien case – instead of going right to heart of dispute and deny the dispute you pay the money into court and the lien automatically comes of the title and the money stands inn place oof the lien
Rule 13.10 – Pleadings Specific Requirements for Replies **Pleadings: specific requirements for replies** **13.10** In addition to the other requirements of these rules, in a reply to (a) a statement of defence, (b) a statement of defence to a counterclaim, or (c) a statement of defence to a third party claim, the reply may only make admissions or respond to matters raised for the first time in the statement of defence.	**Reply** is a pleading filed typically by plaintiff in reply to statement of defence to counterclaim or statement of defence to third party claim and reply can only make admissions or respond to matters made for the first time in the statement of defence
Rule 13.11 – Specific Requirements for Class Proceedings **Pleadings: specific requirements for class proceedings** **13.11(1)** The title of a proceeding under the *Class Proceedings Act* must include the words "*Brought under the Class Proceedings Act*" immediately below the listed parties (a) if it is intended, when the proceeding starts, that a certification order will be sought under the Act, or (b) if a certification order is subsequently made in respect of the proceeding under the Act.	If filing class action, use expressly the words "*Brought under the Class Proceedings Act*" – Rule 13.11

(2) If a certification order is refused in respect of the proceeding or the proceeding is decertified, **the words "*Brought under the Class Proceedings Act*" must not** be included in the title in any subsequent pleadings and documents filed in the proceeding.	Style of cause for class proceedings
Rule 13.12 Denial of Facts **Pleadings: denial of facts** **13.12(1)** Every fact in a pleading is denied if the fact is not admitted in another pleading filed by a party opposite in interest. **(2) A denial of a fact in a pleading must meet the point of substance.**	You don't want to have vague obscure denials of fact but typically say "in response to para 34 of statement of claim the defendant states that" – **specific as to allegations your responding to in opposite party's pleading**
Division 4 - Filed Documents **Subdivision 1** **Contents and Filing** **Requirements for all filed documents** **13.13(1) Every document filed in an action must be in the appropriate form set out in Schedule A to these rules, if any, which may be modified as circumstances require.** **(2)** Whether or not a form is prescribed, each document must begin with the following: **(a) the name of the Court;** **(b) the name of the judicial centre;** **(c) the names of the parties as determined by subrules (3) and (4);** **(d) the action number;** **(e) the nature of the document;** **(f) an address for service of documents;** **(g) the name, address and contact information of the party or lawyer of record who prepared the document;** **(h) once filed, the date the document was filed;** **(i) anything required by these rules to be included.**	(g) Usually the lawyers info (h) officially filed when clerk stamp document
Rule 13.13 **Rule 13.13** **[…]** **(3)** The names of all the parties must be used in (a) a commencement document, (b) a document that changes any party,	

(c) an order, judgment or pronouncement of the Court that grants relief, or (d) a document that in the opinion of the person filing the document should contain the names of all the parties. **(4)** In any document other than those specified in subrule (3), the names of the first 4 parties of any group that contains more than 4 parties may be used, with the remainder being omitted and replaced by the words "and others". **(5)** Every document filed and every exhibit to an affidavit must be legible. **(6)** When a document is filed, the court clerk must retain the original of the document. **(7)** Authorities referred to in a document provided to the Court must be cited in accordance with *rule 14.31*(a) and (d).	(4) – could list first 4 parties and if more than 4 said and others. • used to say "Et a"l but now new rule could list first 4 parties and remaining parties can be replaced with "and others" if more than four parties (5) handwritten allowed but must be legible (7) authorities often exchanged and sent to the court before the date of actual hearing of application filed
Rule 13.14 – **Endorsements on documents** **Endorsements on documents** **13.14(1)** When the court clerk is presented with a commencement document for filing, the court clerk must (a) endorse on the document an action number assigned to the action by the court clerk, and the date that the document is filed, (b) ensure that the document to be filed has endorsed on it the name of the judicial centre where the document is filed, and (c) stamp the document as filed. **(2)** If a lawyer is acting for a person on whose behalf the action is started, when the court clerk is presented with a commencement document for filing, the court clerk must ensure that the lawyer has endorsed on the document (a) the name and address of the law firm, (b) the name of the lawyer in the law firm in charge of the action, and (c) the lawyer's telephone number.	Note: He pulled up sample pleadings Top of statement of claim is a form number, under the rule. Address for service information

(3) When the court clerk is presented with a statement of defence or a demand for notice for filing, the court clerk must ensure that the document has endorsed on it (a) the name of the person filing the document and, if the person filing the document is a lawyer, the same information as is required under subrule (2)(a) to (c), and (b) the defendant's address for service. **(4)** When the court clerk is presented with a document that is to be filed in an action after the action has started, the court clerk must (a) endorse on the document the date that the document is filed, and (b) ensure that the document to be filed has endorsed on it (i) the name of the judicial centre at which the document is filed, And (ii) the appropriate action number. **(5)** If the court clerk is presented with a document that is to be filed after an action has started, the court clerk must also, if a lawyer is acting in respect of the person on whose behalf the document is filed, ensure that the lawyer has endorsed on the document the same information as is required under subrule (2)(a) to (c). **(6)** When a document is filed, the court clerk must note in the Court file, under the action number assigned to the action by the court clerk, the fact that the document was filed.	MANDATORY that they do this • First 2 digits of court file number represent year i..e 21000222 6 is very specific requirement that they have to note on court file that document in question was filed
Rule 13. 15 **When document is filed** **13.15** A document is filed when the court clerk of the judicial centre acknowledges on the document that the document is filed in the action.	
Rule 13. 16 **Deviations from and changes to prescribed forms** Deviations from and changes to prescribed forms 13.16 A prescribed form or a document prepared in place of a prescribed form is not invalidated nor is there any contravention of these rules if there is a deviation from or an addition to or omission from the form or document that	Most often inadvertent deviation Can you clean up a previously filed document? Yes you can under this rule Have to demonstrate adverse effect and no intention to mislead

(a) does not adversely affect the substance of the information required to be provided or that the Court requires to be provided, and **(b) is not intended to mislead.**	
Rule 13. 17 **Amendments to records other than commencement documents, pleadings or affidavits** Amendments to records other than commencement documents, pleadings or affidavits 13.17 If the Court orders that an amendment be made to a document or other record filed with the Court, other than a commencement document, pleading, or affidavit, **(a) a note of the amendment must be attached to, made on, or made in the document or record,** **(b) the amendment must** **(i) be dated and identified, and each amended version must be identified, and** **(ii) be endorsed by the court clerk in the following form:** ***Amended on [date] by [order]*** ***Dated . . .*** **and** **(c) except as required by this rule, the document or other record must not be otherwise physically altered.**	**Exam:** Take note of this one in particular. This type of thing happens quite often. Deals with **fiat** • when you article you may have to go get a **fiat** – you are asking the court to endorse a change made to a pleading as an amendment. You want the court to endorse it. o The judge/master will either allow the fiat or not. • Essentially in the rule says amendment on particular date by order dated XX. o Court is essentially permitting the amendment. Court considers that this amendment is being made to a document filed with the court and it has to be other than a commencement document, other than pleading, affidavit. Has to state amendment, attached to, made in, made on the document on record.
Saadati v Moorhead,2017 SCC 28 Analysis ***Sufficiency of the Pleadings*** Drawing from the Court of Appeal's statements regarding notice, the respondents argue that the trial judge's award for mental injury was made in breach of procedural fairness, having no basis in the pleadings or submissions at trial. **While I note that the respondents did not argue this point at the Court of Appeal, as the respondents now say and as the Court of Appeal said, cases should not be decided on grounds not raised** (*Insurance Corp. of British Columbia v. Patko*, 2008 BCCA 65, 290 D.L.R. (4th) 687, at para. 37; *Rodaro v. Royal*	Sufficiency of pleadings • Decision commented on court of appeal where it dealt with sufficiency of pleadings. Dealt with matters involving procedural fairness and basically whether or not there was sufficient notice given to the other side for additional issues that were originally plead in commencement document but were raised much later at time of oral submissions for argument. Argument was that its inclusion was novel **Exam:** One or two question on this about what can the court consider when looking at whether there has been sufficiently drafted pleading. This case may be of assistance in this regard, as well as Tsiloqot Nation v BC

Brown J (for the court) [10] **In claims for negligently caused mental injury, it is generally sufficient that the pleadings allege some form of such injury** (Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 74). The appellant's Statement of Claim alleges various injuries caused by the accident, including: > **h) such further and other injuries as may become apparent through medical reports and examinations, details of which shall be provided as they become known**; and the effects or results of the said injuries upon the Plaintiff include headaches, fatigue, dizziness, nausea and sleeplessness. > (R.R., vol. I, at p. 7) **It also claims "general damages for pain and suffering, loss of earning capacity past, present and future, loss of opportunity, loss of enjoyment of life, loss of physical health . . ."** (R.R., vol. I, at p. 7). [11] At trial, the appellant introduced an expert report from Dr. Hiram Mok, a psychiatrist, who diagnosed the appellant with mental disorders (although it was unclear whether these disorders resulted from the accident or subsequent accidents). **The appellant's written closing submissions at trial also alleged the occurrence of a psychological reaction to the accident (or in other words a mental injury):** > It is submitted that if the court does not accept a proven concussion, the evidence still shows that the Plaintiff suffered from a change in mood/personality, memory loss, and cognitive difficulties as a result of the July 5 2005 accident. **If not caused by a concussion, then it must be caused by something. The only logical conclusion is that these were caused by a psychological reaction to the accident, new pains, or an aggravation of old pains.** **•••** **It is therefore submitted that, on a balance of probabilities, if the court finds that Mohsen did not suffer a concussion, then the only logical conclusion is that Mohsen's problems with memory, cognition and change in behavior arose as a result of the July 2005 accident**, which compounded upon the January 2003 accident injuries, and was compounded upon again in the September 2005 accident. [Emphasis added.]	Broad reference tto language in relief sought section

A similar line of argument was delivered in the appellant's **oral submissions**: Now, the **alternative argument**, of course, we have is that if you don't find that a concussion has been made out, **we submit that there is still evidence that he suffered chronic pain and some kind of emotional reaction, with resulting memory problems and cognitive problems, and change in mood, in the July 2005 accident, which but for the accident he would not have suffered from.** ••• **We say it's a concussion. . . . But if it's not a concussion, it's some reaction to that accident that may be compounding upon the fact that he was injured in an earlier accident back in January 2003, but something changed in this man. . . .** That accident triggered that, either by way of it being a concussion or by some kind of psychological, emotional reaction to everything ••• **. . . Something happened to him that changed him. We say it's a concussion, but if it's not a concussion, it must be some kind of emotional psychiatric reaction, which isn't something that he could control**. It clearly just came on him after the accident and caused him to become a changed individual between July and September 2005. And that is clear from the evidence of all of the family members. [Emphasis added.]	Important point is in this para
[12] None of these arguments regarding a "psychological", "emotional" or "psychiatric" reaction elicited an objection from the respondents before the trial judge. And, in my view, the many allegations of such reaction appearing in the appellant's oral and written closing submissions, combined with the broad heads of damage alleged in the pleadings, provided ample notice to the respondents of the case which they had to answer. <u>I see no breach of procedural fairness here</u>. •••	Important take away is that the reasoning pathway took a look at the way the pleadings originally were plead (broad? narrow?) and also considered that even at trial these matters going to emotional/psychological issues never resulting in objection from opposing counsel. It went uncontensted at the end Turning point for SCC to indicate really there was no breach of natural justice or procedural fairness

Tsilhqot'in Nation v British Columbia, 2014 SCC 44 MCLACHLIN CJC: (for the Court) — **IV. Pleadings in Aboriginal Land Claims Cases** ••• **I agree with the Court of Appeal that a <u>functional approach</u> should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.** •••	Interesting because the decision is by McLachlin J. and deals with how we plead aboriginal land claim cases. She talks in this decision about a functional approach **Exam:** If he is going to ask question about final remember this case is specific to how we plead aboriginal land claims – functional approach should be taken What The functional approach considers when we plead in aboriginal cases?
Lax Kw'alaams Indian Band v AG Canada, [2011] SCJ No 56 Binnie J (for the Court) ••• A. *Did the Trial Judge Err in Her Approach to Characterizing the Lax Kw'alaams' Claim?* [40] The heart of the Lax Kw'alaams' argument on this point is that "before a court can characterize aclaimed aboriginal right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group" (A.F., at para. 57 (emphasis in original)). I would characterize this approach as a "commission of inquiry" model in which a commissioner embarks on a voyage of discovery armed only with very general terms of reference. **Quite apart from being inconsistent with the jurisprudence that calls for "characterization of the claim" as a first step, the "commission of inquiry" approach is not suitable in civil litigation, even in civil litigation conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies.** [41] I would reject the appellants' approach for three reasons. Firstly, it is illogical. **The relevance of evidence is tested by reference to what is in issue. The statement of claim (which here did undergo significant amendment) defines what is in issue.**	Para 40 at heart of their claim Quite a general statement that when we're looking at statement of claim, the SoC is where we need to look at to determine what the plaintiff has defined as what is exactly in play/issue in that lawsuit

The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight. [42] **Secondly, it is contrary to authority**. **In *Van der Peet*, Lamer C.J. emphasized that the *first* task of the court, even in the context of a defence to a regulatory charge, is to characterize the claim**: …in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, **the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support**. [Emphasis added; para. 51.]	
[43] Thirdly, it defies the relevant rules of civil procedure. **Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement**.	**Note**: Important to remember this slide • When issuing pleadings, giving other side fair notice of "case to meet" • Clear pleadings minimize wasted time and may enhance prospects for settlment
[44] In support of their "characterizing the right" argument, the Lax Kw'alaams cite *Sappier*, at paras. 24 and 46, but I do not read *Sappier* as departing from *Van der Peet* and its progeny. *Sappier* was a prosecution for unlawful possession or cutting down of Crown timber from Crown lands and **the Court's inquiry was whether the accused could establish an Aboriginal right to engage in that particular conduct. The Aboriginal right asserted by the defence was broader than necessary and in its broad generality risked being rejected as invalid. In that context (as in many other prosecutions), it was necessary for the Court to re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming**. See, for example, *Van der Peet* itself where a claim to a general commercial fishery was narrowed because the fish had been caught pursuant to a valid food fishery licence, and thus a claim to a right to *exchange* fish already caught "for money or other goods" would suffice to obtain an acquittal (paras. 52, 77-79).	**Exam:** Wont have to apply any of this in fact pattern on exam but showing us important case from SCC dealing with how to characterize and particularize claims when it comes to native land claims

… Similarly, in *R. v. Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 S.C.R. 821, in response to a charge of illegal gambling on a reserve, the Court treated a defence claim to a broad Aboriginal right "to manage the use of their reserve lands" as one of "excessive generality" (para. 27), i.e. broader than required to defeat the prosecution. **The charge of illegal gambling would be met by a narrower right "to participate in, and to regulate, high stakes gambling activities" on the reserve (para. 26). In the result, it was held that even the narrower claim was not established on the evidence. The re-characterization of the defence claim in *Sappier* was another example in this line of cases.** [45] To the extent the Lax Kw'alaams are saying that, in Aboriginal and treaty rights litigation, rigidity of form should not triumph over substance, I agree with them. However, the necessary flexibility can be achieved within the ordinary rules of practice. **Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties**. The trial judge adopted the proposition that "he who seeks a declaration must make up his mind and set out in his pleading what that declaration is", but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset**. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed. No relevant amendments were sought to the prayer for relief at trial in this case.** •••	**Note**: Important observation – highlighted portion **Note**: There are cases that the court have narrowed the right being claimed Particularizing the claim is essential to arrive at prospective settlement discussions and may indicate whether the side that has to meet the case has to marshall expert evidence.

Chapter 8: Interest	
Rule 13.6(2)(iii) Pleadings: general requirements 13.6**(1)** A pleading must be (a) succinct, and (b) divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer. **(2) A pleading must state any of the following matters that are relevant:** (a) the facts on which a party relies, but not the evidence by which the facts are to be proved; (b) a matter that defeats, or raises a defence to, a claim of another party; (c) the remedy claimed, including (i) the type of damages claimed, (ii) to the extent known, the amount of general and special damages claimed, or if either or both are not known, an estimate of the amount or the total amount that will be claimed, **(iii) a statement of any interest claimed, including the basis for the interest, and the method of calculating the interest**, and (iv) costs, including any known special costs.	
Judgment Interest Act, RSA 2000, c J-1 Calculation of interest 4(1) Interest awarded under this Part on **non-pecuniary damages** shall be calculated at the rate of 4% per year. (2) Interest awarded under this Part on **pecuniary damages** and in debt or other actions shall be calculated, for each year or part of a year included in the period in respect of which the interest is payable, at the prescribed rate applicable to that year. (3) Before the beginning of each year, the Lieutenant Governor in Council may, by regulation, prescribe the rate to be applied under subsection (2) for that year. (4) If a rate is not prescribed in accordance with subsection (3), the rate in effect in the previous year continues to apply until the beginning of a year for which a rate is prescribed. 1984 cJ-0.5 s4	**EXAM:** For final exam have regard to Judgment Interest Act in particular these sections Looking at s. 4 – you will see the **interest rate is 4% per year for non pec** (general – pain and suffering) damages (on the exam) **EXAM**: So for **pec damages** – LG says the rate to be applied - **for this years, its prescribed at 0.2%**

Judgment Interest Regulation, Alta Reg 215/2011 ALBERTA REGULATION 215/2011 Judgment Interest Act JUDGMENT INTEREST REGULATION … **(cc) the interest rate from January 1, 2021 to December 31, 2021 is prescribed at 0.2% per year.** **REMEMBER: THIS INTEREST RATE IS FOR PECUNIARY DAMAGES ONLY!!!**	**Exam**: 100% on the final question about interest rates, Judgment Interest Act, somewhere in MC, TF, or short answer
Editor's Note – p. 56 **The courts have discretion to vary the interest amount which a litigant is *prima facie* entitled to under the *Judgment Interest Act*.** For example, Alberta courts have reduced the amount of time for pre-judgment interest when the successful party has proceeded too slowly during litigation (see *321665 Alberta Ltd. v. ExxonMobile Canada Ltd*., 2012 ABQB 76) and have reconsidered a trial judge's interest award where the judgment has been significantly altered on appeal (see *Aetna Insurance Co. v. Canadian Surety Co*., (1994) 157 A.R. 162(ABCA)).	Be familiar with this exception that it is typically "shall" award prejudgment interest under the Act. But court can reduce the amount of interest because of litigant conduct (dilatory/too slow) → dilatory = dragging feet

Chapter 9 – Venue	
See Part 3 Court Actions Division 1 Court Actions and Their Venue	
Rule 3.3 – Determining the appropriate judicial centre Determining the appropriate judicial centre 3.3**(1)** The appropriate judicial centre for the purpose of these rules is **(a) the closest judicial centre, by road, to the Alberta residences or Alberta places of business of all the parties, or** **(b) if a single judicial centre cannot be determined under clause (a), the judicial centre that is, by road, the closest to the Alberta residence or Alberta place of business of one of the parties, that party being selected by the party starting the action.** **(2)** If a party carries on business in more than one Alberta location, the place of business in Alberta of that party for the purpose of this rule is **the place of business that is nearest to the location at which the matters in issue in the action arose or were transacted.** **(3)** Despite subrules (1) and (2**), the parties may agree on a judicial centre in which to start and carry on the action, in which case the judicial centre agreed on by the parties is the appropriate judicial centre unless the Court otherwise orders.**	Under 3.3 there's two main options
Odland v Odland, 2017 ABCA 397 **I. Introduction** [1] Once a plaintiff commences an action in a particular judicial centre and the defendant wishes to transfer the action to another judicial centre on the basis that the plaintiff's choice was inappropriate, who bears the onus to establish that the plaintiff's choice of venue was reasonable? We conclude that the onus is on the defendant if the plaintiff's selection of judicial centre was in compliance with rule 3.3. However, if the plaintiff's selection of judicial centre did not comply with rule 3.3, the plaintiff has the onus of proving the choice was reasonable.	

[2] The plaintiff commenced her action for divorce and division of matrimonial property in Calgary. She resides for seven months of the year in another province and for the remaining five months in the judicial centre of Edmonton. The defendant lives in Edmonton. Their matrimonial property includes real property in British Columbia and the judicial centre of Edmonton, and shares in family corporations. The corporations are operated mostly out of Edmonton, although in the past they retained the services of an accountant in Calgary.

[3] The appellant's application to transfer the action to Edmonton was dismissed. We allow his appeal.

A. Determining the Appropriate Judicial Centre

[6] A competent authority in the province in which a divorce is commenced may make rules regulating practice and procedure: *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 25(2)(a). Accordingly, the *Alberta Rules of Court,* Alta Reg 124/2010 apply to proceedings under the *Divorce Act* in Alberta. Rule 3.3 provides:

> (1) The appropriate judicial centre for the purpose of these rules is
> (a) the closest judicial centre, by road, to the Alberta residences or Alberta places of business of all the parties, or
> (b) if a single judicial centre cannot be determined under clause (a), the judicial centre that is, by road, the closest to the Alberta residence or Alberta place of business of one of the parties, that party being selected by the party starting the action.
> (2) If a party carries on business in more than one Alberta location, the place of business in Alberta of that party for the purpose of this rule is the place of business that is nearest to the location at which the matters in issue in the action arose or were transacted.
> (3) Despite subrules (1) and (2), the parties may agree on a judicial centre in which to start and carry on the action, in which case the judicial centre agreed on by the parties is the appropriate judicial centre unless the Court otherwise orders.

[7] The leading case under the now-repealed *Rules* on the appropriate judicial centre in which to commence an action is ***Apache Canada Ltd v Johnson***, 2005 ABCA 71 (CanLII), 363 AR 100. The *Apache Canada* test must be modified to conform to rule 3.3, which governs. More specifically:

Stating Apache is no longer good law but must be modified to conform to rule 3.3

i. A statement of claim must be filed in the judicial centre that is closest to the Alberta residences or places of business of all parties: r 3.3 (1)(a). **ii. If a single judicial centre cannot be so determined, the statement of claim must be filed in the judicial centre that is closest by road to the Alberta residence or place of business of one of the parties, as selected by the party starting the action: r 3.3(1)(b).** **iii. If there is more than one place of business in Alberta, the place of business for the purposes of this rule is the one nearest the location where the matters in the action arose or were transacted: r 3.3(2).** **iv. The parties may otherwise agree on a judicial centre to start and carry on the action: r 3.3(3).**	
[8] **The purpose of the repealed rule was to make a lawsuit "convenient and fair to all parties": *Apache Canada* at para 7. That is also the purpose of rule 3.3.**	Modifying apache rule too comply with 3.3
B. Did the Plaintiff Comply with Rule 3.3? [9] The plaintiff submits that she has the discretion to select the judicial centre as long as her choice is not "arbitrary or capricious", citing *Wade Investment Ltd v Hat Travel Ltd* (1979), 21 AR 454, 1979 CarswellAlta 433 (WL Can) (QB).	
[10] *Apache* and cases since rejected this approach: *Apache Canada* at paras 3–4; *325303 Alberta Ltd v Prime Property Management*, 2011 ABQB 817 (CanLII) at paras 14–15, 531 AR 204.	
[11**] Rule 3.3 requires that when there is no single closest judicial centre to the Alberta residences of all the parties, the plaintiff must select the closest judicial centre to the residence of one of them: r 3.3(1)(a) and (b), with emphasis.**	
[12] The plaintiff's selection of Calgary is not a judicial centre contemplated by rule 3.3 because neither party resides in Calgary.	
[13] The court has the discretion to transfer the action if the plaintiff's selection of judicial centre was incorrect: r 3.5; *325303 Alberta Ltd* at paras 21–22. Since both parties' Alberta residences are in the judicial centre of Edmonton, that is the proper judicial centre.	

[14] This would be sufficient to dispose of the appeal but the questions of onus and balance of convenience were fully canvassed by the parties and are discussed next.

C. The Onus of Proof on Applications to Transfer an Action to Another Judicial Centre

[15] The transfer of an action to another judicial centre is governed by rule 3.5, which states:

The Court may order that an action be transferred from one judicial centre to another

> **(a) if the Court is satisfied that it would be unreasonable for the action to be carried on in the judicial centre in which it is located, or**
> **(b) at the request of the parties.**

What is unreasonable? Court operates on presumption that it was brought in the correct judicial centre If commenced in compliance with rule 3.3.

Rule 3.3 as a "presumption"

[19] **In our view, rule 3.3 operates much like a presumption. If the action is commenced in compliance with rule 3.3, it is presumed that it was brought in the correct judicial centre. If a defendant wishes to challenge the plaintiff's choice, the defendant must rebut that presumption and bears the burden of establishing that the plaintiff's choice was unreasonable. In contrast, if the plaintiff does not commence the action in compliance with rule 3.3, the plaintiff does not obtain the benefit of the presumption and it will be necessary for the plaintiff to establish that the choice of judicial centre was reasonable.**

Balance of Convenience for Assessing Rule 3.5 Applications

Get to reasonableness by looking at balance of convenience

[20] **We endorse the approach that reasonableness is determined on the balance of convenience**: *Regular* at para 7; *Pacific Investments* at para 41; *Abou-Morad v Aboumourad*, 2015 ABQB 584 (CanLII) at para 1, [2015] AJ No 1007 (QL).

[21] The following factors were considered under the balance of convenience in *Regular* at paragraph 9:

Certain factors to look at in para 21

> **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.**

[22] **Generally, the location of counsel is not a decisive factor: *Pacific Investments* at para 38; *Regular* at para 8. A party can retain counsel in whichever city they wish, but counsel will be expected to make themselves available in the proper judicial centre**: *Keaton v Keaton*, 2017 ABQB 429 (CanLII) at para 2, [2017] AJ No 712 (QL).

[23] **Applying the *Regular* factors, the balance of convenience clearly favours Edmonton**. The main witnesses are the parties, neither of whom lives in Calgary. If expert witnesses are needed, the defendant's expert will be in Edmonton. The former accountant for one of the companies is in Calgary but this is a matrimonial property action with no real property in Calgary. **Although we acknowledge the plaintiff's point that in the past the companies "operated" wherever the parties were living or travelling because most of the business is done electronically, the fact is that most of the companies' operations are conducted by the defendant, in Edmonton. The parties both have significant financial resources, so it is not a financial burden on the plaintiff to pursue a lawsuit in Edmonton. The travelling expenses of her lawyer may be addressed as a matter of costs. The action is at the disclosure stage. The next stage will be questioning and the only inconvenience is the travel of the plaintiff's lawyer, as the plaintiff will likely have to travel from British Columbia in any event.**

D. A Word About Procedure

[24] The case law suggests two different procedures are used for transferring an action. First, the defendant can apply to have the action transferred under rule 3.5 because the balance of convenience favors another judicial centre. This appears to be the more common process. Second, the defendant may apply for a declaration that the action was not commenced in compliance with rule 3.3 and once that declaration has been made, the defendant applies to transfer the action to a different judicial centre pursuant to rule 3.5. This was the procedure followed in *Pacific Investments.* Either procedure is satisfactory.

Exam: See from 1 to 2 questions dealing with the interest chapter and venue chapter; most likely mc, short answer or t/f

Chapter 10: Joinder of Patties and Causes of Action	
A. Res Judicata as a Limit on Joinder	Cote – **combining persons or topics in one law suit is one definition of joinder. The other definition of joinder is ending pleadings and declaring the issues in the lawsuit closed/defined.** **Note:** We are working with first definition
Rule 3.69 - **Joining claims** Division 6 Refining Claims and Changing Parties **Subdivision 1** **Joining and Separating Claims and Parties** **Joining claims** 3.69**(1) A party may join 2 or more claims in an action unless the Court otherwise orders**. **(2) A party may sue or be sued in different capacities in the same action**. **(3)** If there is more than one defendant or respondent, it is not necessary for each to have an interest (a) in all the remedies claimed or sought, or (b) in each claim included in the action.	
Rule 3.70 Parties joining to bring action **Parties joining to bring action** 3.70**(1)** Two or more parties may join to bring an action, and a plaintiff or originating applicant may make a claim against 2 or more persons as defendants or respondents in an action, if **(a) the claim arises out of the same transaction or occurrence or series of transactions or occurrences,** **(b) a question of law or fact common to the parties is likely to arise, or** **(c) the Court permits.** **(2)** This rule applies irrespective of the remedy claimed by the plaintiff or originating applicant and whether or not 2 or more plaintiffs or originating applicants seek the same remedy.	**Example:** Motor vehicle accident – multiple ppl in car and there is an accident; 3 injured people in care and one dies – the estate fo driver has claim and 2 passangers would have claim and shot gun passenger would have claim. Could join each parties claim as you could say it emerged out of the same transaction or occurrence **Example:** class action lawsuit – same investor screwed them over; action emerging out os same occurrence

Division 6 Refining Claims and Changing Parties **Subdivision 1** **Joining and Separating Claims and Parties** **Joining claims** 3.69**(1)** A party may join 2 or more claims in an action unless the Court otherwise orders. **(2)** A party may sue or be sued in different capacities in the same action. **(3)** If there is more than one defendant or respondent, it is not necessary for each to have an interest (a) in all the remedies claimed or sought, or (b) in each claim included in the action	
Q: What is Cause of Action Estoppel? **A: There are 4 requirements.** *Erschbamer v Wallster, 2013 BCCA 76* [15] **Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28** (from *Grandview v. Doering*, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 1987 CanLII 993 (MB QB), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, aff'd (1987), 1987 CanLII 5396 (MB CA), 45 D.L.R. (4th) 766 (Man. C.A.)): **1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];** **2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];** **3. The cause of action in the prior action must not be separate and distinct; <u>and</u>** **4. The basis of 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.**	Should be distinguished from issue estoppel – both cause action estoppel and issue estoppel on **EXAM** Not mutually exclusive; must meet all to ground a claim in **estopel**

Editor's note on cause of action estopel

Cause of action estoppel means that, once a court judgment is issued in relation to a particular cause of action, no further claims can be advanced in respect of that cause of action. In other words, there can only be one judgment per cause of action. (This is sometimes also referred to as the doctrine of "merger").

A major challenge in applying cause of action estoppel lies in determining what constitutes a cause of action. In *Sherwood Steel Ltd. v Odyssey Construction Inc.*, 2014 ABCA 320, at para 24, the Alberta Court of Appeal described a cause of action **as "a set of facts which are said to entitle the claimant to relief from a court**." But, at paras 25-26, the Court went on to note that this definition does not "preclude two separate causes of action arising from the same subject matter" and, further, that "the fact that two actions request identical relief does not necessarily mean that they each assert the same cause of action."

Significantly, in *Cahoon v Franks* (1967) SCR 455, the Supreme Court of Canada held that a single cause of action includes all of the heads of damage arising from the alleged wrong. This finding has two major implications for litigation procedure.

- **First, it means that cause of action estoppel prevents separate trials for separate heads of damage arising from the same circumstances. For example, assume that A suffers personal injury and property damage in a car accident caused by B. If A sues B for the personal injury only and obtains a judgment against B for that claim, cause of action estoppel applies to prevent A from later suing B for the property damage.**
- **Second, it means that cause of action estoppel does not prevent a claimant from amending a pleading to add a damages claim after the expiry of a limitation period and before judgment is issued.**

So, in relation to the example above, assume that A commences a lawsuit against B for personal injury arising from the car accident. The expiry of the limitation period for the cause of action does not prevent A from amending the claim to seek damages for property loss prior to obtaining a judgment against B.

Exam: Bonus question - What doctrine do we use to connote what judgment for cause of action – **doctrine of merger**

One claim but multiple actions may arise

Note: Cahoon - read on own if we have time

Key→ **single cause of action includes all heads of damage that arise from alleged wrong**

cause of action estoppel prevents separate trials for different heads of damage arising from same wrong

So if only sue for PI, then prevents the injured party from later suing wrongdoing for property damage

have to sue within limitation period

What are the rules for amending pleadings?

Q: What is Cause of Action Estoppel? **A: There are 3 requirements**	**Only 3 requirements for issue estoppel** **There are 4 requirements for cause of action estoppel** Look to case law for 3 requirements on issue estoppel
Penner v Niagara, [2013] S.C.J. No. 19 CROMWELL & KARAKATSANIS JJ:— **This appeal focuses on the discretionary application of issue estoppel**. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal. […] **We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met.** However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. **In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.** **Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and**	Became dicta as to requirements for issue estoppel and how do they defer from cause of action estoppel **NOTE:** issue estoppel is discretionary **EXAM:** know the 3 prong test for issue estopel and that it is discretionary Facts: Court indicates the appeal focuses…. SCC stated there isn't and shouldn't be a rule of public policy that make issue estoppel applicable to policy hearings Works an injustice - court can use discretion not to grant remedy being sought 2 proceedings: civil litigation, admin hearing for discipline unfair to apply issue estoppel and bar the appellant's claim as a civil action

procedures of administrative decision makers <u>however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme.</u>	**Collateral attack**: when you choose to relitigate an issue or cause of action already determined by previous tribunal or court and litigant tries to get another kick at the can and this is considered a collateral attack on the decision → Dont want to have integrity of decision challenged
As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "**The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."**	when they judicate issue estoppel, quite fact based, weighing each factor, does requires some analysis by the court
Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. **First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings.** **Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.**	pithy statements to help understand definition Latin phrase “having the right to be heard” - **audi alterem partem** • Why raise this? Because often invoked – goes to not just being heard but the perception of being heard. Procedural fairness issues can arise quite routinely in administrative legal manner if you don’t give other side legal right to be heard, potentially prejudicing their right to give full answer and defence - have to be able to know the case to meet if you are a respondent in admin matter and if you are a defendant in civil matter Second: leaving the door open for litigant to be able to marshal a SoC even although the prior tribunal has completed a fair hearing – Court providing guidance
(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in this Case ▪ In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. **However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.**	Explaining why fairness was still on the table and why this permitted or gave MR. Penner a further opportunity to have his claim advanced in court of law

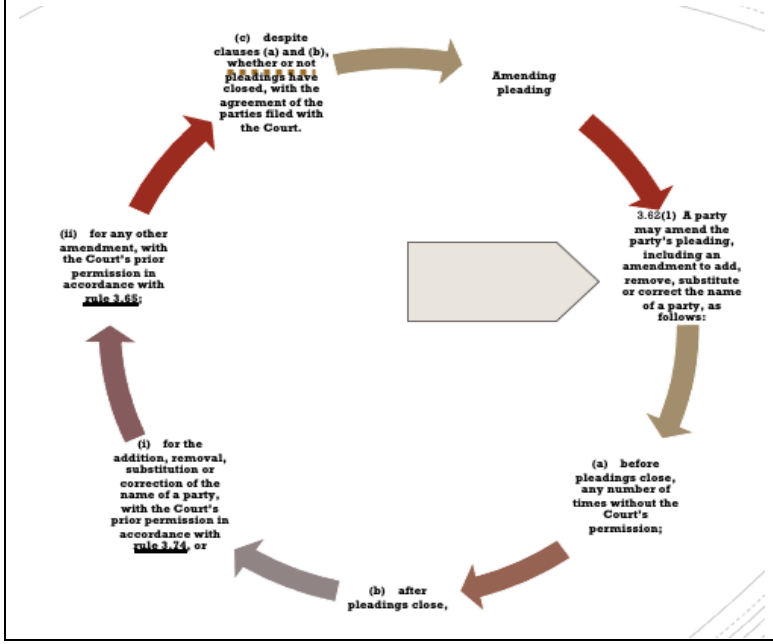
The test for issue estoppel B. The Test for Issue Estoppel ▪ The three preconditions for the operation of issue estoppel were set out by Dickson J. in Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248: **(1) whether the same question has been decided;** **(2) whether the judicial decision which is said to create the estoppel is final; <u>and</u>** **(3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).**	**Exam:** Must know these preconditions What kind of decision is made along the way to trial or to a hearing – **interlocutory decisions** • can you appeal an interlocutory decision to say to the ACCA if the first decision is made by ABQB? Yes o You can appeal interlocutory decisions - for example, a cost decision may be made along the way to trial o 90 days document production for plaintiff, 60 days for defendant - if they dont within the timeline, you offend the limitations, then you can apply for interlocutory application for compelling documents and a cost penalty for dilatory conduct for failing to produce records on time **Note**: Cannot have isuse estoppel where there is an interlocutory decision - **has to be a final ruling/determination/pronouncement by the court** **Exam**: may come up on TF question Is it true that interlocutory applications are confined to final decisions? No, but issue estoppel is Re: (3) Cannot have different parties to the subsequent matter, they have to match
Penner v Niagara, [2013] S.C.J. No. 19 ▪ However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel: ▪ **The first step is to determine whether the moving party... has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied. [Emphasis in original; citations omitted; para. 33.]** ▪ In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice.	**<u>Note: 2 step application for residual discretion</u>** **Takeaway**: understand that issue estoppel is discretionary even if you meet all 3 prongs of the IE test and be aware of 2 factors of identifying issue of unfairness

- **Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]**

- This approach is consistent with the longstanding principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

- C. *Issue Estoppel and Administrative Decisions*
  This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. **Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.**
  •••

Takeaway: while it is possible to advance a second subsequent claim in the civil courts even if you meet the test for it, the court may still exercise discretion to preclude ability of litigant to proceed if in its view it would disrupt the finality, ability for previous decision maker to be final,



B**. Amendment of Pleadings**
Diagram of Rule 3.62 (amending of proceedings)

start at big arrow, know the boxes in the circle for the final

A. before pleadings close, any number of times without the courts permission (can amend) (used to be without leave of the court, now permission)
B. after pleadings close, some preconditions to amend
   (i) for the addition, removal, substitution or correction of the name of a party, with the Court's prior permission in accordance with rule 3.74, or
   (ii) for any other amendment, with the Court's prior permission in accordance with rule 3.65;
   (c) despite clauses (a) and (b), whether or not pleadings have closed, with the agreement of the parties filed with the Court.
      i. consent order agreeing to amendment of pleading

Rule 3.62 – Amending Pleadings **(2) An amended pleading must be** **(a) filed, and** **(b) served on each of the other parties** **(i) within 10 days after the date on which it is filed, or** **(ii) if the pleading is a statement of claim that has not already been served, in accordance with Division 3, Subdivision 2.** **(3) A party may, without the Court's permission, amend that party's pleading before or after pleadings close if that amended pleading is** **(a) a statement of defence in response to an amended statement of claim, an amended counterclaim or an amended third-party claim, or** **(b) a reply to an amended statement of defence, amended statement of defence to an amended counterclaim, or amended statement of defence to an amended third-party claim.** **(4) A response pleading referred to in subrule (3) must be** **(a) filed, and** **(b) served on each of the other parties within 10 days after the date that the amended pleading referred to in subrule (3) is served.** **(5) If a party has pleaded in response to a pleading that is subsequently amended and served on that party and the party does not file and serve a further response to the amended pleading, the party is assumed to rely on the party's unamended pleading in response to the amended pleading referred to in subrule (3).** **(6) This rule does not apply to amendments to a class proceeding under the *Class Proceedings Act*.**	What happens when you go in for amendment and get it (this rule comes into play) 32 min in 10 day LP to serve pleading on other side (or all counsel) 10 day LP for service of party who has amended and got it filed, then 10 day LP for responding party to file their own amending pleading
Rule 3.63(1) **Identifying amendments to pleadings** 3.63**(1) Unless the Court otherwise orders, if a party amends a pleading, a new pleading must be filed, being a copy of the original pleading as amended**.	first amendment usually red second amendment usually green

(2) The amendment must **(a) be dated and identified, and each amended version must be identified, and** **(b) be endorsed by the court clerk in the following form:** ***Amended on [date] by [order]*** ***[party consent]*** ***Dated . . .***	
Rule 3.64 **Time limit for application to disallow amendment to pleading** 3.64**(1)** On application, the Court may disallow an amendment to a pleading or a part of it. **(2) The application must be filed within 10 days after service on the applicant of the amended pleading.**	If you are opposing to proposed amendment to pleading, must file application within 10 days after service on applicant after amended pleading
Rule 3.65 **Permission of Court to amendment before or after close of pleadings** 3.65**(1) Subject to subrule (5), before or after close of pleadings, the Court may give permission to amend a pleading.** **(2) If the Court gives permission for a pleading to be amended, the Court must specify the time period within which the amended pleading must be filed and served**. **(3) An order giving permission to amend a pleading under this rule ceases to have effect unless the amended pleading is filed and served within the time specified by the Court**. **(4) If the Court directs or allows a pleading to be amended at trial,** **(a) the amendment must be recorded in writing by the court clerk, and** **(b) no order need be filed.** **(5) This rule does not apply to an amendment to a pleading to add, remove, substitute or correct the name of a party to which rule 3.74 applies.**	Court discretion if agreement to amendment given, then court has to give time period for filing Read all these rules through

Rule 3.66 **Costs** 3.66**(1) Subject to subrule (2), the costs, if any, as a result of an amendment to a pleading are to be borne by the party filing the amendment unless** **(a) the amendment is a response to an amended pleading, or** **(b) the Court otherwise orders.** **(2)** The costs of a contested application to amend a pleading are in the discretion of the Court, in accordance with rule 10.29.	**Note:** be aware of this rule costs rule dealing with amendments default rule is that party seeking amendment bears cost for amendment (ss. a)
Rule 3.67 Close of pleadings **Close of pleadings** 3.67**(1)** This rule applies to pleadings between the following: (a) a plaintiff and a defendant; (b) a plaintiff-by-counterclaim and a defendant-by-counterclaim; (c) a third party plaintiff and a third party defendant; (d) a plaintiff and a third party defendant. **(2) Pleadings close when** **(a) a reply is filed and served by a plaintiff, plaintiff-by-counterclaim or third party plaintiff, as the case may be, or** **(b) the time for filing and serving a reply expires, whichever is earlier.** **(3)** The close of pleadings against one party represents the close of pleadings against all parties to that pleading.	**Exam:** Important slide know for exam, in MC or SA TF Often confuse what is a close of pleadings, when does it happen? • Most assume after defence has been filed and served, not true because of this rule. • Look at 3.67 No reference to a defence being filed and served as timing when pleadings close Closing pleadings involves a reply in these two scenarios (2a & 2b)
Subdivision 2 - Changes to Parties after closing of pleadings Rule 3.74 – Adding, removing or substituting parties after close of pleadings **Adding, removing or substituting parties after close of pleadings** 3.74**(1)** After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.	after time period of reply has expired, or reply has already been filed and serves contemplates close of pleadings

(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if **(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;** **(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.** **(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.**	need to file consent of person proposed to be added or substituted as a party no consent required in B but application made by party and court satisfied that order should be made **Note**: threshold to get an amendment to a pleading is relatively low • to demonstrate prejudice to the other side, probably have to show the court that cost award of some kind isnt going to be enough to cure the issue of prejudice **Note**: if adjournment is required, may eliminate prejudice Difficult to argue against an amendment of pleading
Rule 3.75 – Adding, removing or substituting parties to originating application **Adding, removing or substituting parties to originating application** 3.75**(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.** **(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action,** **(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;** **(b) in the case of an application to add or substitute a person as a respondent, or to remove or correct the name of a party, if the Court is satisfied the order should be made.** **(3)** The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.	**Note:** similar to previous rule, but as an originating applicant, if consent from the person going to be added, or as a respondent, then file and court has to be satisfied order should be made

3 stages of drafting pleadings	**seminal case in AB is Atilla Dogan**
Attila Dogan Construction and Installation Co. Inc. v Amec Americas Ltd, 2014 ABCA 74 The drafting of pleadings proceeds through three stages: a) **At the commencement of the action the plaintiff is allowed to include any allegation that discloses a cause of action** (so long as the pleading is not "vexatious") **without having to produce any evidence in support of the pleading**. b) **Before "pleadings close" the plaintiff is allowed to amend the pleading "any number of times" without consent or permission, and without having to produce any evidence in support: R. 3.62(1)(a).** c) **After "pleadings close" amendments are still possible, but must now be accompanied either by consent or the permission of the court, in which case the amending party will be required to produce some evidence in support of the allegations in the amendment**: R.3.62(1)(c), R. 3.65; ***Mikisew Cree First Nation v. Canada***, 2002 ABCA 110 atparas. 26 ff; 2 Alta LR (4th) 1, 303 AR 43. The scheme of the Rules therefore recognizes the importance of "closing pleadings", as defined in R. 3.67. **At some point the pleadings must be finalized so as to define the issues in the litigation, and to provide fixed parameters within which record production, questioning, settlement discussions, and the trial can occur.** **<u>Even after pleadings close, amendments are still relatively easy to get</u>. There is no deadline for amending, and pleadings can even be amended at trial; but that does not mean that the passage of time is irrelevant. <u>Amendments can be allowed even if the original pleading was carelessly prepared, which means that no particular reason for needing the amendment is required. While some evidence is needed to amend after the close of pleadings, the evidentiary threshold is low.</u>**	These 3 statements from the court B - can do it before pleadings close, any number of times. Always inform client they can amend the pleadings C - amendments still possible but must be accompanied by consent or court agreement and some evidence must be presented. Evidentiary bar - threshold is low especially after close of pleadings As long as you have a **centilla of evidence** - should be successful getting your amendment • centilla means a miniscule amount - tiny trace or spark of feeling. It is a finite amount of evidence that you need to be successful with amendment. **Exam: latin phrase previously mentioned** • that audi alterem partem is a bonus question filed parameters where settlement, trial, etc can occur
The 4 exceptions to amending pleadings	If your up against smart opposing counsel who is opposing your amendment, likely avert to Attilla Dogan and 4 exceptions to defeat your application

Eon Energy Ltd v Ferrybank Resources Ltd, 2018 ABCA 241 [18] Rule 3.65 of the Alberta Rules of Court gives the court broad discretion to permit a party to amend its pleadings. **The test as to when an amendment should be allowed is not in dispute, and was summarized as follows by Wittman, C.J.Q.B. in *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2010 ABQB 524** at paragraphs 20-21, 495 AR 338: ▪ **Generally, any pleading can be amended no matter how careless or late is the party seeking to amend: *Balm v. 3512061 Canada Ltd*., 2003 ABCA 98, 327 A.R. 149 at para. 43. This is referred to in Balm as the "classic rule".** ▪ **The classic rule is subject to four major exceptions**: *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*, 2000 ABQB 440, 269 A.R. 49 at para. 11; *Foda v. Capital Health Region*, 2007 ABCA 207 at para. 10; see also C*.H.S. v. Alberta (Director of Child Welfare),* 2006 ABQB 528, 403 A.R. 103 at para. 11, aff"d 2006 ABCA 355, 401 A.R. 215 . Those exceptions are as follows: **1. the amendment would cause serious prejudice to the opposing party, not compensable in costs;** **2. the amendment requested is "hopeless" (an amendment that, if were in the original pleadings, would have been struck);** **3. unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and** **4. there is an element of bad faith associated with the failure to plead the amendment in the first instance. Therefore, if no exception applies, the pleadings can generally be amended.** [19] If the respondent to an amendment application establishes any of the above exceptions, the trial judge may properly exercise her discretion to refuse to allow an amendment.	encourages us to read Balm if we have time (*insert eye roll*) Major exceptions - just want to nail four exceptions 1. cannot be neutralized with costs 2. what is a hopeless amendment is dependent on how case law interpreted this phrase - just know this is one of the 2nd exceptions 3. this is relevant for purpose of discussion of Poff decision 4. dont have to recall case law that specifically defined bad faith only 1 of the above exceptions can be called to get discretion to allow an amendment **Exam**: MC, SA on final
Poff v Great Northern Data Supplies (AB) Ltd, 2015 ABQB 173 **FACTS:** ▪ This is an appeal from the decision of a learned Master in Chambers.	Appeal that was heard by Schutz appeal from Master in ABQB

- The Master allowed the Plaintiff Ms. Poff, who is the Respondent on this appeal, to amend her Statement of Claim with the result that Great Northern Data Supply Co Ltd ("NewCo") was added as a Defendant.
- The Master permitted Ms. Poff's amendment to add NewCo, though, without prejudice to NewCo's right to raise a limitations defence.

Other Background Facts

- On 23 January 2008 Ms. Poff alleges she suffered a stroke, rendering her totally disabled and consequently eligible for long term disability benefits offered through her employer, Great Northern Data Supplies (AB) Ltd ("AlbertaCo").
- On 30 May 2008, Ms. Poff alleges that she received a letter from The Great West Life Assurance Company ("Great West Life") informing her that her eligible long term disability monthly payment was $1,541.00 based upon a monthly salary of $2,300.00.
- Ms. Poff alleges her actual, correct monthly salary was $3,765.00, and that her long term disability payments ought to have been based upon the higher monthly salary actually paid to her.
- On 18 May 2010 Ms. Poff issued her Statement of Claim, naming as Defendants AlbertaCo, "Great Northern Data Supplies", and Great West Life. The answer to the question of who is responsible for the alleged communication of erroneous salary information to Great West Life, and for the damages that may flow from that error, is the focus of Ms. Poff's lawsuit and claim.
- After close of pleadings, Ms. Poff sought to amend her Statement of Claim pursuant to Rules 3.62 and 3.74 of the *Rules of Court*. The proposed Amended Statement of Claim substitutes NewCo as a named Defendant, in the place of the non-entity Great Northern Data Supplies.
- Ms. Poff seeks amendments to her Statement of Claim because "Great Northern Data Supplies" is a nonentity, a fact upon which counsel for both Ms. Poff and NewCo agree, and to put forward that NewCo is evidently the administrator of AlbertaCo's employees' long term disability benefits plan, insured by insurer Great West Life.
- Misnomer was not argued, here or below. And, no one disputes that AlbertaCo and NewCo are separate and distinct legal entities.

Who is responsible for alleged erroneous data information from salary reporting is the basis of this appeal

- Ms. Poff seeks to add NewCo as a Defendant because NewCo says it — not AlbertaCo — was the *administrator* of Ms. Poff's employee long term disability benefits plan.
- In consequence, presumably it was NewCo that allegedly communicated to Great West Life erroneous salary information pertaining to Ms. Poff, upon which erroneous salary information her long term disability benefits were based. NewCo says it is too late for Ms. Poff to sue NewCo, or to claim that NewCo made the critical error in communicating erroneous salary information about Ms. Poff, to Great West Life.

Position of Appellant – NewCo

- NewCo appeals the Master's order on the basis that Ms. Poff has not met her burden under s 6(4)(a) of the *Limitations Act*, RSA 2000 c L-12 (the "*Act*").
- The *Act* requires that Ms. Poff satisfy the court that the added claim against NewCo is related to the conduct, transaction or events described in the original pleading.
- NewCo contends, moreover, that it has met its burden, requiring it to establish that it did not **receive sufficient knowledge of the added claim** within the time specified in s 6(4)(b), and that it has satisfied its burden imposed by s 6(5)(b) of the *Act*.
- NewCo submits that the Master erred in permitting the Plaintiff's amendments, with or without the preservation of NewCo's right to raise a limitations defense.

Position of Respondent – Ms. Poff

- Ms. Poff submits the opposite. She says that she has met her burden to establish that the added claim is related to the conduct, transaction or events described in her original Statement of Claim
- NewCo has failed to satisfy its burden that it did not receive sufficient knowledge of the added claim within the specified time. In consequence Ms. Poff asserts that the Master was correct to allow the amendment to add NewCo.

Further Factual Matrix in Poff

These facts are not disputed:

- AlbertaCo was Ms. Poff's employee;
- Ms. Poff worked for AlbertaCo;
- AlbertaCo paid Ms. Poff's salary; and,

the added claim must relate to the conduct, transaction or events described in original proceeding

What does did not receive sufficient knowledge of the added claim - live issue in this decision

▪ AlbertaCo offered its employees (including Ms. Poff) employee long term disability benefits. Schutz J: **Notwithstanding these undisputed facts, NewCo says that it was NewCo that did the administrative work relating to AlbertaCo's employee long term disability benefits plan and, further, that Ms. Poff knew, or ought to have known — within two years of receipt of the letter from Great West Life or of the filing of Great West Life's Statement of Defence — that if there was any communication of erroneous salary information about Ms. Poff to Great West Life, that would be NewCo's error, not AlbertaCo's.**	
Standard of Review **Appeal from a Master's Order – Correctness** **The parties agree that the standard of review on an appeal from a Master to a Judge, on all issues, is correctness**: *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 (Alta. C.A.) at para 30, (2012), 524 A.R. 382 (Alta. C.A.); see also *Royal Bank v. Samra*, 2012 ABCA 225 (Alta. C.A.) at para 8, (2012), 533 A.R. 356 (Alta. C.A.) [hereinafter Liberty Mortgage Services Ltd.]; *Boyd v. Cook*, 2013 ABCA 27 (Alta. C.A.) at para 24, (2013), 542 A.R. 160 (Alta. C.A.) ("An appeal from a Master is *de novo*, and on such appeals no deference is owed.")	**Exam:** Know for the exam the bolded parts now only two standards of review in Canada - reasonableness and correctness **She is appealing this as de novo appeal - new/fresh - appeal from Master - no deference owed to the Master'**
Analysis Schutz J (as she then was): ▪ To establish whether the test identified in s 6(4) has been met, I must determine whether the proposed amendments are an "added claim" and if so, I must then determine whether each party has satisfied its respective burden, imposed by subsections 6(5)(a)(i) and 6(5)(b). ▪ For the purposes of this appeal, in my view both the statute and the interpreting case law are clear: **if, as in the case at bar, an amendment is sought to add a defendant beyond the applicable limitation period, and the criteria of s 6(4) are met, then the added defendant's entitlement to claim immunity under s 3 of the *Act* — by reason of a tolled limitation — is irretrievably lost. Section 6(1) expressly states that "the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsections (2), (3) or (4) are satisfied."**	

1. What do "claim" and "added claim" mean? ▪ **In order to properly frame the statutory requirements, it is important to understand what "claim" and "added claim" mean. Section 1(a) of the *Act* defines "claim" as "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order."** In *Stuffco v. Stuffco*, 2006 ABCA 317, 397 A.R. 111 (Alta. C.A.) [*Stuffco*], the Court of Appeal speaks to what this definition means, at paras 25-26: ▪ 25 **In my view, by defining "claim" as the *matter* that gives rise to a civil proceeding, the Legislature was referring to the facts giving rise to the injury or offence for which a remedial order is sought**. This interpretation accords with the plain and ordinary meaning of the words. It is also what was intended by the Alberta Law Reform Institute (the Institute), which recommended this particular definition of claim in its Report No. 55 on Limitations. The Institute noted at 50: ▪ **The word "claim", defined in cl. 1(a), is substantive in meaning, not procedural. That is to say, it refers to the facts and circumstances which give rise to the alleged right to a remedy, not to the process by which the claim is made.** ▪ 26 **This interpretation is also consistent with the general scheme of the New *Act* where the new limitation periods commence upon either discovery of the defendant's malfeasance (s. 3(1)(a)), or 10 years from the date the "claim" arises (s. 3(1)(b))...**	**Exam:** Could be MC question about definition of a claim and it is in para 25 above • Give rise to civil proceedinng common reference to facts giving rise to right to seek remedial order 10 years is quick reference to ultimate limitation period under LA
2. Is the added claim related to the conduct, transaction or events described in Ms. Poff's original Statement of Claim? ▪ **Ms. Poff has the burden of establishing that the added claim is "<u>related to the conduct, transaction or events described in the original pleading</u>".** ▪ **The phrase "related to" has been held to have a very broad meaning**: *McDonnell v. Csaki*, 2014 ABQB 452, 244 A.C.W.S. (3d) 940 (Alta. Q.B.), relying on *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304, 380 A.R.195 (Alta. C.A.) ; see also *Canadian National Railway*, and *Canadian Natural Resources Ltd. v. Arcelormittal Tubular Products Roman S.A.*, 2012 CarswellAlta 2257(Alta. Q.B.) ; 2012 ABQB 679 (Alta. Q.B.), at para 409, (2012), 549 A.R. 72 (Alta. Q.B.), aff'd	dualing burdens between the parties

Determination on “added claim” ▪ **I find that Ms. Poff's added claim against NewCo is related to the events described in her original pleading — her Statement of Claim.** Her original pleading describes events — her debilitating stroke, her claim for disability payments, and her alleged underpayment due to communication of erroneous salary information. Clearly, NewCo's alleged involvement as the negligent, miscommunicating administrator of the employee long term disability benefits — which alleged negligent miscommunication caused the underpayment of benefits to Ms. Poff — is related to the events Ms. Poff describes in her original Statement of Claim. ▪ **In light of the low threshold Ms. Poff has to meet in order to satisfy s 6(4)(a), and the broad definition of the phrase "related to", I find that the added claim contained in her Amended Statement of Claim (namely the addition or substitution of NewCo as a defendant and the clarification of NewCo's involvement in the events described) is related to the conduct, transaction or events described in the original pleading, her initial issued Statement of Claim.** ▪ **The learned Master in Chambers, therefore, was correct in deciding that Ms. Poff had satisfied her burden.**	Low threshold for getting an amendment to a pleading “in light of low threshold” for satisfying s. 6(4)(a)
3. Did NewCo receive, within the limitation period applicable plus the time provided by law for service of process, sufficient knowledge of the added claim that NewCo will not be prejudiced in maintaining a defence to it on its merits? ▪ NewCo is burdened with showing that the requirement under s 6(4)(b) has not been satisfied: *Canadian National Railway*, at para 27. It is helpful to break down NewCo's burden into discrete parts, starting with "limitation period applicable".	Third issue she had to decide (see right hand side in red for issues)
What is the applicable limitation period? Schutz J:	

▪ Ms. Poff concedes that the limitation period within which she could have added NewCo has expired, but for the saving provision of s 6 of the *Act*. ▪ It was assumed by the Master that the limitation period passed before Ms. Poff sought to amend her original Statement of Claim by adding NewCo, and before she sought to add the amendments pertaining to NewCo's involvement in the events described. ▪ **Although I need not make any finding about when the limitation period commenced, because of this concession I will assume that the limitation for the added claim also commenced on 30 May 2008, being the date upon which Ms. Poff claims to have received the letter from Great West Life setting out her monthly long term disability payments based upon the erroneous salary information.**	**Note**: takeaway in bold
Determination on applicable limitation period • **Thus, for the purposes of s 6(4)(b), the "applicable limitation plus the time for service of process" — there being no extensions of time for service — is 30 May 2011.** • **The question is: Has NewCo established that it did not receive sufficient knowledge of the added claim in the three year period between 30 May 2008 and 30 May 2011 that NewCo will not be prejudiced in maintaining a defence to it on its merits?**	Time for service of process is 1 year application limitation period if 2 years generally speaking, then 1 year for service of process, gets you to May 30, 2011 (because the year was 2008) Question above: meat of the secondary analysis undertaken by the Court
What does "sufficient knowledge" mean? Schutz J: ▪ The evidence adduced, and the submissions made on behalf of NewCo, may evince a fundamental misconception of what is required to meet its burden set out in s 6(5)(b) of the *Act*. ▪ First, any submissions that focus on what knowledge Ms. Poff may have had about the distinction between NewCo and AlbertaCo, or their respective roles or actual involvement in the employee long term benefits, are irrelevant and immaterial. ▪ **This is because once Ms. Poff satisfies her burden that the added claim against NewCo relates to**	Reasoning pathway for the question asked above evidence - may demonstrate, show Key: doesnt matter what the plaintiff's knowledge was …"this is because…."

the conduct, transaction or events described in the original pleading — the Statement of Claim — the burden shifts and rests solely on NewCo to persuade the Court it ought not to be satisfied that NewCo had sufficient knowledge, within the applicable time period, of the added claim against it related to the events described in Ms. Poff's original Statement of Claim. ▪ Second, it is not determinative that AlbertaCo and NewCo are separate and distinct corporate entities. ▪ Although these aspects of NewCo's arguments may be relevant at trial, it seems to me that they are juridically irrelevant when considering allowing an added claim under s 6 of the *Act*. ▪ Moreover, given her concession, the timing of when Ms. Poff gained sufficient knowledge that AlbertaCo and NewCo had different responsibilities in respect of her employee disability benefits is, again, irrelevant. ▪ **Put simply, the focus is not on what *Ms. Poff* knew, or when she knew it; rather, the focus is on whether *NewCo* received sufficient knowledge of the added claim within the applicable time period.** ▪ NewCo says it did not become aware of the added claim against NewCo — as administrator of the employee long term benefits — until 12 September 2013, when Ms. Poff's counsel provided a draft copy of the Amended Statement of Claim. This evidence is given in the Affidavit of Michelle Johnson, sworn 31 July 2014. […]	take umbrage (issue/offence) with michelle's affidavit
Affidavit of Michelle Johnson ▪ In her 30 July 2014 Affidavit, Michelle Johnson deposes that during Ms. Poff's employment, the shareholder structures and the Directors of NewCo and AlbertaCo were different. ▪ Ms. Johnson's evidence is silent, however, as to whether during the time contemplated by s 6(4) of the *Act* — that is, between the dates 30 May 2008 and 30 May 2011 — the Directors or Shareholders were the same.	

▪ Her Affidavit is also silent about when she became a Director of each company, or when her relationship as a Director of either corporation (or both) may have changed. NewCo bears the continuous burden under s 6(4)(b).	
"Corporate Knowledge" ▪ I pause here to consider how a corporation acquires knowledge. The Court of Appeal answers, in *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72 (Alta. C.A.) at para 88, (2010), 474 A.R. 367 (Alta. C.A.), when it says: ▪ ... "**Corporate knowledge" can have two different meanings. In some situations knowledge in the mind of any one representative of a corporation will be attributed to the corporation as a whole.** ▪ If several representatives of a corporation have different pieces of information which, if combined together, are significant, the corporation might be assumed to have that knowledge, even if no one representative of the corporation is sufficiently apprised of all the information to make the connection... **In [other] cases a corporation may have files or documents that contain important information**. **However, the individual employees who are making decisions (or representations) are not actually aware of the information in those documents. The information is "corporate knowledge" in the sense that the corporation has access to it, but the human agents who are acting in the name of the corporation are not actually aware of that information.**	**Exam:** MC question on Final • how does corporation acquire knowledge? o Molkoskis Holding case is the answer para 88 (highlighted portions)
Determination on "sufficient knowledge" ▪ I find it difficult to conceive that, being aware of the claim against AlbertaCo as contained in the original Statement of Claim, the knowledge of Michelle Johnson qua Director of AlbertaCo and NewCo of the added claim related to the events (i.e. the facts and circumstances of Ms. Poff's claim) does not satisfy the "sufficient knowledge" requirement. ▪ **In the context of this case, the first meaning applies. I find that Ms. Johnson's sufficient knowledge of the facts and**	

circumstances of the added claim, her sufficient knowledge of the events relating to the added claim as described by Ms. Poff — the providing to Great West Life of erroneous salary information deprived Ms. Poff of her rightful disability payments — <u>is NewCo's sufficient knowledge</u>. ▪ Because of Ms. Johnson's role as a Director of both AlbertaCo and NewCo concurrent to 18 January 2011, I find it reasonable to conclude, in consequence, that NewCo had sufficient knowledge of the facts and circumstances, and matters giving rise to Ms. Poff's added claim on that date well before the expiry of the applicable limitation period plus the time permitted by law for service of process, that is, prior to 30 May 2011. ▪ Put another way, I find that NewCo and AlbertaCo had sufficient knowledge at all material times as to which of the two corporations (AlbertaCo or NewCo) had responsibility for administering AlbertaCo's employee long term disability insurance benefits. ▪ NewCo's evidence fails to satisfy me that it did not receive sufficient knowledge of the facts and circumstances giving rise to the added claim within the applicable time. NewCo's corporate distinctiveness from AlbertaCo is not proof that NewCo had not received sufficient knowledge of the facts and circumstances giving rise to the added claim. Simply put, NewCo has not met its burden of proof. […] ▪ Therefore, I find that the learned Master in Chambers was correct in permitting Ms. Poff's added claim. This does not end the analysis. I must ensure that NewCo "will not be prejudiced in maintaining a defence to the added claim on its merits."	
Will NewCo be prejudiced in maintaining a defence to the added claim on its merits? ▪ When queried by the Master as to what evidence existed in respect of NewCo's alleged prejudice in maintaining a defence to the added claim on its merits, NewCo pointed to paragraph 19 of Ms. Johnson's Affidavit which says:	NewCo will not be prejudiced for adding a claim on the merits Be mindful of this - Lawyers iwll draft and file affidavits on which they are the ones making submissions on behalf of their client but the client should be giving the evidence**. submissions of counsel are not evidence**

19. A third party was responsible for gathering income information with respect to employees of Alberta Co and conveying it to GWL. ▪ **With respect, I do not find that paragraph 19 is evidence that NewCo will be prejudiced in maintaining a defence to the added claim on its merits. And, with respect, submissions of counsel are not evidence: *Lister v. Calgary (City)* (1997), 193 A.R. 218 (Alta. C.A.) at para 15, (1997), 47 Alta. L.R. (3d) 14 (Alta. C.A.).**	
Determination - No prejudice found ▪ Granting that r 3.74 also comes into play I must consider prejudice in the context of the rule, also. The onus is on the NewCo to establish prejudice: *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98 (Alta. C.A.) at para 43, (2003), 327 A.R. 149 (Alta. C.A.) [*Balm*]. NewCo has not adduced sufficient evidence to satisfy me that it will be prejudiced. ▪ In summary, I am satisfied that NewCo has not met its burden under s 6(4)(b): s 6(5)(b).	
Appeal dismissed by Schutz J. ▪ In the end result, **I find that the learned Master in Chambers did not err in allowing Ms. Poff's added claim under s 6(4) of the *Act*, but the Master in Chambers' qualification that the amendments will be allowed without prejudice to NewCo's right to claim immunity from liability due to expiry of a limitation period, is not correct. I dismiss the appeal and remove the qualification previously granted by the Master. Ms. Poff has been wholly successful; accordingly, costs here and below, on the appropriate Column of Schedule C, shall follow that result.** ▪ Appeal dismissed.	

Chapter 11 Service	
A. Purpose of Service	
Butkovsky v Donahue 1984 CarswellBC 83 McKAY J:— ••• It seems clear on the authorities that at common law the plaintiff, having properly served the defendant within the jurisdictions, is prima facie entitled to continue the proceedings in this jurisdiction. ••• *Application dismissed*	Issue with Plaintiff being properly served within jurisdictions
B. Service of Commencement Documents on Parties in Alberta	How do we serve commencement documents in AB? Series of technical rules to consider when serving commencement documents in AB
1. On Individuals **See Rules 2.12(2), 11.5 – 11.8, 11.12, and 11.18.**	
Rule 2.12(2) Types of litigation representatives and service of documents **Types of litigation representatives and service of documents** 2.12**(1)** There are 3 types of litigation representatives under these rules: (a) an **automatic litigation representative** described in rule 2.13; (b) a **self-appointed litigation representative** under rule 2.14; (c) a **Court-appointed litigation representative** under rule 2.15, 2.16 or 2.21. **(2) Despite any other provision of these rules, if an individual has a litigation representative in an action,** **(a) service of a document that would otherwise be required to be effected on the individual must be effected on the litigation representative, and** **(b) service of a document on the individual for whom the litigation representative is appointed is ineffective**	Talks about service involving different types of lit reps and service of those documents Important rule 3 types of lit reps under these rules (a,b,c) **Exam:** Be mindful of s. 2(a) & (b) for the final

Rule 11.5 Service on Individuals **Service on individuals** 11.5**(1)** A commencement document may be served on an individual who is not required to be served by another method under this Division by (a**)** **being left with the individual**, or (b) **being sent by recorded mail addressed** to the individual. **(2)** Service is effected under this rule, (a) if the **document is left with the individual, on the date it is left, or** (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed by the individual to whom it is addressed.**	(a) – called **personal service** (b) -used to only be that you could serve the person personally (process server and swear affidavit that they got good service on the individual). But now, seems you can serve by recorded mail • Recorded mail can include such things as registered mail where recipient signs acknowledgement of receipt 2(a) – process server attending 2(b) – registered mail signing
Rule 11.6 Service on trustees and personal representatives (PR) **Service on trustees and personal representatives** 11.6**(1)** A commencement document may be served on a trustee or personal representative who is an individual (a) by **being left with the trustee or personal representative, or** (b) **by being sent by recorded mail addressed to the trustee or personal representative.** **(2)** Service is effected under subrule (1), (a) if the **document is left with the trustee or personal representative, on the date it is left**, or (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed** by the trustee or personal representative to whom it is addressed. **(3)** A commencement document may be served on a trustee or personal representative that is a corporation in accordance with rule 11.9(1), and service on the trustee or personal representative is effected in accordance with rule 11.9(2).	(a) – personal service (b) - registered mail Same goes for PR and trustees as with individuals – leave with personally, or acknowledge receipt by signing

Rule 11.7 Service on litigation representatives **Service on litigation representatives** 11.7**(1)** A commencement document may be served on a litigation representative who is an individual (a) by **being left with the litigation representative**, or (b) by **being sent by recorded mail addressed to the litigation representative**. **(2)** Service is effected under subrule (1), (a) **if the document is left with the litigation representative, on the date it is left**, or (b) **if the document is sent by recorded mail, on the date acknowledgment of receipt is signed by the litigation representative to whom it is addressed**. **(3)** A commencement document may be served on a litigation representative that is a corporation in accordance with rule 11.9(1), and service on the litigation representative is effected in accordance with rule 11.9(2).	Can do personal service (litigant can hand them the commencement documents themselves or by process server) or registered mail Same for when service is effected – leave with them or acknowledge receipt for documents **Exam: On final**, may just ask how is service effected on lit rep in AB and have to go back to this rule and tell him that either subsection 2a or b (left with lit rep or acknowledge receipt by signing)
Rule 11.8 - Missing persons **Missing persons** 11.8**(1)** A commencement document may be served on an individual who is **declared to be a missing person under the *Public Trustee Act*** (a) **by being left at the office of the Public Trustee with an individual who appears to have management or control responsibilities in that office,** or (b) by **being sent by recorded mail to the Public Trustee.** **(2)** Service is effected under this rule, (a) if the **document is left with an individual in accordance with subrule (1)(a), on the date it is left**, or (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed.**	How do you serve a missing person?
Rule 11.12 **Service on individuals using another name**	Read this rule directly

11.12**(1) If a claim is made against a single individual carrying on business, operating or engaged in an activity under another name, a commencement document may be served on the individual** **(a) by being left** **(i) with the individual, or** **(ii) with an individual who appears to have management or control responsibilities with respect to the business, operation or activity at the principal place of business**, operation or activity in Alberta, or **at the place of business, operation or activity in Alberta where the claim arose,** or (b) **by being sent by recorded mail**, addressed to the business, operation or activity name, to the principal place of business or activity in Alberta of the business, operation or activity. **(2)** Service is effected under subrule (1), (a) if the document **is left with an individual** in accordance with subrule (1)(a), on the date it is left, or (b) if the document is **sent by recorded mail, on the date acknowledgment of receipt is signed.**	Different scenarios – be aware of the language Note: A lot of the subrules are repetitive in how service is effected but be sure you are accurately citing the different scenarios under different factual circumstances
Rule 11.18 **Service on self-represented litigants** 11.18**(1)** A self-**represented litigant may accept, in writing, service of a commencement document.** **(2)** Service is **effected under this rule on the date that the self-represented litigant accepts service of the document in writing**.	Note: Not verbal; Verbal conversations about service not going to satisfy the rule

2. On Corporations **See Rules 11.4, 11.9, and 11.13.**	
Rule 11.4 **Methods of service in Alberta** 11.4 Unless the Court otherwise orders or these rules otherwise provide, a commencement document must be served in Alberta and in accordance with (a) a method of service provided by an enactment, or (b) this Division.	
Rule 11.9 **Service on corporations** 11.9(1) A commencement document may be served on a corporation (a) by being left (i) with an **officer of the corporation who appears to have management or control responsibilities with respect to the corporation, or** (ii) with **an individual who appears to have management or control responsibilities with respect to the corporation at its principal place of business or activity in Alberta, or at the corporation's place of business or activity in Alberta where the claim arose,** or (b) by being sent **by recorded mail**, addressed to the corporation, to the principal place of business or activity in Alberta of the corporation. **(2)** Service is effected under this rule, (a) if the **document is left with an individual** in accordance with subrule (1)(a), on the date it is left, or (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed.**	If you are serving satellite office where primary activity not taking place, then not satisfying service requirement **Note**: If service corporation, strongly recommend you serve the attorney address for service of the corporation (RR address usually on the Annual Report/Corporate Registry Search) Receipt that is signed can be tracked through Canada post and you print off the tracking and signature for receipt and attach it to an affidavit of service
Rule 11.13 **Service on a corporation using another name** 11.13**(1) If a claim is made against a single corporation carrying on business or operating in a name other than its own, a commencement document may be served on that corporation** (a) **by being left**	

(i) with an **officer of the corporation who appears to have management or control responsibilities with respect to the corporation, or** (ii) **with an individual who appears to have management or control responsibilities with respect to the corporation at the principal place of business or activity in Alberta of the corporation, or at the place of business or activity in Alberta of the corporation at which the claim arose,** or (b) by being sent by **recorded mail**, addressed to the business or operating name of the corporation, to the principal place of business or activity in Alberta of the corporation. **(2)** Service is effected under this rule, (a) if the document is **left with an individual** in accordance with subrule (1)(a), on the date it is left, or (b) if the document is **sent by recorded mail, on the date acknowledgment of receipt is signed.**	
See Alberta's *Business Corporations Act*, RSA 2000, c B-9, s 256 and Alberta's *Interpretation Act*, RSA 2000, c I-8.	
Alberta *Business Corporations Act*, s. 256 **Notice to and service on a corporation** 256(1) A notice or document that is required or permitted to be sent to or served on a corporation may be (a) **delivered to its registered office**, or (b**) sent by registered mail to** (i) **its registered offic**e, or (ii**) the post office box designated as its address for service by mail,** as shown in the last notice filed under section 20. **(2)** Notwithstanding subsection (1), in the case of a notice of intent to dissolve a corporation, the notice may be sent by ordinary mail to the corporation addressed (a) to its registered office, or (b) to the post office box designated as its address for service by mail,as shown in the last notice filed under section 20. **(3)** A notice or document sent by registered mail to the corporation in accordance with subsection (1)(b) is deemed to be received or served 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. **(4)** A notice of intent to dissolve a corporation sent by ordinary mail to the corporation in accordance with subsection (2) is deemed to have been received or served at the time it would be delivered in the ordinary course of mail despite the fact that it is returned as undeliverable.	
Alberta's *Interpretation Act*, RSA 2000, c I-8, s.30 **Reference by common name** 30 In an enactment a reference by name to any country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which that **name is commonly applied, notwithstanding that the name is not its formal or extended designation.**	Interesting provision in the AIA
3. On Firms / Partnerships **See Rules 11.4, 11.10, and 11.11.**	
Rule 11.10 **Service on limited partnerships** 11.10(1) A commencement document may be served on a limited partnership that is the subject of a claim in the name of the limited partnership (a**) by being left** (i) with **an individual who is a general partner, or** (ii) **with an individual who appears to have management or control responsibilities with respect to the limited partnership at its principal place of business or activity in Alberta, or at the limited partnership's place of business or activity in Alberta where the claim arose,** or (b) by being **sent by recorded mail**, addressed to the limited partnership, to the principal place of business or activity in Alberta of the limited partnership. **(2)** Service is effected under subrule (1), (a) if the document is **left with an individual**, on the date it is left, or	

(b) if the document is **sent by recorded mail, on the date acknowledgment of receipt is signed.** **(3)** If a general partner is a corporation, the commencement document may be served on that general partner in accordance with rule 11.9(1), and service on the general partner is effected in accordance with rule 11.9(2).	
Rule 11.11 **Service on partnerships other than limited partnerships** 11.11(1) **A commencement document may be served in the name of the partnership on every partnership other than a limited partnership that is the subject of a claim,** **(a) by being left** (i) with an **individual who is a partner**, or (ii) with an **individual who appears to have management or control responsibilities with respect to the partnership at its principal place of business or activity in Alberta, or at the partnership's place of business or activity in Alberta where the claim arose,** or (b) by **being sent by recorded mail,** addressed to the partnership, to the principal place of business or activity in Alberta of the partnership. **(2)** Service is effected under subrule (1), (a) if the document is **left with an individua**l in accordance with subrule (1)(a), on the date it is left, or (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed**. **(3)** If a partner is a corporation, the commencement document may be served on that partner in accordance with rule 11.9(1), and service on the partner is effected in accordance with rule 11.9(2).	
4. On Statutory / Other Entities See Rule 11.14. **Service on statutory and other entities** 11.14**(1) A commencement document may be served on an entity established by or under an enactment, or an entity not otherwise described in this Part, that is capable of being the subject of an action,** (a) **by being left**	**Example**; Metis Settlements Appeal Tribunal would apply as it is a creature of statute and subject to rule 11.14

(i) **with an officer or administrator of the entity who appears to have management or control responsibilities with respect to the entity, or** (ii**) with an individual who appears to have management or control responsibilities with respect to the entity at the entity's principal place of business or activity in Alberta, or at the entity's place of business or activity in Alberta where the claim arose,** or (b) by being **sent by recorded mail**, addressed to the entity, to the entity's principal place of business or activity in Alberta. **(2)** Service is effected under this rule, (a) if the document is **left with an individual** in accordance with subrule (1)(a), on the date it is left, or (b) if the document is sent **by recorded mail, on the date acknowledgment of receipt is signed.**	
5. Special Circumstances (a) Address for Service See Rule 11.15. (b) Lawyer See Rules 11.16 & 11.17. (c) Business Representative of Absent Party See Rule 11.19. (d) Agreement See Rule 11.3.	
Rule 11.15 **Service on person providing an address for service** 11.15**(1) In an action, a commencement document may be served on a person who has provided an address for service on a filed document** (a) by **being left, addressed to the person, at that address, or** (b) by being **sent by recorded mail, addressed to the person, at that address.** **(2)** Service is effected under subrule (1), (a) if the **document is left at the address, on the date it is left, or** (b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed.**	Don't have to do personal service under this rule simply leave document addressed to person at that address

Rule 11.16 **Service on lawyer** 11.16**(1) If a lawyer acts for a person in an action and the person must be served with a commencement document, the lawyer may, in writing, accept service on behalf of the person.** **(2)** Service is **effected under this rule on the date service of the commencement document is accepted in writing by the lawyer**.	If OC is asking the lawyer to accept service on behalf of their client, if their lawyer is refusing service, need to get a process server to personally serve the client or by way or recorded mail • Easier if the lawyer will accept service on behalf of client ○ But want to ensure client has personal knowledge of it so some lawyers are hesitant to accept service on behalf of their client. Would rather their client be served and turn over documents to them
Rule 11.17 **Service on lawyer of record** 11.17**(1) A commencement document may be served on a party by being served on the lawyer of record for the party** (a) by **being left with the lawyer, being left at the lawyer's office, or being left at another address specified by the lawyer, or** (b) by **being sent by recorded mail,** addressed to the lawyer, to the lawyer's office. **(2)** Service is effected under this rule, (a) if the **document is left with the lawyer or at the lawyer's office or at another address specified by the lawyer, on the date it is left,** or (b) **if the document is sent by recorded mail, on the date acknowledgment of receipt is signe**d	Usually means all future documents for service can be served on that lawyer
Rule 11.19 **Service on business representatives of absent parties** 11.19**(1)** A commencement document may be served on a party **WHO IS OUT OF ALBERTA BUT WHO HAS A REPRESENTATIVE WHO RESIDES AND CARRIES ON THE ABSENT PARTY'S BUSINESS IN ALBERTA**, if the claim arose in respect of that business, (a) by **being left with the representative**, or (b) **by being sent by recorded mail addressed to the representative.** **(2)** Service is effected under subrule (1), (a) if the **document is left with the representative, on the date it is left, or**	

(b) if the **document is sent by recorded mail, on the date acknowledgment of receipt is signed by the representative**. **(3)** If the representative described in subrule (1) is a corporation, the corporation may be served in accordance with rule 11.9(1), and service is effected on the representative in accordance with rule 11.9(2).	
Rule 11.3 **Agreement between parties** 11.3(1) **If, in a contract that is the subject of an action, the parties agree on** **(a) a place for service,** **(b) a mode of service, or** **(c) a person on whom service may be effected,** **service of a document may be made in accordance with the agreement, and service is effected when so made.** **(2)** An agreed method of service described in subrule (1) that applies outside Alberta must comply with rule 11.26. **(3)** An agreement about service of documents under this rule does not invalidate the service of a document that otherwise complies with the rules in this Part.	
C. Service of Commencement Documents Outside of Alberta ("Ex Juris") → See Rules 11.25 & 11.26	
Division 5 Service of Documents Outside Alberta Real and substantial connection Rule 11.25 11.25**(1) A commencement document may be served OUTSIDE ALBERTA AND IN CANADA only if** (a) **a real and substantial connection exists between Alberta and the facts on which a claim in the action is based,** and (b) **the commencement document discloses the facts in support and specifically refers to the grounds for service of the document outside Alberta and in Canada**.	**Exam: Know the real and substantial connection test for the final in 11.25** **11.25(1) is outside alberta but still within canada**

(2) A commencement document may be served <u>OUTSIDE CANADA</u> only if (a) **a real and substantial connection exists between Alberta and the facts on which a claim in an action is based and the commencement document is accompanied with a document or affidavit that sets out the grounds for service of the document outside Canada,** (b) **the Court**, on application supported by an affidavit satisfactory to the Court, **permits service outside Canada, <u>and</u>** (c) **the person served with the commencement document is also served with a copy of the order permitting service outside Canada.**	Cant serve commencement documents ex juris unless and until you apply to the court – need a court order requirements for commencement document served ex juris rule 11.25(2) - outside of Canada Court order if your serving outside of Canada must be served on the person your serving outside of Canada
(3) Without limiting the circumstances in which a real and substantial connection may exist between Alberta and the facts on which a claim in an action is based, **in the following circumstances a real and substantial connection is presumed to exist**: **(a) the claim relates to land in Alberta;** **(b) the claim relates to a contract or alleged contract made, performed or breached in Alberta;** **(c) the claim is governed by the law of Alberta;** **(d) the claim relates to a tort committed in Alberta;** **(e) the claim relates to the enforcement of a security against property other than land by the sale, possession or recovery of the property in Alberta;** **(f) the claim relates to an injunction in which a person is to do or to refrain from doing something in Alberta;** **(g) the defendant is resident in Alberta;** **(h) the claim relates to the administration of an estate and the deceased died while ordinarily resident in Alberta;** **(i) the defendant, although outside Alberta, is a necessary or proper party to the action brought against another person who was served in Alberta;** **(j) the claim is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:** (i) the trust assets include immovable or movable property in Alberta and the relief claimed is only as to that property; (ii) the trustee is ordinarily resident in Alberta; (iii) the administration of the trust is principally carried on in Alberta;	**Exam:** identify and appreciate the list within (3) - could see this on exam in form of MC or even a T/F or short answer - be aware of the numerous circumstances →Asking which apply, which dont apply Example of (3)(j) could occur in situation where testatrix leaves gift to minor beneficiary and personal representative is holding the asset for benefit of minor beneficiary and they can access at 18.

(iv) by the express terms of a trust document, the trust is governed by the law of Alberta; **(k) the action relates to a breach of an equitable duty in Alberta.**	
D. Service of Non-Commencement Documents in Alberta **See Part 11, Division 1 and Division 3.**	i.e. serving corporations, getting acknowledgement of receipt, leaving with someone with managerial duties - now is commencement of non-commencement documents when the party has already been served.
E. Proving Service → See Rule 11.30.	
Rule 11.30 **Proving service of documents** 11.30**(1) Service of a document IN ALBERTA and service of documents other than commencement documents outside Alberta may be proved to have been effected** (a) **by an affidavit** **(i) stating that the person was served,** **(ii) describing the method of service, and** **(iii) stating the date and place of service,** **(b) by an acknowledgment or acceptance of service in writing by the person served or by a lawyer on the person's behalf, or** (c) by an **order validating service** under rule 11.27. **(2) Service of a commencement document OUTSIDE ALBERTA may be proved to have been effected** (a) **by an affidavit** **(i) stating the real and substantial connection between Alberta and the claim,** **(ii) stating that the person was served,** **(iii) describing the method of service, and** **(iv) stating the date and place of service,** **(b) by an acknowledgment or acceptance of service in writing by the person served or by a lawyer on the person's behalf,** or (c) by **an order validating service** under rule 11.27.	**Note**; Become familiar with this (a) affidavit of service is usually the way we prove service. Assistant if they served by registered mail or something will state how served, date and place, and acknowledgement of served person. If your serving a lawyer repping the other side, typically if commencement document, if not formally retained, you can ask that lawyer if they would agree to accept service on behalf of their client - if so, you have the lawyer's acknowledgement you can serve counsel. If not, you have to personally serve the client. Electronic service sufficient? • Cote says about service via electronic means - **not permitted in document commencing a lawsuit. Later in the lawsuit may be used to serve party who has given electronic address** (email, fax number).
F. Overcoming Service Problems **See Part 11, Division 1 and Division 6**	

1. Substitutional Service - See Rule 11.28 **11.28(1) If service of a document, <u>INSIDE OR OUTSIDE ALBERTA</u>, is impractical, the Court may, on application, make an order for substitutional service.** **(2) The application must be supported by an affidavit** **(a) setting out why service is impractical,** **(b) proposing an alternative method of service**, and **(c) stating why the alternative method of service is likely to bring the document to the attention of the person to be served.** **(3)** Unless otherwise ordered, **an order for substitutional service of a document must be served with the document except when substitutional service is by advertisement, in which case the advertisement must contain a reference to the order**. **(4)** If a document is served in accordance with an order for substitutional service, **service is effected on the date specified in the order.**	Tells us what subservice entails Note: **service has to be "impractical" only then can court make order for sub-service on application** Affidavit evidence usually only means for supporting application seen in Court. (c)This prong of the test goes to the strength on evidence for method of alternative service (3) - usually not a newspaper ad unless tool of last resort
Metcalfe v Yamaha Power Motor Products 2012 ABCA 240 …Rule 11.26 must be differentiated from the other rules regarding service generally, because service *ex juris* imports additional considerations. **Granting service outside Alberta is not solely concerned with the test of whether a document was brought or likely to be brought to the attention of a foreign defendant. As already noted, service *ex juris* is founded upon a decision to extend the court's jurisdiction beyond its own territory.**	Read the bold Court is doing something quite significant by expanding jurisdiction beyond its borders - what this case is trying to affirm - **that authority of service ex juris is the courts' jurisdiction going outside the borders** – extra-teritorially
2. Validating Service - See Rule 11.27 11.27**(1)** On application, **the Court MAY make an order validating the service of a document served INSIDE OR OUTSIDE ALBERTA in a manner that is not specified by these rules if the Court is satisfied that the <u>method of service used brought or was likely to have brought the document to the attention of the person to be served</u>**.	Subservice v validating service • validating service - not asking for court to grant order in which your recommending to the court to use different method of service**, you are asking the court to validate the method of service used** - Not mentioning another method of service here. in subsection (1) Is this a question of law or fact? - its mixed fact and law issue because you have rule saying what it does but when you apply the facts to this legal rule, your doing mixed fact and law. Cant answer question of brought or likely to be brought to attention of person served unless you scrutinize the affidavit evidence.

(2) On application, **the Court MAY make an order validating the service of a document served inside or outside Alberta if the Court is satisfied that the document would have been served on the person or would have come to the attention of the person if the person had NOT EVADED SERVICE.** **(3)** If service is validated by the Court under this rule**, service is effected on the date specified in the order**. **(4)** Subrules (1) to (3) apply despite (a) **any previous order that permitted or directed service of the document by a particular method**, and (b) the fact that the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* applies to service of the document.	**Evidence in sub-service or validating service application is very important to get the order granted** - if the affidavit evidence of applicant isn't strong enough you will be denied order if not strong enough to be brought within ambit of "come to the attention of the person intended to be served" • Is what the process serviceor telling you enough to get you in court for sub-service or validation (2) has to be an element of evading service (3) if you can get the court to order service effective on a certain date, you have good service, you're good to go. (4)(b) - if in Family Law have regard to Hague Convention
226911 Alberta Ltd. v. Redecopp 2012 ABQB 776 **FACTS** • The plaintiffs sued Angela and Brian Redecopp as a result of the plaintiffs' purchase of the Redecopps' business. The sale occurred in March, 2006 and the claim was filed on March 5, 2008. • Counsel for the plaintiffs and Ms. Redecopp, who was a lawyer, had discussions to try to resolve the issues between the parties. • On May 26, 2008 Ms. Redecopp and the plaintiffs' counsel discussed a settlement meeting scheduled for the next day. Mr. Freeman, counsel for the plaintiffs, had a copy of the statement of claim emailed to Ms. Redecopp. Before opening the document containing the claim, Ms. Redecopp sent an e-mail to Mr. Freeman, stating: *"Please confirm that [the statement of claim] is being provided for my records only and in anticipation of my "without prejudice" meeting with Mr. Freeman tomorrow and does not in any way constitute service of the claim."* • Mr. Freeman's office sent an e-mail back stating that Mr. Freeman "confirms this is correct". Ms. Redecopp states that as a result, she did not believe that the plaintiffs were "engaging her legal rights" nor that there was any need to	Court found the second criteria was met - it was brought to her attention, the first requirement is in issue

respond to the claim. She states that she would not have openly participated in the settlement discussions the next day had it been otherwise as she would have felt the need for legal counsel. That discussion did not resolve the dispute.

- On September 16, 2008 a letter was sent by Mr. Freeman to Ms. Redecopp stating that if he did not receive a reply to prior correspondence **"[they] will have to formally serve the statement of claim and pursue litigation". Ultimately the matter was not settled.**
- The statement of claim was never served on Ms. Redecopp. Furthermore, there is no evidence that it was ever served on Mr. Redecopp or that he was even aware of it, prior to its expiration in March, 2009. Ms. Redecopp was of the view that the statement of claim had expired and the plaintiffs did not intend to pursue their action. No statement defence was filed by Ms. Redecopp. She says that as a result she did not take any specific steps to preserve her records.
- **On May 19, 2011, over two years after the expiration of the statement of claim, this application was filed asking that this Court validate service of the statement of claim pursuant to rule 11.27 which provides for validation where <u>"the method of service used brought or was likely to have brought" the document to the intended recipient's attention.</u>**
- There is no helpful case law on this specific rule. It received a brief comment in ***Metcalfe v. Yamaha Motor Powered Products Co.***, 2012 ABCA 240 at para. 45 where the Court noted:
    - **Rule 11.27 permits validation of service when the manner was not specified in the *Rules*. As provided in the rule, the test of validation is whether the service used "brought or was likely to have brought the document to the attention of the person to be served".**
    - This rule has two requirements.
        - First there must be a method of service and
        - second, it must have brought or been likely to bring the claim to the attention of the person to be served. The second criteria was met in this case. Ms. Redecopp does not deny that the claim

was brought to her attention. It is the first requirement that is in issue.	
The application to validate service is denied • In this case counsel for the plaintiff confirmed, quite clearly, that the statement of claim was being provided on an information basis and did "not in any way constitute service of the claim" [emphasis added]. The context indicates that when the claim was forwarded it was without any intention to affect legal rights. Nothing indicates otherwise. In fact, subsequently, it was acknowledged that formal service would be undertaken. • **(important point) There was no method of service undertaken as required by the Rule. As a result, there was no service to validate. While my determination is based on the case law, it is also in line with my view that the word of a lawyer is to be seen as his or her bond.** • Counsel for the plaintiff acknowledged that the provision of the statement of claim did not "in any way" constitute service of the claim. He is no longer the counsel of record, however, that statement made by him was and continues to be binding upon his client. It is, in my view, entirely inappropriate for counsel, having made such a statement, to then seek to find that service has been effected by the informal provision of the claim. He is, in my view, going back on his assurance, which assurance was relied upon by Ms. Redecopp, a lawyer in her own right.	communication from one lawyer to another lawyer who happened to be a litigant in a lawsuit (final bullet) **prime example** where the lawyer, in this case the court calling out the lawyer for inappropriate conduct, may be subject matter of complaint against Freeman in this case. (PR matter). Could serve as ground for complaint to law society for conduct unbecoming a solicitor - for Freeman to have communicated in the fashion that he did to Redecopp. **Be careful when dealing with counsel that if your word is your bond, adhere to that bond and ensure you are clearly communicating with counsel and not assuming things, your confirming things in writing, no room for ambiguity when comes to instructions from client, shouldn't be implied, should be clarity in communication with counsel.**
Thompson v Procrane Inc 2016 ABCA 71 SLATTER JA:— ••• The applicant also notes that R. 11.4 requires that commencement documents be personally served. Rule 11.5 contemplates that service will be effected by leaving the document with the individual, or sending it by recorded mail. **Service by email is not specifically contemplated for commencement documents (consistent with Cote). On the other hand, R. 11.27 enables the Court to validate service done "in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served".**	If your wondering, can I serve lawsuit by recorded mail, yes under Rule 11.5.

Service is essentially 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. The principle was stated in *Concrete Equities Inc., Re*, 2012 ABCA 266, 542 A.R. 12 (Alta. C.A.): **19 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. While civil procedure recognizes certain forms of service, unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective. For example, assume that personal service is required, but when the process server arrives the defendant is not there. His wife agrees, however, to provide the documents to her husband when he returns. The next day the husband sends an e-mail, the contents of which make it clear that his wife did follow through, and that he is aware that he has been sued and served. This is effective service, even though it is unconventional.** In this case, service of the Procrane Originating Application by email was an "**unconventional form of service that actually brought the legal process to the attention of the person being served".** The use of an unconventional method does not mean that the service is automatically ineffective.	**Note**: When in practice if determining whether you can go in for order for validation of service, if seems method of service was unconventional, look at this case. Has persuasive value despite being single judge CoA decision. **Note**: if you put delivery and read receipt on email and acknowledge of both, your good to go (can rely on this case to argue unconventional service doesn't mean ineffective)
3. Dispensing with Service - Rule 11.29 11.29**(1)** On application, the Court may make an order dispensing with service, inside or outside Alberta**, if service of a document by a method prescribed by these rules is impractical or impossible.** **(2)** The application must be **supported by an affidavit** (a) **setting out that all reasonable efforts to serve the document have been exhausted or are impractical or impossible,** (b) **stating why there is no or little likelihood that the issue will be disputed, and** (c) **stating that no other method of serving the document is or appears to be available.**	**Dispensing: So impractical or impossible to serve, just do away with requirement of service.**

4. Setting Aside Service - See Rule 11.31. 11.31**(1) A defendant may apply to the Court to set aside** **(a) service of a commencement document,** **(b) an order for substitutional service of a commencement document, or** **(c) an order dispensing with service of a commencement document,** **only before the defendant files a statement of defence or a demand for notice.** **(2)** An application under this rule is not an acknowledgment by the defendant that the Court has jurisdiction with respect to a claim, counterclaim or third party claim in respect of which the application is filed. **(3) If the Court is satisfied that** **(a) the addressee did not receive a document, other than a commencement document, sent by recorded mail within 7 days after the date on which the recorded mail was sent,** **(b) the failure of the addressee to receive the document is not attributable to the addressee's own efforts to avoid receiving the document, and** **(c) the addressee would be prejudiced by the application of rule 11.22(2),** the Court may make any order that the Court considers appropriate in respect of any matter relating to the document, including setting aside service.	affidavit has to say no or little likelihood issue will be disputed and no other method of serving appears to be available **under (3) court has to be satisfied with the 3 listed things.**

Chapter 12 Renewal of Statement of claim	
Subdivision 2 Time Limit for Service of Statement of Claim Rule 3.26 **Time for service of statement of claim** 3.26**(1) A statement of claim must be served on the defendant within one year after the date that the statement of claim is filed unless the Court, on application filed before the one-year time limit expires, grants an extension of time for service.** **(2)** The extension of time for service under this rule **must not exceed 3 months.** **(3)** Rule 13.5 does not apply to this rule or to an extension of time ordered under this rule.	Renewal falls within filing date and 1 year limitation **This rule permits you to apply to the court to renew your statement of claim for a period of 3 months but you have to ensure you give yourself sufficient time.** Rule 3.26 is time limit for statement of claim Note: know subsection 2
Rule 3.27 - Extension of time for service 3.27**(1)** The Court may, at any time, grant an extension of time for service of a statement of claim in any of the following circumstances: **(a) if a defendant, anyone purporting to be a defendant, or a lawyer or other person purporting to negotiate on behalf of a defendant, has caused the plaintiff or the plaintiff's lawyer to reasonably believe and to rely on the belief that** **(i) the defendant has been served,** **(ii) liability is not or will not be contested, or** **(iii) a time limit or any time period relating to the action will not be relied on or will be waived;** **(b) if an order for substitutional service, an order dispensing with service or an order validating service is set aside;** **(c) special or extraordinary circumstances exist resulting solely from the defendant's conduct or from the conduct of a person who is not a party to the action.** **(2) If an extension of time is granted under subrule (1), no further extension of time may be granted under this rule** and rule 13.5 does not apply unless different or new circumstances described in subrule (1) are established to the Court's satisfaction.	Circumstances when court can grant extension for time of service. You only get the 1 time extension

Rule 3.28 **Effect of not serving statement of claim in time** 3.28 If a statement of claim is not served on a defendant within the time or extended time for service, **(a) no further proceeding may be taken in the action against a defendant who was not served in time, and** **(b) a statement of claim served on any defendant in time is unaffected by the failure to serve any other defendant in time.**	Too bad if you miss time for service You have been negligent professionally because you didn't protect client's service deadline. Triggers obligation to report matter to Law Society. • You personally don't pay, but will see a surcharge on your premium for liability insurance. (b) is interesting, because if you have served ,multiple D's but not all that doesnt impede your claim to continue suit against those remaining defendants who were served on time
Rule 3.29 **Notice of extension of time for service** 3.29 If a statement of claim is served within an extension of time for service permitted by the Court under rule 3.26 or rule 3.27, **when it is served the statement of claim must be accompanied with** **(a) a copy of the order granting the extension, or** **(b) written notice of the order.**	usually copy of order attached
Stremich v Pefanis, 2017 ABCA 383 **BACKGROUND FACTS:** • The appellants, Constantine J. Pefanis and his law firm Pefanis Horvath, appealed from a decision of a chambers judge allowing an appeal from a Master's decision. • The Master dismissed a statement of claim filed by self-represented respondent, Patricia Stremich, under rule 3.28 of the *Alberta Rules of Court*, Alta Reg124/2010 because she had failed to serve it within the required one year period under rule 3.26. • The chambers judge granted an extension of time for service under rule 3.27(1)(c). • **The result was that service was considered sufficient even though it had not been effected until three days following the expiry of the one year period.** The Majority (Fraser CJA and Bielby JA): [12] We have concluded that the decision of the chambers judge was reasonable and a valid exercise of his discretion. **We begin with this. A process server, although hired by a plaintiff, can be "a person who is not a party to the action" within the scope of rule 3.27(c):** Sanderson Estate v Potter, 2012 ABQB 593 (CanLII) at para 44, 550 AR 33. **While there is nothing on this record expressly establishing that Reinhold is a process server, the fact that**	applying for extending time for service case Result from Master was considering service sufficient even though late Highlighted important things for us to consider

Stremich retained him to effect service in that role has not been disputed. More important, it was open to the chambers judge on this record to infer that Reinhold was a process server. That is precisely what the chambers judge did, expressly characterizing Reinhold as a "process server": see paragraphs 4 and 20 of the decision under appeal, Appeal Record at F74, F76**. There is nothing palpably unreasonable in this conclusion.**	Concluding he was process server - they dont reverse
[14] That takes us to the appellants' submission that the chambers judge failed to take into account Stremich's failure to attempt alternate methods of service or to obtain an order extending time for service on either April 2 or 7, 2015. **While the chambers judge did not address this argument in his reasons for decision, it is implicit in them that he inferentially accepted that Stremich's serious physical disabilities, readily apparent when she appeared in chambers, precluded her from a practical perspective from taking effective steps to gain an extension of time in the very short period available for that purpose. She would have had only either one or, at best, two days (April 2 or 7, 2015) to secure an order extending the time for service before the one year period expired.**	What does court do with analysis? Go on to say that Chamber's judge inferentally accepted that….. (in the bullet below)
[15] Moreover, the chambers judge also inferentially accepted that the practical problems that Stremich faced in taking alternate action on one of these two days flowed directly from the special or extraordinary circumstances caused by Reinhold's failure to serve the firm on April 1, 2015.(**important)** Serving the firm may well have brought Pefanis into the action since he would arguably be liable as a partner in the firm as well as personally. **In other words, although Stremich conceded in oral argument that she knew of the failure to serve before April 7, 2015, the very brief time left available to her to act was sufficiently connected to, and flowed from, Reinhold's mistake.**	
[16] While it is true that it would have been prudent for Stremich to have taken steps to effect service earlier than she did, that reality does not preclude the granting of extensions in and of itself. **Extensions are necessary, by definition, only where the plaintiff has missed the time to serve. Many, if not most, of these situations could have been avoided if service had been attempted earlier than it was.** The issue remains whether special or extraordinary circumstances exist within the provisions of rule 3.27 that support the granting of an extension. That determination is an individualized fact driven exercise in every case.	Holding in para 16 onwards **(general statement to practicing bar and self reps - dont wait till you get close to 1 year to serve to be asking court for extensions- attempts should be made months in advance ideally.)**

[17] In the circumstances of this case, it was reasonable for the chambers judge to consider that Reinhold's mistake was the sole cause of the failure to serve on time. That mistake set Stremich up for the failure of timely service.

[18] The evidence of efforts at timely service, the fact that timely service on Pefanis personally may well have been unsuccessful if alternate process servers or recorded mail had been attempted before April 7, 2015, and the admitted absence of any prejudice to the appellants are sufficient to address legitimate policy concerns about the need to avoid encouraging procrastination by plaintiffs. **Suffice to say that what occurred here will be rare since a process server will typically put a plaintiff on notice of the failure to effect service on a timely basis, in which event, the plaintiff will be obliged to forthwith take the steps necessary to extend the time for service *before* the one year period expires.**

[19] For these reasons, we decline to interfere with the chambers judge's decision and dismiss the appeal.

Chapter 13 Particulars	
Rule 3.61 - Request for particulars 3.61**(1)** A party on whom a pleading is served may serve on the party who served the pleading a request for particulars about anything in the pleading. **(2) If the requesting party does not receive a sufficient response within 10 days after the date on which the request is served, the requesting party may apply to the Court for an order requiring the party who served the pleading to provide the particulars.** **(3)** If the Court orders particulars to be provided, **it must specify a time within which the order is to be complied with.** **(4)** Subject to any order, despite a request for particulars, the obligation under these rules to file and serve pleadings continues even though a request for particulars has been made and whether or not it has been complied with	Typically defendant asks plaintiff to provide particulars of the claim **Exam: no the ten day limitation**
Alberta v Altria Group Inc, 2015 ABQB 390 Strekaf J (as she then was): The purpose of particulars has been discussed in numerous decisions. **Any request for particulars should be considered in light of 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** **A request for particulars is not akin to an examination for discovery. Particulars function to limit the generality of allegations and to define the issues to be tried, whereas examinations for discovery are to learn the knowledge of the adverse party**: *Misericordia Hosp v Acres Consulting Services Ltd* (1977), 5 AR 254 at 255 (ABSC- TD) (*Misericordia*).	defendant entitled to know the case to meet (trite law) old wording used to be a demand for particulars under old rules now it's a request Where there are bare pleadings - defendant is doing bare denial of all allegations in SoC or SoC is so bare in detail that it alleges cause of action and thats about it - prime territory for defendant to make request for particulars to plaintiff. defining issues to be tried - first class, parties should be encouraged to try to identify issues in dispute as early as possible in law suit and to try to achieve expeditious and timely resolution between the parties. Goes to Rule 1.2 – trying to truncate
The General Legal Test While not mandatory, **an application for particulars should as a general rule be accompanied by an affidavit disclosing the applicant's need for particulars**. No substantive affidavits were filed	Key in common law is when we interpret rule for request for particulars, look to pleading, if defective on its face, will trigger request for particulars and if you have an affidavit you have to show they are vague and need particulars.

on behalf of any of the Defendants in this case. Therefore, **to show that particulars are required, absent an affidavit stating as such, the Defendants must show that the pleading is defective on its face and that "the allegations are so general and so vague that the need for particulars is evident":** *Oceatain Investments Ltd v Canadian Commercial Bank* (1983), 51 AR 364 (ABQB) at para 8 (*Oceatain*).

The Court has discretion in determining whether the allegations are so vague as to necessitate an order for particulars. As noted by Justice McMahon in *Re Indian Residential Schools*, 1999 ABQB 823 at para 15:

> **An order for particulars is discretionary. There are no precise rules as to the degree of particularity required in any given case. Generally, what is reasonable and fair will dictate whether, and to what degree, further particulars will be ordered.**

Pleadings must be succinct but must still disclose sufficient material facts for the defendant to understand what case it must meet. The amount of detail necessary varies with the nature of each case: William Blake Odgers, *Principles of Pleadings and Practice in Civil Actions,* 21st ed (London: Stevens & Sons, 1975) at 103. If a specific fact is not set out, but can be properly inferred from other statements in the pleading, that is sufficient for the purposes of a statement of claim: see *O'Neill v Rosetown (Town),* [1941] 2 WWR 481(SKCA).

Pleadings require facts, but should not contain evidence (trite law). The line between these is often difficult to draw: see *Can-Air Services Ltd v British Aviation Insurance Co* (1988), 63 Alta LR (2d) 61 (CA). Material facts are facts upon which the party pleading relies for its claim, whereas evidence consists of the manner by which those facts are to be proved: *Misericordia*. **The distinction between the two is often a question of degree. Expert report or opinion is evidence, not material fact, and therefore need not be particularized**: *Hoy v Medtronic*, 2004 BCSC 440 at para 39. **Finally, requests for particulars that are in the nature of a question of law or of mixed fact and law need not be answered**: see *Commonwealth Credit Union Ltd v Waylan Mechanical Ltd*, 2008 ABQB 96

> A plaintiff is required to sufficiently particularize its claim so as to permit the defendants to identify their defenses for the purpose of filing a statement of dense. However, the demands for particulars should not be permitted to turn

Exam: how does the request for particular actually operate under the rules
Limitation is quite tight for responding to particulars.

Pleadings dont include evidence especially is commencement documents . Line between is often difficult to draw.

Particulars should not be done for delay
"litigation by installment"

into a delaying tactic or a substitute for what can be obtained through a notice tto produce records or the questioning process. Otherwise, litigation will be stonewalled at an early stage through excessive particularization	
Particulars in Complex Cases **To strike a balance between these competing considerations in large and complex litigation, case management judges "must have some elbow room" in order to "keep the suit moving" and prevent it from being "[bogged] down in interlocutory matters**": *Korte v Deloitte, Haskins & Sells* (1995), 36 Alta LR (3d) 56 (CA) at para 3. The Court of Appeal in *Lameman* noted that in complex cases that are case managed, litigation management orders can be more effective than particulars in providing an efficient structure to determine a claim: para 32	Reasonable and fair depends on the case - realistic and pragmatic approach should be adopted at pleadings stage to prevent undue delay. **interlocutory matter** is a matter dealt with on the way to trial (classic example: security for costs)
1021018 Alberta Ltd v Bazinet, 2015 ABQB 151 Schutz J (as she then was): It is worth reiterating exactly what the Court of Appeal says in *Stoney*, about particulars, generally, at para 5: **In any event, the fact that a defendant knows the facts is not a legal objection to the plaintiff's giving particulars**. That is because particulars are pleadings and claims, not discovery or evidence. For example, the defendant driver in a highway collision suit was present at the collision and saw it all, but he is still entitled to particulars of the plaintiff's plea of negligence. **The defendant may know what he actually did, but he does not know what the plaintiff thinks that the defendant did. It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent.** **He is entitled to know the particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make against him, which may be something very different from the true facts of the case.** -- Goulding, Simon, *Odgers on Civil Court Actions*, p. 215, 24th ed. (London: Sweet & Maxwell, 1996) **And if a statement of claim covers a large topic or more than one specified transaction, the defendant does not know which of the**	introduces idea of natural/procedural justice

many things which he has done is in issue. Nor whether the complaint is something which someone else did, or no one did. The question is one of natural justice: notice of the claim which the defendant has to meet.	
"Includes but not limited to" **As for the phrase "includes but not limited to**", Wachowich J expresses concern about this qualifier in *Canadian Commercial Bank*, and notes that **<u>questioning is not a substitute for particulars</u>**. In that case, however, Wachowich J did not order further particulars because he was satisfied that **"...all Defendants are at present in possession of sufficient particulars to enable them to plead and to get started on with what is certain to be an extremely lengthy discovery process**": *Canadian Commercial Bank* at para 33.	**REMEMBER: Questioning is not a substitute for particulars.** Still tend to see regularly in pleadings "includes but not limited to X,V,Z and last item is usually as such particulars as to ___ that may be proven at trial".
1021018 Alberta Ltd v Bazinet, 2015 ABQB 151 **The Plaintiff must give the Defendant particulars of what the Plaintiff knows. Mr. Bazinet is not obliged to speculate, or guess, about what the Plaintiff knows.** Accordingly, the Plaintiff shall remove references to what the Defendant "knows" and replace those references with such further or other particulars upon which the Plaintiff intends to rely in its case against Mr. Bazinet. Further, the phrase "including but not limited to" shall not form part of the Plaintiff's pleadings. **<u>I agree that in the face of an allegation "including but not limited to", questioning cannot and shall not be a substitute for particulars</u>**, <u>and I am not able to find that Mr. Bazinet is at present in possession of sufficient particulars to enable him to sufficiently plead his defence or prepare evidence for questioning, or trial.</u> **Relevance is determined by the pleadings. The Plaintiff's intention to rely on allegations that the Defendant "knows", or that some allegations are "including but not limited to" other, unstated, unknown allegations, is not fair to the Defendant.** The boundaries of the Plaintiff's pleadings must be drawn with sufficient particularity by the Plaintiff that the Defendant is not left to speculate, or guess, about that to which the Plaintiff refers, or about the case the Defendant must meet.	underlined section is principle of natural justice, case to meet.

Chapter 14 Procedure on Default	Dealing with after service of claim on defendant, they dont do anything. Under rules, the require to file/serve statement of defence within 20 days, if they dont, you can **note the defendant in default.** Different to default judgment. Precipe to note in default is what we used to file. **Noting in default (clerk makes notation in court file they are noted in default for not filing notice of defence and then you are at liberty to proceed to apply for default judgment)**. Then because of this you can get an order for default judgment **For exam**: know different between noting in default and default judgment.
Chapter 14 – Procedure on Default **A. Time for Defending** Subdivision 3 Defence to Statement of Claim, Reply to Defence and Demand for Notice Defendant's options **3.30 A defendant who is served with a statement of claim may do one or more of the following:** **(a) apply to the Court to set aside service in accordance with rule 11.31;** **(b) apply to the Court for an order under rule 3.68;** **(c) file and serve a statement of defence or demand for notice.**	**3.30 is defendant's options when they've been served** **3.68 is application rule for application to strike** (striking rule - claim is so meritless it is hopeless for plaintiff to prove allegations in the statement of claim that you are applying to court to strike the SoC on the face of the pleading). **On a striking application, no affidavit evidence is permitted (know this for final). Full and finally determined on face of pleading that is all.**
A. Time for Defending - Rules 3.30, 3.31 and 3.34 **Statement of defence** **3.31(1) If a defendant files a statement of defence, the statement of defence must** **(a) be in Form 11, and** **(b) comply with the rules about pleadings in Part 13, Division 3.** **(2)** The defendant must file the statement of defence and serve it on the plaintiff within the applicable time after service of the statement of claim. **(3) The applicable time is** **(a) 20 days if service is effected in Alberta,** **(b) one month if service is effected outside Alberta but in Canada, and** **(c) 2 months if service is effected outside Canada.**	Form 11 - precedent for statement of defence. **Exams:** On past finals, has given us a blank pleading and have to identify errors in the pleading So look at sample pleadings. Last year he put on the actual pleading identifying by number where there is potential error and you have to identify what the error is. Could also give us the pleading and we have to identify 3 or 4 errors (could be error in drafting, or errors in formatting). Went through formatting rules earlier in course so have regard to that. Chances on final are high. Scenario where we get sample SoC and plaintiff is pleading evidence instead of facts. What part of pleading if clearly evidence and not facts - on the final. Form 11 set up is similar to SoC.

Rule 3.34 – Demand for notice by defendant **3.34(1)** If the defendant files a demand for notice, the demand must be in Form 13. **(2)** The defendant must file the demand for notice and serve it on the plaintiff within the applicable time after service of the statement of claim on the defendant. **(3) The applicable time is** **(a) 20 days if service is effected in Alberta,** **(b) one month if service is effected outside Alberta but in Canada, and** **(c) 2 months if service is effected outside Canada**. **(4)** If the defendant files a demand for notice and serves it on the plaintiff, **the defendant must be served with notice of any application or proceeding in which the defendant is named as respondent**, but filing and service of the notice does not give the defendant a right to contest liability. **(5)** If a defendant files a demand for notice and serves it on the plaintiff, the defendant may subsequently file a statement of defence only with the Court's permission. **(6) Judgment or an order may be given against a defendant who has filed and served a demand for notice only if** **(a) the plaintiff applies to the Court for judgment or an order, and** **(b) notice of the application is served on the defendant.**	Just know the rule, demand for notice form **not going to be tested on exam**. Form 13. (4) not challenging that your at fault but want to be informed of subsequent pleadings that are going to take place not automatic that you can file SoD after filing demand for notice- Have to seek leave. Cant go in ex parte basis – without notice
B. Default Judgment Part 3, Division 3, Subdivision 4 **Failure to Defend** **Judgment in default of defence and noting in default** **3.36(1) Subject to subrule (2), if a defendant does not file a statement of defence or demand for notice, or if the defendant's statement of defence is struck out, the plaintiff may, on filing an affidavit of service of the statement of claim,** **(a) enter judgment against the defendant under rule 3.38 or 3.39, or** **(b) require the court clerk to enter in the court file of the action, in Form 14, a note to the effect that the**	(b) Form used to be precipe to note in default but use it now for same purpose

defendant has not filed a statement of defence or demand for notice and consequently is noted in default. (2) A judgment in default of filing a statement of defence must not, without the Court's permission, be entered against a person who is represented by a litigation representative. (3) If the defendant has filed but has not served a statement of defence or demand for notice, the plaintiff may apply to the Court for a costs award against the defendant for anything arising from the defendant's failure.	(2) and (3) are subrules that deal with (1)(a) and (1)(b) Rule 3.38 – 3.39 = judgment for property or debt
Rule 3.37 – Application for judgment against defendant noted in default 3.37**(1) The plaintiff may, without notice to any other party, on proof of the plaintiff's claim, apply to the Court for judgment in respect of a claim for which default judgment has not been entered if** **(a) one or more defendants are noted in default, or** **(b) the defendant's statement of defence is struck out.** **(2) In the circumstances described in subrule (1) the plaintiff is entitled to a costs award.** **(3)** The Court may do one or more of the following: **(a) pronounce judgment;** **(b) make any necessary order;** **(c) direct a determination of damages;** **(d) adjourn the application and order additional evidence to be provided;** **(e) dismiss the claim or a part of it;** **(f) direct that the claim proceed to trial and that notice be served on every other defendant;** **(g) make a costs award in favour of the plaintiff.**	
Rule 3.38 – Judgment for recovery of property 3.38 Subject to rule 3.41, if a statement of claim includes a claim for the recovery of property and one or more defendants do not file a statement of defence or demand for notice, the plaintiff may enter judgment against that defendant or those defendants for the recovery of that property, and the plaintiff is entitled to a costs award.	Asking for recovery of property, not money damages (give the thing that was taken) What is that called in property law? - specific performance/repleaven/detenue

Rule 3.39 - Judgment for debt or liquidated demand 3.39**(1) If a statement of claim includes a claim for a debt or a liquidated demand, with or without interest, whether as debt or damages, and one or more defendants do not file a statement of defence or demand for notice in response to that claim or any part of it, the plaintiff** **(a) may enter judgment for a sum not exceeding the amount in respect of which no defence is filed and the interest payable, if the interest calculation is based on a set rate, either under an agreement or an enactment, and** **(b) is entitled to a costs award.** **(2)** In this rule, "**LIQUIDATED DEMAND**" means (a) **a claim for a specific sum payable under an express or implied contract for the payment of money, including interest, not being in the nature of a penalty or unliquidated damages, where the amount of money claimed can be determined by** **(i) the terms of the contract,** **(ii) calculation only, or** **(iii) taking an account between the plaintiff and the defendant,** **or** (b) **a claim for a specific sum of money, whether or not in the nature of a penalty or damages, recoverable under an enactment that contains an express provision that the sum that is the subject of the claim may be recovered as a liquidated demand or as liquidated damages.**	ss (2) on the exam - MC question - know the definition of (2) for the final liquidated demand example - credit card contract
1. Liquidated Demand ***TLA Food Services Ltd v 1144707 Alberta Ltd*, 2011 ABQB 550** Shelley J: Moreover, the context of the Rules dealing with default judgment and noting in default further support this interpretation. **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	Court may still order assessment hearing to get to heart of how much does this cost (first form of judgment) second form - is knowable again - recovery of property wouldnt get to assessment hearing, readily known how much is owing and how much judgment is for.

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. **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.** This would be the case in a foreclosure action, where the plaintiff has a mortgage identifying its interest, or in a bailment action, where the plaintiff has an agreement describing the personal property sued for.	only if easily calculable will you get default judgment where no assessment is required "easily ascertainable" -
Noting in Default → Rule 3.36 ***Argent v Gray*****,** 2015 ABQB 292 **FACTS** ☐ The Defendant, Mr. McMillan, did not file a Statement of Defence and was noted in default. Dario J: ☐ In itself, however, that is not equivalent to judgment having been rendered against him. In *Agriculture Financial Services Corp v Zaborski*, 2013 ABCA 277, 556 AR 180 at para 21, the Court of Appeal held: ☐ T**he noting in default was not a judgment**. It was not an order for the payment of money. **Moreover, a noting in default cannot be enforced. It is the judgment which is capable of enforcement. Nor can a noting in default be renewed.** It might not even have led to a judgment or an order for the payment of money. ☐ **Rule 3.37 of the Alberta *Rules of Court* provides that when a defendant has been noted in default, the plaintiff may apply to the Court for judgment**. Rule 3.37(3) gives the Court various options: 3.37(3) The Court may do one or more of the following: **(a) pronounce judgment;** **(b) make any necessary order;** **(c) direct a determination of damages;** **(d) adjourn the application and order additional evidence to be provided;** **(e) dismiss the claim or a part of it;** **(f) direct that the claim proceed to trial and that notice be served on every other defendant;**	getting a noting in default is not akin to getting a judgment. Notice of default cannot be enforced or renewed. Have this below list identified because on final

(g) make a costs award in favour of the plaintiff ☐ Justice Dario observed that having been noted in default, Mr. McMillan could not avail himself of the limitations defence applicable to the other Defendants: see *Makowichuk v Makowichuk*, 2013 ABCA 439, 60 CPC (7th) 448 at para 9. ☐ BUT…Dario J went on to say this: ☐ **Nevertheless, given that Rule 3.37 allows a court to dismiss a plaintiff's claim notwithstanding a noting in default, I am satisfied that the Plaintiffs cannot succeed against Mr. McMillan <u>unless they prove their claim against him.</u>**	Judge exercised jurisdiction to state that she was not satisfied that plaintiff had successful claim against Mr. McMillan and saying you have to still prove it.
In *TLA Food Services Ltd v 1144707 Alberta Ltd*, 2011 ABQB 550, 525 AR 1 at para 24, Shelley J set out the **following principles as to when default judgment can be granted:** A summary of these principles follows: • **When a defendant is noted in default, it is deemed to have admitted the allegations in the Statement of Claim;** • **Before granting default judgment the Court must still inquire as to whether a cause of action is made out in the Statement of Claim, and may direct a hearing on the matter;** • **A defendant who has been noted in default cannot adduce evidence to contradict the facts alleged in the Statement of Claim in the course of a hearing for the assessment of damages** • **Quantum of damages may be assessed on affidavit evidence** • **R 152 of the previous rules gives the Chambers judge discretion as to whether to grant default judgment *ex parte* based on affidavit evidence or to require that notice be given and an assessment set down for hearing.** ☐ Dario J. cites Justice Shelley who referred in *TLA* to the earlier case of *Toerper v Hoard*, 2011 ABQB 85 in which Justice Strekaf made clear at para 3 that the allegations the defaulting defendant is deemed to have admitted are <u>allegations of fact</u> ☐ Dario J. further cites Justice Gates in *Pinsent v Sandstrom*, 2014 ABQB 269, wherein his Lordship cited the principles	Gets into summation of *TLA* decision - in this case, in Argent, Dario, J. Summarizes principles discussed. **Exam:** 5 principles below on MC/SA/TF question on final

enumerated by Justice Shelley in *TLA* and arrived at this conclusion at para 16: ☐ **Although the Defendant has been noted in default, this Court is nonetheless required to consider whether the Plaintiffs have made out defamation, as a cause of action pled in their Statement of Claim, before granting a default judgment.** ☐ Dario J. also cites Justice Watson (as he then was) in *Raywalt Construction Co v Bencic*, 2005 ABQB 989, 386 AR 230. ☐ At para. 390, Justice Watson considered the need to balance two conflicting factors: the importance of not "exempting [the defendant] from the consequences of his default" and the fact that "[the plaintiff] has not made a case against [the defendant] but for his deemed admissions, and the deemed admissions are not only not fully supportable against the present evidence but rendered somewhat improbable thereby." ☐ Justice Watson chose to balance these factors by finding the defendant liable, but only to the extent of one per cent of the plaintiff's damages.	He skipped Justice Waton section
Dario J: **By virtue of his default, Mr. McMillan is deemed to have admitted the facts set out in the Argents' Statement of Claim. The relevant facts in the Statement of Claim with respect to Mr. McMillan are:** (1) that Mr. McMillan was an employee of C-ARC; (2) that Taylor, while receiving treatment at CARC, obtained and consumed antifreeze; (3) that on the night of April 1, 2007, Taylor showed signs of impairment, including social withdrawal, forgetfulness, incoherent speech, difficulty walking and maintaining balance and, later, laboured breathing and excessive sweating; and (4) that, later on the night of April 1, 2007, Taylor fell asleep or entered a coma, lying on the floor of his room. **It remains for the court to determine whether the evidence before it establishes the Argents' claim on those facts. Therefore, notwithstanding my findings on the limitations argument, I must consider the evidence in respect of the Plaintiffs' negligence claims.**	Addressed what she did in respect to McMillan at “by virtue of his default” - facts deemed to be admitted in SoC (1-4). .

C. Setting Aside Default Judgment → Rule 9.15

Setting aside, varying and discharging judgments and orders

9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) 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.

(2) Unless the Court otherwise orders, the **application must be made within 20 days after the earlier of**

(**a) the service of the judgment or order on the applicant, and**

(**b**) **the date the judgment or order first came to the applicant's attention.**

(can be a factual issue of course - where default judgment is already served, then along time later, defendant then tries to open up default judgment and hires counsel.)

(3) The Court may, on any terms the Court considers just,

(a) permit a defence to be filed by a party who has been noted in default,

(b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or

(c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.

(4) The Court may set aside, vary or discharge an **interlocutory order**

(a) because information arose or was discovered after the order was made,

(b) with the agreement of every party, or

(c) on other grounds that the Court considers just.

"may" - not mandatory

Common law test for setting aside default judgment is 3 pronged.

heart of test is about fairness to defendant - Hite, J wrote that decision

just because default judgement has been served years out, dont tell client you wont get it set aside, you can still get it set aside, it might be a challenge but its possible.

- can try to argue it in court after 20 days but opponent is going to try to argue 20 day rule as being "sinker" for your case - not necessarily true.

Common law test is about fairness and is it in the interest of justice to allow applicant to set aside default judgment.

(3) - usually see (a)

***Yehya v Las Palmas Estate Homes Ltd*,** 2018 ABQB 374

Manderscheid J:

23 **The test for setting aside a default judgment was described in** *Palin v Duxbury*, 2010 ABQB 833 at para 21, 15 CPC (7th) 191 (CanLII). **It requires that the defendants *must* show that:**

Exam: important slide to know which sets out test for setting aside default judgment - have to know for exam

- test remained consistent over the years. - highlighted

(a) they have an arguable defence; and **(b) they did not deliberately let judgment go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and** **(c) after learning of the default judgment, they moved promptly to open it up.** 24 Other useful principles outlined in *Palin v Duxbury* at paras 22-24, 48 include: **(a) A defendant must do more than merely assert an arguable or triable defence. The simple assertion of a claim of a defence is insufficient, and does not relieve the Court from evaluating whether there is a triable defence.** **(b) If a defendant deliberately allows a default judgment to go against him, knowing the effect of failing to defend, he will not be allowed to set aside the default judgment.** **(c) Mere delay will not be a bar to the application unless an irreparable injury will be done to the Plaintiff, or the delay has been wilful.** **(d) To succeed in setting aside the default judgment, the Defendants must do more than meet one of the three elements of the test. They must satisfy them all.**	fact based test especially prong 2 - **all 3 prongs have to be met or else court can dismiss application for failing to meet requirements**. other points to know - *Palin* case principles (a) - (d) (a) provide some type of arguable defence, some type of particularly when making defence and allegation of defense

Chapter 15: Pleadings Subsequent to Statement of Claim	
Defendant's Procedure **See Rules Part 3, Division 3, Subdivision 3.**	Talked about Beaver (2021 ABQB 134) – test for civil contempt comments made by Rooke about appropriate sanction at paras 125 – Paddock decision sets out what can be taken into account when determining punishment for contempt. (1) proportionality of sentence to the wrongdoing (2) presence of aggravating/mitigating factors (3) deterrence (4) reasonableness of a fire and appropriateness of incarceration. Rooke found that a fine wouldn't have addressed issue of misconduct adequately.
1. Demand for Notice - Rule 3.34 **Demand for notice by defendant** 3.34(1) If the defendant files a demand for notice, the demand must be in Form 13. (2) The defendant must file the demand for notice and serve it on the plaintiff within the applicable time after service of the statement of claim on the defendant. (3) The applicable time is (a) 20 days if service is effected in Alberta, (b) one month if service is effected outside Alberta but in Canada, and (c) 2 months if service is effected outside Canada. (4) If the defendant files a demand for notice and serves it on the plaintiff, the defendant must be served with notice of any application or proceeding in which the defendant is named as respondent, but filing and service of the notice does not give the defendant a right to contest liability. (5) If a defendant files a demand for notice and serves it on the plaintiff, the defendant may subsequently file a statement of defence only with the Court's permission. (6) Judgment or an order may be given against a defendant who has filed and served a demand for notice only if (a) the plaintiff applies to the Court for judgment or an order, and (b) notice of the application is served on the defendant.	#3 is in respect of the claim Note the various time limits in #3 (5) defendant can only subsequently file statement of defence after filed and served notice of demand with the courts permission
Form 13 – Demand for Notice **See Sample Form 13 in Sample Pleadings**	Last class looked at demand for notice by defendant. Our sample pleadings don't have Form 13 but he has posted to TWEN the AB court website for what it looks like. Bottom of Weblinks tab – Civil Forms ABQB. On court website, go down to form 13. • When the demand for notice is filled out, there is no issue as to liability.

Bell v Grande Mountain Apartments
(1984) 50 AR 372 (QB)
McFadyen J:
The filing of a demand of notice has been held to result in a partially defended action
Master Hyndman extensively reviewed the authorities relating to the effect of the filing of a demand of notice in *Chiste* v. *Northern Elec. Co*. (1978), 7 Alta. L.R. (2d) 183 at 187-88, 8 C.P.C. 180, 14 A.R. 559 (T.D.). He summarized these authorities as follows:

In *Stone* v. *Vulcan Mun. Hospital Dist*., [1930] 1 W.W.R. 839, [1930] 3 D.L.R. 210 (Alta.), Walsh J. said at p. 843 that **the practice of delivering a demand of notice was peculiar to this jurisdiction and that there is no authority under it except in the judgments of the courts of Alberta. He said that the 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. Walsh J. at p. 842 classified an action in which a demand of notice had been filed as a "partially defended action" and in the case before him held that because a demand of notice had been filed the defendant's counsel should be permitted to cross-examine the plaintiff's witnesses, adduce evidence for the defendant on the question of damages and address the jury. (**similar to rules last class of what is permissible by the court when court goes after defendant with default judgment. Not just that once you have default judgment that the court issues judgment in plaintiff's favor – can do many things (strike parts of claim, assessment for damages, etc.) – defendant can still have role in action itself in the area of assessment for damages**)**

Under (the old) R. 146 the plaintiff is authorized to proceed against the defendant as if he had failed to defend except that the plaintiff must give notice to the defendant of subsequent motions and judgment may only be obtained on motion with notice to the defendant.

It is my view from the foregoing that an analogy can be drawn to an application under R. 153 to set aside a noting in default and to permit the filing of a defence.

The procedure applicable thereto can be applied to this application.

The demand of notice was filed on 29th November 1982 and the application for leave to withdraw it was filed on 23rd August 1983. It is evident that the defendant did not act promptly. The defendants must also show that they have a good defence on the merits. It would be entirely unproductive to permit the filing of a statement of defence in circumstances where a summary judgment application would be granted should a statement of defence be filed. Counsel for the defendants has anticipated this ruling and has filed an affidavit setting forth the two grounds on which it is proposed to defend this action. [The court found that the defendants did not have a good defence on the merits and accordingly dismissed the appeal.]	Separate and apart from demand for notice
Statements of Defence **See Rule 3.31 and Part 13, Division 3.** **See also Rule 4.01(2) of the *Code of Conduct*.**	
Rule 3.31 **Statement of defence** 3.31(1**) If a defendant files a statement of defence, the statement of defence must** **(a) be in Form 11, and** **(b) comply with the rules about pleadings in Part 13, Division 3.** (2) The defendant must file the statement of defence and **serve it on the plaintiff within the applicable time after service of the statement of claim.** (3) The applicable time is **(a) 20 days if service is effected in Alberta,** **(b) one month if service is effected outside Alberta but in Canada, and** **(c) 2 months if service is effected outside Canada.**	Important to ensure while you may be doing most of your work in defence work, you should be familiar with statements of claim (i.e. be familiar with both). **Reference to service is service of the statement of claim** • If statement of claim served/effected in Alberta, then you have 20 days to file and serve your defence. **Exam;** On the exam ss (3)
C(L) v Alberta 2011 ABQB 12 GRAESSER J:— •••	

Rule 1.2(3) contemplates that both substantive and procedural matters be addressed: the issues to be resolved presumably relate to the elements of the plaintiff's claims and the defendant's defences. I would suggest that the days when the defendant could file a defence in the old form, namely that "the Defendant denies all allegations in the Statement of Claim and puts the Plaintiff to the strict proof thereof", are over. **Defendants will be required to disclose their position and state their defences sooner rather than later. But defendants are still entitled to defend actions against them vigorously and to maintain any and all defences that are not unreasonable or frivolous and can withstand a summary judgment application. They are also entitled to insist that the plaintiff follow proper procedures and comply with the Rules of Court.** ••• *Plaintiff entitled to bring application and defendant ordered to provide responses as directed.*	Prolix delay – undue delay • Do not engage in • State defences sooner rather than later • Shouldn't take years for plaintiff to get defendant to state their position in response to statement of claim Not required to give everything to the plaintiff when they file their defence, they're entitled to the plaintiff following rules of court. **Defendant has to give some particulars, cannot issue bare denial of defences to statements of claim** – will attract scrutiny from the court
Barcellona v Einarson [2012] A.J. No. 82 MASTER W.S. SCHLOSSER: ••• Statement of Defence that has been filed but not served is not a completed step required by the Rules. Accordingly, it may not be immune from examination to see whether it has somehow moved the matter closer to trial in a meaningful way. The old and new Rules differ on what can happen if a defence is filed but not served. Under the old Rule 142, a Plaintiff had to prove service of the Statement of Claim and, if a defence was filed, no service (hence no delivery) of the Defence before default proceedings could be taken. Under the old Rules, filing a defence did not in and of itself act as a bar to default proceedings. **The new Rules are different. Under New Rules 3.36 and 3.39, filing a defence appears to act as a bar to either Noting in Default (Rule 3.36), or taking Default Judgment (Rule 3.39).** It may not be the formality of service that matters but the lack of communication of the defence to the other side. **The effect of an unserved defence under the new Rules is essentially negative. Rather than moving an action forward, it *prevents* the action from moving forward by acting as a bar to default proceedings, which would be a Plaintiff's next step if there was no response from the Defendant. Otherwise it doesn't do anything.**	Acts as a bar

B. Counterclaim **See Rule 3.32 and Rules Part 3, Division 3, Subdivision 7.**	He pulled up Statement of Defence in sample pleadings **Exam:** Sometimes he does a mix and match on the final, and confirm if there are errors in the sample pleading and correct the errors Organize pleadings by topic within the document. Be mindful of the fact that in the defence (sample) reference to set of and when you get to the counterclaim and the counterclaim is issued by the contractor, against the subcontractor, the basis is the set off claim and the defence that is used to ground counterclaim.
Set-Off *Holt v Telford*, [1987] 2 SCR 193 WILSON J (for the Court):— ••• Thus, as was stated by the British Columbia Court of Appeal in *C.I.B.C.* v. *Tuckerr Indust. Inc*., [1983] 5 W.W.R. 602, at p. 604, **STATUTORY SET-OFF (or set-off at law) "requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations."** ••• **EQUITABLE SET-OFF is available where there is a claim for a money sum whether liquidated or unliquidated**: see *Aboussafy* v. *Abacus Cities Ltd*., [1981] 4 W.W.R. 660 (Alta. C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. **First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.** ••• Thus, cases involving debts that arise from the same contract or closely interrelated contracts form an exception to the general rule. **In these cases a debt arising out of the contract or closely interrelated contracts may be set-off against the assignee even if the debt accrues due after the notice of the assignment.**	**Exam:** The bolded definition in MC on final. **(statutory set off)** Equitable set off – either liquidated or non-liquidated. **Exam:** Probably not testing on equitable set off, opposed to statutory set off (so statutory set off will be on exam)
Counterclaims Generally **See Alberta's *Limitations Act*, RSA 2000, c L-12, ss 6(2) and 6(4).**	s. 3 and s. 6 of Limitations Act will become well known by end of this course
Lil Dude Ranch Ltd v 1229122 Alberta Inc, 2014 ABQB 39 FACTS:	

The plaintiff-by-counterclaim (defendant) applies to amend the counterclaim to add a non-defendant as a plaintiff-by-counterclaim. As well, the plaintiff-by-counterclaim wants to amend the prayer for relief in the counterclaim to make alternative pleas regarding amounts already claimed as damages. The application was filed shortly after the first anniversary of the commencement of the claim, after questioning was done, subject to some undertakings to be answered and perhaps further questioning on those answers. The application was referred to a special application and several more months elapsed during which briefs were filed by both sides. The briefs focussed on the "classic rule" relating to amendments of pleadings, as enunciated by the Alberta Court of Appeal in *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98, [2003] A.J. No. 417, as well as other cases, in particular by Justice Poelman in *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51, [2011] A.J. No. 91. **Issues** The issues before the Court included: 1. Do the *Alberta Rules of Court* permit the addition of a non-party as a plaintiff by counterclaim, in light of, in particular, Foundational Rule 1.2, Rule 3.56(1), and Rule 3.74(2)(a)? 2. If so, should the new plaintiff by counterclaim be added in the facts of this case, following the guidelines set out in the "classic rule" relating to amending pleadings? 3.As the proposed amendments can be separated into two components, one being the addition of the new party and the second being what might be described as "housekeeping" amendments modifying the prayer for relief, should the "housekeeping" amendments be allowed in any event? ***Analysis re Adding a Non-party as Plaintiff-by-Counterclaim*** It is manifestly clear that the former Rule 93(1) and Rule 3.56(1) say that **only a defendant can advance a counterclaim**. Although the wording of the new rule is slightly different than the former rule, they both say that a defendant can advance a counterclaim, and in doing so the defendant can add other parties as defendants-by-counterclaim in addition to the plaintiff. **Neither the former rule nor the current rule admit of the possibility of adding a stranger to the proceedings as a plaintiff-by-counterclaim**.	Going to special application – tells us that it landed as half day application, special chambers application, or a full day application between either master or justice.

This is what Master Alberstat said clearly in *Bhatt v. Hoogstraat*, [1989] A.J. No. 927, 1989 CarswellAlta 421 at paragraph 4: **The rule is quite explicit. Only a defendant can file a counterclaim. There is no provision whatsoever for someone who is a stranger to the action, to file a counterclaim. The counterclaim therefore is, or was, a nullity.** If the oral "living arrangement" was made between the Plaintiff Lil Dude Ranch Ltd. and Ray Anderson and not between Lil Dude and 1229122 Alberta Inc., as Mr. Jenkers asserted in his testimony, then paragraph 8 of the defence to counterclaim delivered by Lil Dude is in error because it clearly states that the living arrangement agreement was between the two corporations. **This pleading was consistent with paragraph 5 of the counterclaim, although it does not use the expression "living arrangement" but describes the agreement to make improvements on lands referred to as the "Lil Dude Quarter" as being between part of a partnership agreement between the two corporations.** Accordingly, all parties pled that the agreement in question was between the corporations, but Mr. Renkers asserted that is was not - in spite of what his own counsel had pled. **The defendant (plaintiff-by-counterclaim) now worries that a trial judge might accept the evidence of Mr. Renkers - despite the way the case was pled by both sides - and dismiss that part of the counterclaim, because the wrong party has been named as plaintiff-by-counterclaim.** The defendant (plaintiff-by-counterclaim) here says that the existing *Rules*, in particular rule 1.2 quoted above, require a new interpretation that would allow the counterclaim advanced here by a non-party. **The curious circumstance, as I pointed out to counsel during oral argument, is that one might have expected the application to amend and add a party would have been by the plaintiffs. The evidence given at questioning was given by a plaintiff and the thrust of the particular passage in question suggests that his own pleading may have advanced a claim against the wrong party, or perhaps an alternative claim should be made against the new party. If the plaintiffs had applied to add a new defendant, there would be no bar in the *Rules*, and once that amendment were made the new party could apply to be added as a plaintiff-by-counterclaim.** I comment that there is strong appeal to the concept, as reflected in rule 1.2, of adding the new plaintiff-by-counterclaim to make sure	Strong claim on restriction on who can advance counterclaim- only defendant **Exam:** May be 1 or 2 questions about this topic of adding a non-defendant to a counterclaim what are the restrictions He just read all these points directly Do see this – the heart of this the court is saying is why wouldn't plaintiff have added that party as defendant in the first place? Evidence should've alerted the plaintiff that the party should have been added as defendant by application and then there would've been no bar.

that the correct parties are before the Court at trial. The submission is that rule 3.56(1) should be "interpreted" so as to allow the addition of a non-party as plaintiff-by-counterclaim. The difficulty is that I would not be "interpreting" it, but rather re-writing it, and I would be doing so in the face of 57 years of consistent case law that read the same words, albeit in earlier *Rules*, as saying that the words mean what they say in their plain and ordinary meaning: **a defendant can advance a counterclaim. No one else can (except a third party, as now expressly provided in rule 3.56(2)).** I do, however, note that rule 3.73, quoted above, may allow relief at trial to Anderson Co. and Ray Anderson if the "proper party" has not been named. I make no ruling on that at this stage and no one has asked me to; I simply draw the rule to the attention of counsel. **Accordingly, I conclude that adding Mr. Anderson as a plaintiff-by-counterclaim would be to allow a nullity, which I obviously cannot do.** ***Conclusion*** **The application to amend the counterclaim by adding Ray Anderson, and the consequential references to him throughout the text of the proposed pleading is dismissed**. **The remaining proposed amendments, being revisions to the prayer for relief in the proposed counterclaim, are allowed**. If there are issues arising from the re-drafting of the amended counterclaim so as to comply with this ruling, counsel may return before me for further argument and adjudication. If counsel are not able to agree on an award of costs then they may return before me for determination.	Affirms fact that defendant can only advance counterclaim Except a third party
Third Party Claim and Notice to Co-Defendant **See Rules Part 3, Division 3, Subdivision 5 and Subdivision 6.**	Third party claims are more complicated to understand
Basis of the Claim **See Alberta's *Contributory Negligence Act*, RSA 2002, c C-27, ss 2 and 6 and Alberta's *Tort-Feasors Act*, RSA 2000, cT-5, s 3.**	*Tortfeasors Act* **Application of Act** **2** Nothing in this Act (a) affects any proceedings against any person for a penalty or forfeiture under any Act of the Legislature in respect of any wrongful act, or (b) renders enforceable any agreement for indemnity that would not have been enforceable if this Act had not been passed. Idea is to seek indemnity from one defendant to another – defendant's are pointing fingers – if one defendant is liable, then coming after co-defendant for contribution and indemnity. In Court judgment, defendants usually found jointly and severely liable (percentage of fault)

Contributory Negligence Act, RSA 2002, c C-27, s 2 **Determination of degree of fault** **2**(1) When damage or loss has been caused by the fault of 2 or more persons, **the court shall determine the degree in which each person was at fault**. (2) When 2 or more persons are found at fault, **they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.** **Adding party defendant** 6 When it appears that a person **not already party to an action is or may be wholly or partly responsible for the damages claimed, that person <u>may be</u> added as a party defendant on such terms as are considered just.**	Specific wording dealing with fault of two or more persons Can happen for example where there is a MVA and the defendant passenger who is hurt in the one vehicle, sues the driver of the other vehicle, but they don't realize you don't sue the other driver in some cases, just that driver, in some cases you can sue the insurer involved. If not well advised by counsel, they will get the insurance for the other side, and if they are self rep'd, claim issued against driver of other vehicle, but in reality they are being represented through their insurance, so often, insurance company can be added as party defendant.
Tort-Feasors Act, RSA 2000, cT-5, s 3. **Damage suffered as result of tort** 3(1) When damage is suffered by any person as a result of a tort, whether a crime or not, (a) a judgment recovered against any tort-feasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage, (b) if more than one action is brought in respect of that damage (i) by or on behalf of the person by whom it was suffered, or (ii) for the benefit of the estate, or of the spouse or adult interdependent partner, parent or child of that person, against tort-feasors liable in respect of the damage, whether as joint tort-feasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions, other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action, and	When notice of co-defendant is issued, your not just seeking contribution from other defendant, your seeking indemnity (they will pay for your costs if you get sued again) – ss (c) is relating to such a pleading Good idea to seriously consider if your in a co-defendant situation to consider if you will get instructions to simultaneously issue statement of defense with notice of co-defendant

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by the person first mentioned in respect of the liability regarding which the contribution is sought. (2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be an amount that the court finds to be just and equitable having regard to the extent of that person's responsibility for the damage. (3) The court has power (a) to exempt any person from liability to make contribution, or (b) to direct that the contribution to be recovered from any person shall amount to a complete indemnity.	Also goes to litigation on notice of co-defendant. Brought up sample pleadings for notice of counterclaim - form 21 With a counterclaim, separate claim filed against defendant by counterclaim (only defendant can advance). The original defendant becomes plaintiff-by-counterclaim. In the sample, the relief section (p. 15 of sample pleadings) they want judgment against subcontract and sub-subcontractor jointly and severally, etc. etc. Form for notice of claim against co-defendant is form 15. Who issues this? The defendant claims contribution or indemnity or both under *Tortfeasors Act* or *Contributory Negligence Act*.
Canadian Natural Resources Ltd. v Arcelormittal Tubular Products Roman SA 2012 ABQB 679, varied (2013) ABCA 279, application for leave to appeal dismissed [2013] SCCA No 403 **C. Summary** Third Party Claims for contribution under the common law A claim for contribution under the common law arises when a third party breaches a duty in contract, a common law duty of care or a statutory obligation owed by the third party to the defendant: *Leoppky* at para 30. Because it is a claim for contribution, it stands or falls based on the outcome of the plaintiff's claim against the defendant. This does not mean that it is derived from the plaintiff's claim against the third party. It does not depend upon the plaintiff having a claim against the third party. A common law claim for contribution is a free-	Cote: "*usually the main claim and counterclaim are tried together, often each of the contending parties will get some relief 'the plaintiff from their claim and defendant from their counterclaim' what form the judgment will take and whether it will merely award the other the difference is not addressed. Sometimes, someone in the suit wants to sue others not just those suing in the statement of claim, this is usually permissible*."

standing claim: *Supreme Steel*. It arises out of the breach of a separate duty owed by the third party to the defendant "which could support an independent cause of action": *Loeppky* at para 30. A third party claim through which a common law claim for contribution is asserted is described as a claim alleging that the "duty or obligation owed by the third party to the defendant ... *relates to the same damages* pled in the statement of claim" [emphasis added]: *Leoppky* at para 30. A third party claim for contribution under the common law must therefore allege facts that could support a finding that *the third party's breach of duty to the defendant caused the defendant to suffer damage that is related* to the damage that the plaintiff claims it suffered as a result of the defendant's breach of duty to the plaintiff. Third Party Claims for contribution under the *Tortfeasors Act* As is the case with a claim for contribution under the common law, a claim for contribution under the *Tort-feasors Act* stands or falls based on the outcome of the plaintiff's claim against the defendant. If the claim is a third party claim for contribution under the *Tortfeasors Act*, the third party claim must allege facts that could support a finding that *the third party's breach of duty caused the plaintiff to suffer the same damage* that the plaintiff claims it suffered as a result of the defendant's breach of duty to the plaintiff. As discussed, a claimant for contribution under the *Tort-feasors Act* must also establish that the third party would if sued be liable for the damage suffered by the plaintiff. It is clear that a claim for contribution arises under the *Tort-feasors Act* when a third party breaches a duty of care in tort owed by the third party to the plaintiff. A defendant asserting a claim for contribution under the *Tort-feasors Act* on this basis asserts the claim that the plaintiff could have asserted but did not. It is a derivative claim. The Defendants argue that a claim for contribution arises under the *Tort-feasors Act* can also arise when a third party breaches a duty, in either contract or tort, owed by the third party to the defendant, if that breach of duty causes the defendant to breach a duty to the plaintiff, which causes the plaintiff to suffer the same damage that it alleges was caused by the defendant. The following cases suggest that a claim may arise in these circumstances: *Deboer* at para 5;	

Wallace at paras 39, 55, and 56; *MacKay* at para 12; *Howalta*, per O'Ferrall JA at paras 77 and 85. **Independent Third Party Claims** An independent third party claim arises when the third party breaches a duty owed to the defendant, which causes the defendant to suffer losses that are factually related to the losses suffered by the plaintiff. A true third party claim for contribution is dependent upon the outcome of the plaintiff's action against the defendant. An independent claim for contribution arises from unrelated matters and is not dependent on the outcome of the plaintiff's action against the defendant: *Supreme Steel* at para 9. Claims for contribution under the Rules • Under the new Rules, **a third party claim may be filed against a party who is or might be liable to the party filing the third party claim for all or part of the claim against that party: Rule 3.44(a).** This type of third party claim is asserted to recover a claim for contribution under the common law or the *Tort-feasors Act: ALRI 2004 Report on Joining Claims and Parties* at para 123. • **Rule 3.44(b) now also allows third party claims to be filed against a party who is or might be liable to the party filing the third party claim for an independent claim if it is sufficiently related as that is defined in that Rule.** • **Rule 3.44(c) also allows a third party claim to be filed against a party who should be bound by a decision about an issue between the plaintiff and the defendant.**	
2. Limitations Act, RSA 2000, c L-12 s. 3(1.1) **(1.1) If a claimant who is liable as a tort-feasor in respect of injury does not seek a remedial order to recover contribution under section 3(1)(c) of the Tort-feasors Act against a defendant, whether as a joint tort-feasor or otherwise, within** **(a) 2 years after** **(i) the later of** **(A) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant, and** **(B) the date on which the claimant first knew, or in the circumstances ought to**	Limitation for tortfeasor claimaint Claimant seeking specifically contribution under s. 3(1)(C) **Exam:** On the exam, have us reference various limitation periods for claimant seeking contribution under Tortfeasors Act → Wont have more than 1-2 questions about this slide

have known, that the defendant was liable in respect of the injury or would have been liable in respect of the injury if the defendant had been sued within the limitation period provided by subsection (1) by the person who suffered the injury, if the claimant has been served with a pleading described in paragraph (A), or **(ii) the date on which the claimant first had or in the circumstances ought to have had the knowledge described in subclause (i)(B), if the claimant has not been served with a pleading described in subclause (i)(A),** **or** **(b) 10 years after the claim for contribution arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim for contribution.**	
Reply to defence Rule 3.33 **3.33(1) A plaintiff may file a reply to a statement of defence.** **(2) If the plaintiff files a reply, the reply must** **(a) be in Form 12, and** **(b) comply with the rules about pleadings in Part 13, Division 3.** (3) The plaintiff **must file the reply and serve it on the defendant within 10 days after service of the statement of defence on the plaintiff.**	Remember what he said about replies that the 'close of pleadings' people typically think they closed after you file defence, but this is technically incorrect, it is when the **time frame for the expiry of the timing for reply has come and gone (10 days)**, that is technically when pleadings are closed. Wait for the opportunity for plaintiff to file reply, once the timeframe has passed, then pleadings are closed.
Plaintiff's reply to third party defence Rule 3.54 3**.54(1) A plaintiff or third party plaintiff may file a reply to a statement of defence filed by a third party defendant.** **(2) If a plaintiff or third party plaintiff files a reply, the reply must** **(a) be in Form 20,** **(b) comply with the rules about pleadings in Part 13, Division 3, and** **(c) be filed and served on the third party defendant and each of the other parties within 10 days after service of the statement of defence by the third party defendant on the plaintiff.**	Plaintiff can also reply to the statement of defence filed by a third party defendant by 3.54(2)

Chapter 16: Scope of Disclosure Obligation	How do we determine what type of records we are required to disclose to opponent
Part 5 Disclosure of Information Purpose of this Part 5.1(1) Within the context of rule 1.2, **the purpose of this Part is** **(a) to obtain evidence that will be relied on in the action,** **(b) to narrow and define the issues between parties,** **(c) to encourage early disclosure of facts and records,** **(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and** **(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.** (2) The Court may give directions or make any order necessary to achieve the purpose of this Part	"one of his favorite chapters – on the exam?" This is the framework of subrules were going to look at, can see how the subrules dealing with the purpose of this part of the rules , we see express rules of how evidence is going to be adduced in litigation and should strive to meet context of fundamental rule 1.2 Negotiation of dispute at pre-trial level Deterrence to not unduly delay proceedings – frivolous applications
Division 1 How Information Is Disclosed Subdivision 1 Introductory Matters When something is relevant and material 5.2(1) **For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected** **(a) to significantly help determine one or more of the issues raised in the pleadings, or** **(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.** (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.	Appreciate what this rule says about how to determine if something is relevant and material Either the record helps truncate issues raised in the pleadings (help to answer dispute) or (b) the records are used to ascertain evidence that could be reasonably be expected to help
Appointment of corporate representatives - **Rule 5.4** 5.4(1) **Unless the Court otherwise orders, every corporation that is a party must appoint a corporate representative**. (2) Corporate representatives must (a) inform themselves of relevant and material records and relevant and material information before being questioned under this Division,	Corporate representatives on behalf of corp litigant – appoint corp rep to give evidence on behalf of the corporation Even if it's a new person who had no connection to the matter, could give evidence on behalf of the corporation by informing themselves of the material records in possession of corp and that evidence is binding

(b) if questioned under this Division, bring to the questioning any records likely to be required in respect of which there is no claim of privilege, and (c) give appropriate evidence of the relevant and material records and relevant and material information. Appointment of corporate representatives (3) The corporate representative's evidence is evidence given by the corporation. (4) **On application, the Court may order corporate representatives to inform themselves of relevant and material records or relevant and material information, or both.** (5) The Court may appoint a corporate representative for a party that is a corporation if the party has not done so. **(6) The Court may appoint an additional or a substitute corporate representative for a party that is a corporation if** **(a) an appointed corporate representative is not suitable, or** **(b) an appointed corporate representative failed to inform himself or herself of relevant and material records and relevant and material information before being questioned.**	Uninformed corporation representative could be participating in a useless questioning where the questioning lawyer asking corp rep questions they didn't bring themselves up to speed before the questioning. Could be subject to order that lawyer familiarizes themselves with material records.
Form and contents of affidavit of records → rule 5.6 5.6**(1)** An affidavit of records must (a) be in **Form 26**, and (b) disclose all records that (i) are relevant and material to the issues in the action, and (ii) are or have been under the party's control. **(2)** The affidavit of records must also specify (a) which of the records are under the control of the party on whose behalf the affidavit is made, (b) which of those records, if any, the party objects to produce and the grounds for the objection, (c) for those records for which there is no objection to produce, a notice stating (i) the time when the record may be inspected, which must be within 10 days after the affidavit is served, and	**Exam:** Know all these provision Pulled up **form 26** (page 24 of PDF sample pleadings). He tested on this last year – had fill in the blanks – would ask us to tell him what is required in this portion of the affidavit of records prescribed form – would have to fill in the blanks – likely are good it will be repeated this year. Really study well Form 26. Understand what objective and scope of record and the form of affidavit of records. Affidavit of Records of Silly Contractor Sworn by Cracker Jack – Cracker jack is the representative Ideally should be disclosing everything right from the get-go but practically speaking doesn't usually happen – other records come up later on in the process. Continuing obligation to disclose relevant and material records to the other side, no matter how late that disclosure comes

(ii) the place where the record may be inspected, which must be (A) the address for service of the party serving the affidavit, (B) a place agreed on by the parties or ordered by the Court, or (C) if the record is in constant use, the place where it is usually kept, (D) which relevant and material records the party previously had under the party's control, and (i) the time when, and the manner in which, those records ceased to be under that party's control, and (ii) the present location of the records, if known, and (E) that the party does not have and has never had any other relevant and material record under the party's control. **(3)** If a party does not have and has never had any relevant and material records under the party's control, the affidavit must say so.	Jurat **– bonus question –** what is the jurat? On a legal document – "sworn before me at the city of Edmonton, Alberta, this __ day of ___ 2021" is the jurat. Where the commission stamp and signature goes. [Always have the round brackets.] **Note:** As junior lawyer, inspect both sides of the document before notarizing something. Schedule 1 – actual way its laid out is in the sample pleadings after affidavit of records **On final exam**, will probably have to ask about errors of phraseology that is standard on form 26 – including relevant and material records aka producible records on schedule 1. Also know wording at schedule 2 & 3. Without prejudice – extricated from production Privilege review – go through records and see which are subject to privilege concerns (timely) **Again, form 26 and schedules definitely on exam.**
Appropriate questions and objections **Rule 5.25** Appropriate questions and objections 5.25(1) During questioning, a person is required to answer only (a) relevant and material questions, and (b) questions in respect of which an objection is not upheld under subrule (2). (2) **A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:** **(a) privilege;** **(b) the question is not relevant and material;** **(c) the question is unreasonable or unnecessary;** **(d) any other ground recognized at law.** **(3)** A **corporate representative** may object to an oral or written question during questioning on the basis that it would be unduly onerous for the corporate representative to inform himself for herself in the circumstances. **(4)** If an objection to a question cannot be resolved the Court must decide its validity.	Important for those who will be advocates in civil litigation matters to appreciate types of questions that can be raised in questioning Questioning of an affidavit is typically restricted to the document itself – 4 corners of doc This is dealing with questioning writ large – broad in main action Often, counsel objecting to questions raised by opponent on basis of privilege and materiality • Privilege (solicitor client; litigation; settlement (without prejudice) • Object opinions • Irrelevant or immaterial • Unclear questions **Note**: Put hand up in front of witness before they answer, and say objection and on your basis why you think its irrelevant and other side says why they think its relevant Interrogatories – written questions (4) I reserve my right – mean you reserve your right to have the court determine on application by the other side whether or not they are going to direct your client to answer the question (interlocutory application) = ruling based on whether relevant or material

(5) After the questioning party has finished questioning a person, that person may be questioned by the party for whom the person is or may be a witness to explain, elaborate or provide context for an answer initially given. **(6)** Following answers to the explanatory, elaborative or contextual questions, the person may be questioned again about the person's answers.	(5) and (6) allow for subsequent line of questions to occur – witness own council can go back to client to provide further elaboration or context and then the opposing party can ask further questions
Relevant and Material Information **Kaddoura v Hanson,** 2015 ABCA 154 At the production stage of the litigation, **it is not necessary to decide whether the trial judge will or will not be prepared to draw the inferences from the circumstantial evidence put forward by the respondents. Nor must the respondents demonstrate conclusively that the discovered records will in fact contain any evidence of assistance to them. <u>It may be that the client files will be produced, be examined, and be shown to have no probative value under any theory of the case. However, at this stage of the litigation the respondents need only show a plausible line of argument</u>**: Dow Chemical Canada ULC v Nova Chemicals Corp., 2014 ABCA 244 at para. 21, 577 AR 335; Weatherill (Estate) v Weatherill, 2003 ABQB 69 at para. 16, 11 Alta LR (4th) 183, 337 AR 180. The appellants cite cases that suggest that a litigant need not disclose records which might be of "secondary" or "tertiary" use in proving facts. **The precise difference between primary, secondary, and tertiary evidence is elusive, and is not satisfactorily delineated in these cases. That line of analysis is not helpful in determining which records should be produced because it does not accommodate proving facts using inferences and circumstantial evidence<u>. [There is no fixed standard of what is "material".]</u> <u>Production of records is not required just because some remote and unlikely line of analysis can be advanced, and it will not be ordered to support lines of pretrial discovery that are unrealistic, speculative, or without any air of reality</u>: Dow Chemical at paras. 19, 21.** **<u>Discovery will not be permitted if its cost is grossly disproportionate to any likely benefit</u>: R. 5.3(1)(b). Where the state of mind of the litigants is relevant, however, it is often only possible to prove that state of mind using circumstantial evidence. Describing such evidence as "secondary" or "tertiary" does not assist, because the underlying records might nevertheless**	Test for relevance and materiality Plausible line of argument is only required

"significantly help determine one or more of the issues". The Master did not err in determining that the client files were "relevant and material" within the meaning of the Rule. …Rather, **the onus is on the other litigant to review its own records and prepare an affidavit of records listing relevant records that do exist:** Myers v Elman, [1940] AC 282 at p. 322 (HL); Canada (Attorney General) v Spencer, 2000 SKCA 96 at paras. 16, 24-6, 199 Sask R 127, 7 CPC (5th) 280; Alberta (Director of Child Welfare) v C.H.S., 2005 ABQB 695 at para. 15, 2005 ABQB 695, 55 Alta LR (4th) 168, 385 AR 119. **When it comes to record disclosure, if there are fish, the respondents do not have to go fishing for them. (turn over what you have upfront, full disclosure, under the rules you have that obligation but fishing expedition isn't going to ensue)** Finally, the appellants argue that the records should not be disclosed because the respondents have "other methods" of getting the same information. They argue, for example, that some of the information may be on file at the Land Titles office (assuming that one knew where to look). **The discovery process in Part 5 of the Rules is an efficient, structured, and comprehensive method of obtaining relevant and material information in litigation, and it is no answer to legitimate discovery inquiries that information in the hands of a litigant might also be available through other methods.**	
Electronic data and social media postings constitute producible records as long as they meet the test of being relevant and material. See for example: *Leduc v. Roman*, (2009) O.J. No. 681 (ONSCJ).	
2. The Exception for Privileged Information	
SOLICITOR-CLIENT PRIVILEGE **Alberta (Information and Privacy Commissioner) v University of Calgary,** 2016 SCC 53 (leave to appeal to S.C.C. ref'd, (2017) S.C.C.A. No. 411) **Coté J:** ***Principles of Statutory Interpretation*** 28 To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, **set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so**.	

The privilege cannot be set aside by inference (*Blood Tribe*, at para. 11; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.), at para. 33; *Lavallee, Rackel & Heintz*, at para. 18). As this Court affirmed in *Thompson*: **... it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. <u>If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect</u>. [para. 25]** 29 I would also add that this requirement is not a renunciation of the modern approach to statutory interpretation. Indeed, on my reading, *Blood Tribe* does not preclude using a full modern approach to interpret words purportedly abrogating privilege. **Rather than supporting adoption of a strict construction rule, the analysis conducted in *Blood Tribe* reflects what is essentially the modern approach to statutory interpretation when dealing with solicitor-client privilege, insofar as it recognizes legislative respect for fundamental values. The modern approach was followed by this Court in *Thompson*, and the same approach is followed here. Therefore, in no way is this Court returning to the plain meaning rule or abandoning the modern approach.** ***D. Solicitor-Client Privilege*** 34 **It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice** (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, **"privilege is jealously guarded and should only be set aside in the most unusual circumstances**" (*Pritchard*, at para. 17).	**Language has to be clear and unambiguous in regards to the legislation that is going to be impugned.** Only the party can waive solicitor client privilege

35 Further, **solicitor-client privilege belongs to the client, not to the lawyer** (*Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 SCC 20 (S.C.C.), [2016] 1 S.C.R. 336, at para. 48; *Blood Tribe*, at para. 9). Seen through the eyes of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant.

E. Application

The key issue in this case is whether s. 56(3) of *FOIPP*, which requires a public body to produce to the Commissioner records **"[d]espite ... any privilege of the law of evidence",** allows the Commissioner to review documents that the University claims are protected by solicitor-client privilege. **I conclude that "any privilege of the law of evidence" is not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege.**

I find that the present case engages solicitor-client privilege in its substantive, rather than evidentiary, context. This case is not occupied with the tendering of privileged materials as evidence in a judicial proceeding. Rather, it deals with disclosure of documents pursuant to a statutorily established access to information regime, separate from a legal proceeding. While it is true that the person who applied for the information was initially seeking the information for use as evidence in separate litigation against the University, her lawsuit has since ended. In addition, the Privacy Commissioner is not seeking to review the solicitor-client privileged information as evidence in order to decide a legal dispute.

The disclosure of the information in this context is therefore not related to the "evidentiary privilege". Rather, disclosure in this case is more akin to the review of mail being delivered to prison inmates, which this Court addressed in *Solosky*. In that case, as it was described in *Descôteaux*, the Court "applied a standard that has nothing to do with the rule of evidence ... since there was never any question of testimony before a tribunal or court" (p. 875). Equally, the absence of such a question here highlights the engagement of solicitor-client privilege in its substantive, rather than evidentiary, role.

This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary (*Chambre des notaires*, at para. 28, citing *Lavallee, Rackel & Heintz*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185 (S.C.C.), at para. 27, and *Goodis*, at para. 15). Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in "certain clearly defined circumstances, and does not involve a balance of interests on a case-by-case basis" (*McClure*, at para. 35). These limited categories, which will only be satisfied in rare circumstances, include the accused's right to make full answer and defence (*McClure*; *Brown*) and where public safety is at stake (*Smith*). Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege[s] of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege[s] of the law of evidence".	
LITIGATION PRIVILEGE **Lizotte v Aviva Insurance Co. of Canada,** 2016 SCC 52 FACTS ▪ In the course of an inquiry into an insurance claims adjudicator, the assistant syndic of the *Chambre de l'assurance de dommages* (Chambre), the Quebec self-regulatory body that oversees the conduct of insurers, asked Aviva Insurance Company (Aviva) to produce a complete copy of the claim file with respect to an insured. ▪ This request was made pursuant to section 337 of the *Act respecting the distribution of financial products and services* (*ADFPS*), which creates an obligation for the insurer to produce any document concerning the activities of a representative whose professional conduct is being investigated by the Chambre.	

- Aviva refused to produce certain documents on the basis of litigation privilege, given ongoing litigation involving the insured.
- The Chambre syndic brought a motion to obtain the documents on the basis that the production obligation set out in section 337 overrides litigation privilege.
- Before the motion was heard, the litigation between the insured and Aviva settled, and Aviva produced the documents. However, the syndic proceeded with its motion.
- The Superior Court found this was a "genuine problem" worth deciding.
- Both the Québec Superior Court and Court of Appeal ruled in Aviva's favour, finding that litigation privilege cannot be abrogated absent an express provision.
- The SCC agreed.
- Justice C. Gascon for the SCC clarified that the differences between solicitor-client and litigation privilege identified in the case of *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 have been adopted in Quebec law, and litigation privilege is not merely a subcategory of civil law professional secrecy but a stand-alone privilege.
- **Justice Gascon went on to make three important comments about LITIGATION PRIVILEGE:**
  - **1. Litigation privilege is a class privilege.**
  - **2. Although litigation privilege is subject to the same clearly defined exceptions as solicitor-client privilege, it is not subject to a case-by-case balancing test.**
  - **3. Litigation privilege can be asserted not just against parties to the litigation, but also as against third parties, including third-party investigators who have a duty of confidentiality.**

I would dismiss the appeal. **Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.**

Exam: Know for exam (3) comments

Litigation privilege are records ae subjected to privilege on the dominant basis for that record is litigation

The requirements established in *Blood Tribe* apply to litigation privilege. **Given its importance, <u>THIS PRIVILEGE CANNOT BE ABROGATED BY INFERENCE AND CANNOT BE LIFTED ABSENT A CLEAR, EXPLICIT AND UNEQUIVOCAL PROVISION TO THAT EFFECT</u>**. Because the section at issue provides only for the production of "any ... document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.	Clear language that evinces legislative intent to set aside solicitor-client privilege
Differences between Solicitor-client and Litigation Privilege … since *Blank* was rendered in 2006**, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable**. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them: **1. The purpose of solicitor-client <u>privilege is to protect a *relationship*</u>, while that of litigation privilege is to <u>ensure the efficacy of the adversarial *process*</u> (para. 27);** **2.Solicitor-client privilege is <u>permanent</u>, whereas litigation privilege is <u>temporary</u> <u>and lapses</u> when the litigation ends (paras. 34 and 36);** **3. Litigation privilege applies to <u>unrepresented parties</u>, even where there is no need to protect access to legal services (para. 32);** **4.Litigation privilege <u>applies to nonconfidential documents</u> (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);** **5.Litigation privilege <u>is not directed at communications between solicitors and clients as such</u> (para. 27).**	**Exam:** Know this for exam (MC, TF, SA) **KNOW THIS FOR FINAL**
Litigation Privilege Protects a process, not a relationship and is a class privilege Thus, although litigation privilege differs from solicitor-client privilege in that its purpose is to facilitate a process — the adversary	Under schedule 2, rejecting to produce documents under litigation privilege.

process (*Blank*, at para. 28, quoting Sharpe, at paras. 164-65) — and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).	
Immunity from disclosure This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (*National Post*, at para. 58).	
Exceptions applicable to Solicitor-Client privilege What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather than conducting a balancing exercise in each case. In this regard, the Court held in *Smith v. Jones*, [1999] 1 S.C.R. 455, that **the exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the "highest privilege recognized by the courts" (para. 44).** **These include the exceptions relating to PUBLIC SAFETY, TO THE INNOCENCE OF THE ACCUSED AND TO CRIMINAL COMMUNICATIONS (paras. 52-59 and 74-86). They also include the EXCEPTION TO LITIGATION PRIVILEGE RECOGNIZED IN *BLANK* FOR "EVIDENCE OF THE CLAIMANT PARTY'S ABUSE OF PROCESS OR SIMILAR BLAMEWORTHY CONDUCT" (para. 44).**	**Exam:** Know the exceptions on this slide
Litigation Privilege serves an overriding "public Interest" I disagree. The requirements discussed in Blood Tribe apply with equal force to litigation privilege. Not only is litigation privilege a class privilege, but it serves an overriding "public interest" as that expression is used in Bisaillon. This public interest, as was explained in Blank, is **"[t]he secure and effective administration of justice according to law"** (para. 31). **The purpose of litigation privilege is to "ENSURE THE EFFICACY OF THE ADVERSARIAL PROCESS" (Blank, at para. 27) by maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial**	

advocate" (para. 40, quoting Sharpe, at p. 165). By maintaining a protected area for the preparation of litigation, litigation privilege in its own way promotes "access to justice" and the "quality of justice" (Blood Tribe, at para. 9).	
Alberta v Suncor Energy Inc, 2017 ABCA 221 FACTS: ▪ On April 20, 2014, a Suncor employee was fatally injured at a worksite near Fort McMurray. Occupational Health and Safety (OHS) officers issued a stop-work order that day. Immediately after the accident, anticipating litigation, Suncor began an internal investigation and threw a privilege blanket over all information pertinent to its investigation. ▪ Within hours of the workplace incident on April 20, 2014, legal counsel for Suncor contacted its environmental health and safety employees and requested an internal investigation. Legal counsel directed the investigation team to segregate the investigation documents and to endorse all material as privileged and confidential. ▪ The Suncor investigation team interviewed witnesses, recorded statements and collected photographs. On May 5, 2014, OHS issued a demand under section 19 of the *OHSA* for Suncor to provide copies of the witness statements, as well as employees' names and contact information. OHS reiterated this demand on May 12, 2014. ▪ On May 20, 2014, Suncor replied and provided the names and contact information of employees, but asserted privilege over the witness statements collected by its investigation team. ▪ OHS did not issue a further demand until October 2, 2014, when it requested a report under section 18 of the *OHSA,* outlining the circumstances of the incident and any preventive measures adopted by Suncor. ▪ On November 14, 2014, Suncor provided a copy of the incident report, and on December 5, 2014, OHS confirmed that Suncor was in compliance with the section 18 demand. ▪ On October 23, 2015, nearly a year after Suncor provided its report, OHS issued another demand for the names and contact information of persons interviewed by Suncor, copies of witness statements, names and contact information of investigation team members, and copies of	

notes, records, photos, videos, and other documents taken or collected by Suncor ▪ On November 20, 2015, Suncor provided the names and contact information of witnesses who were interviewed. Suncor also provided the names and contact information of its investigation team members, but expressly stated that it was not waiving privilege by doing so. ▪ On December 4, 2015, OHS rejected Suncor's claims of privilege and reiterated its request for the investigation materials. On December 7, 2015, OHS demanded that certain employees of Suncor, including investigation team members, attend at OHS offices for interviews. Suncor continued to assert privilege and OHS ultimately issued an administrative penalty of $5000. That penalty is the subject of separate proceedings pending the outcome of this matter ▪ Between January 12 and January 28, 2016, OHS issued three requests for particulars about the refused documents and the nature of the privilege. On March 3, 2016, Suncor produced a list of 1655 records bundled into eight categories, asserting solicitor-client privilege and litigation privilege over all of them. ▪ OHS took the position that the descriptions of the documents were insufficient to allow it to assess the claims of privilege. ▪ The charging deadline under *OHSA* expired on April 20, 2016 and no charges have been laid.	In Schedule 2 of Affidavit of Records, records that are subject to solicitor client privilege (SC privilege) and litigation privilege
The following issues are raised by the appeal: 1. Did the chambers judge err in finding that the dominant purpose of the investigation wasin contemplation of litigation? 2. Did the chambers judge err in finding that the documents were sufficiently described to allow an assessment of the privilege claims? 3. Did the chambers judge err in referring the assessment to a referee after making a finding about the dominant purpose of the investigation? 4. Did the chambers judge err by failing to grant Alberta the right to make submissions before the referee?	
VI. Standard of Review **The question of the test to be applied in determining whether a claim of legal privilege succeeds is an extricable question of law and reviewable on the standard of correctness**: *Housen v*	**Note**: Not going to ask us specific facts about specific cases on final or cite specific dicta on exam

Nikolaisen, 2002 SCC 33 (CanLII) at paras 8; 33, [2002] 2 SCR 235. [21] Though the chambers judge's exercise of discretion to invoke Rule 6.45 is not in dispute, we note that, absent material error of law or principle, such exercises of procedural discretion under the *Alberta Rules of Court* are entitled to deference: see *eg Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd,* 2014 ABCA 74 (CanLII) at para 17, 569 AR 308; *Balogun v Pandher*, 2010 ABCA 40 (CanLII) at para 7, 474 AR 258.	Attila Dogan one of the main cases on amendment to pleadings
Litigation privilege attaches to documents created for the dominant purpose of litigation: *Blank* at paras 59-60. This includes any document created for the dominant purpose of preparing for related litigation that "remains pending or may reasonably be apprehended": *Blank* at para 38. **The object of this inquiry is the purpose for which the document was *created*, or came into existence, as distinct from the purpose for which it may have been collected or put to use**: *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244 (CanLII) at para 38, 577 AR 335.	**Litigation privilege attaches to documents created for the dominant purpose of litigation** → **purpose for which the doc was created**
[39] **… given the breadth of the litigation privilege he conceived and the referee process he directed, the chambers judge has not yet turned his mind to the interplay between the claims of legal privilege and the statutory obligations upon Suncor under sections 18 and 19 of the *OHSA*.** These include the obligation to carry out an investigation, prepare a report, and provide access to the workplace and employees for information respecting the accident for the *OHS* investigation. He may be required to consider Suncor's obligation to prepare a report "outlining" the circumstances and corrective action taken after an accident, under section 18 (3) (b) of the *OHSA;* or employees' obligation to provide information to an OHS officer after an accident under s 19 (2) of the *OHSA*, when their statements are also prepared for the internal investigation and claimed to be privileged.	
[40] **Plainly, if legal privilege does not cover particular records or information, and the requirements of sections 18 and 19 of the *OHSA* apply to those same records or information, the question of whether sections 18 and 19 operate to override any aspect of privilege disappears.** Once the procedure for assessing the contested materials is complete, records or information sifted out of the scope of privilege will be subject to the consideration under the correct legal interpretation of sections 18 and 19 of the *OHSA*.	

Did the chambers judge err in finding that the dominant purpose of the investigation was in contemplation of litigation? [41] In conclusion, **the chambers judge erred in finding that the dominant purpose of the investigation was in contemplation of litigation and proceeding to conclude that, within the context of Suncor's internal investigation carried out in anticipation of litigation, the material "created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege".** [42] Since the decisions in *Lizotte* and *University of Calgary*, it is clear the statutory obligations upon Suncor following a workplace accident, and found in sections 18 and 19 of the *OHSA,* do not preclude claims of litigation privilege. **In accordance with *ShawCor*, each document or bundle of like documents must be described with sufficient particularity to identify the claimed privilege and the evidentiary basis for the claim.** [43] **The referee's inquiry, and ultimately that of the chambers judge, must focus on the dominant purpose for creating each document or bundle of like documents, whether it be for routine, day to day operation of the plant or some other purpose; for compliance with statutory obligations, including sections 18 and 19 of the *OHSA;* or for seeking or giving legal advice or for contemplated litigation**. Remaining to be decided is what material falls within the sphere of legal privilege, and the interplay between sections 18 and 19 of the *OHSA* and those privilege claims. **Did the chambers judge err in finding that the documents were sufficiently described to allow an assessment of the privilege claims?** [48] To support a claim of litigation privilege, Suncor must describe documents with enough particularity to indicate whether the dominant purpose for their *creation* was in contemplation of litigation. [49] **In conclusion, we find that the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims.**	Doesn't matter if your operating under the Act or not, must focus on dominant purpose of making each document or bundle of like documents

The comments in *ShawCor* at para 63 apply equally to the OHS context: the claim of privilege is based on the honour system, and reasonable people can disagree as to whether particular material is privileged. The eight categories of material claimed as privileged by Suncor are not particularized to identify whether and how it claims the material was *created* in contemplation of litigation. As noted above, material created in the ordinary course of business and later collected for the investigation file, may arguably not be covered by litigation privilege. Of course, this does not require Suncor to describe the document in a way that undermines the privilege claimed.	When asserting privilege be careful you are not breaching any privilege in how you describe
Did the chambers judge err in referring the assessment to a referee under Rule 6.45 of the *Alberta Rules of Court*? [50] Alberta argues that an assessment by the referee is illusory because the chambers judge already found as a fact that the dominant purpose of the investigation as a whole was in contemplation of litigation. Even if that general finding does not bind the referee with respect to any individual document, or bundle of like documents, Alberta asserts that it is prejudicial to the assessment. [51] We agree. The inquiry undertaken by the referee under Rule 6.45 of the *Alberta Rules of Court* for consideration of whether legal privilege applies to particular documents or bundles of documents should be undertaken as contemplated in these reasons.	
Did the chambers judge err by failing to grant Alberta the right to make submissions before the referee? [52] Alberta argues that the chambers judge erred by ordering an *ex parte* assessment before the referee while Alberta should be entitled to make submissions. In oral argument, Alberta clarified that it did not seek to inspect the documents put before the referee. Instead, Alberta wishes to assist in setting out the basis upon which the referee may determine which documents are arguably relevant and need to be put before the referee; and to make submissions about how the documents are described and identified. We agree. **As is customary where parties dispute the claim of privilege, both parties should have the opportunity to make submissions.**	Audi alterem partem – parties have the right to be heard → goes to issueu of procedural fairness
[53] The chambers judge erred in finding that the dominant purpose of the internal investigation was in contemplation of litigation and therefore every document "created and/or collected" during the	

investigation is clothed with legal privilege. Suncor cannot, simply by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" so as to clothe them with solicitor-client or litigation privilege. **Where a workplace accident has occurred, and the employer has statutory duties under sections 18 and 19 of the *OHSA* and simultaneously undertakes an internal investigation, claiming legal privilege over all materials derived as part of that investigation, an inquiry is properly directed to a referee under Rule 6.45 to determine the dominant purpose for the creation of each document or bundle of like documents in order to assess the claims of legal privilege.**	
3. Settlement Privilege = without prejudice communications	
Union Carbide Canada Inc v Bombardier Inc, 2014 SCC 35 Wagner J: **Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called THE "WITHOUT PREJUDICE" RULE, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation.** This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).	Under the rules, there have been recent amendments to part 10 of the Rules, where we deal with how the court deals with Costs at conclusion of trial – used to be you couldn't consider offers made on informal basis, but juris has evolved in last 20 years. Now we have codified rule under Part 10 where court can consider formal and informal style offers to settle when considering costs at conclusion of trial. →**Exam:** There is no magic formula when it comes to form/style of offer. Used to call it Calderbank style offers used to be informal offers of settlement (Hoziki). Consequence of Calderbank style offer is typically to ask for enhanced costs from the court when comes time to address costs – **bonus question on final.** → two months to accept a formal offer from when its served; if not served its automatically withdrawn
Bellatrix Exploration Ltd v Penn West Petroleum Ltd, 2013 ABCA 10 **Exceptions to Settlement Privilege** As with most forms of privilege, there are exceptions to the rule. Some are universally accepted, while others are more controversial. Among the generally recognized exceptions are the following: **(a) to prevent double recovery:** *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 BCAC 54; **(b) where the communications are unlawful, containing for example, threats or fraud;** **(c) to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement:** *Comrie v. Comrie*, 2001 SKCA 33, 203 Sask R 164;	

(d) it is possible that the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the Rules of Court, but also with respect to informal offers: *Mahe v. Boulianne*, 2010 ABCA 74 at paras 8 - 10, 21 Alta LR (5th) 277; *Calderbank v. Calderbank*, [1975] 3 All ER 333 (CA). Some of these may not truly be exceptions to the rule, but simply matters outside the scope of the rule. For example, using without prejudice communications to prove that a settlement was actually achieved is not inconsistent with the policy behind the privilege. Similarly, it may be that even if part of a communication is covered by the privilege another part, such as a separate enclosure might not be. •••	**When trial is over, no more privilege**. TJ can ask the parties have any offers been exchanged between the parties? And now the rules tell us that they permit dialogue between formal and informal offers
4. Case by Case Privilege	
AM v Ryan, [1997] 1 SCR 157 ▪ **While the circumstances giving rise to a privilege where once thought to be fixed by categories defined in previous centuries — categories that do not include communications between a psychiatrist and her patient — it is now accepted that the <u>common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate</u>:** *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Fosty*, *(*sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, at p. 286. The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), §2285**.** ▪ **First, the communication must originate in a confidence.** ▪ **Second, the confidence must be essential to the relationship in which the communication arises.** ▪ **Third, the relationship must be one which should be "sedulously fostered" in the public good.** ▪ **Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation**	**Exam:** One question on final dealing with this type of privilege, what are the factors under this type of case-by-case privilege

5. Waiver	
Sturgeon Lake Indian Band v Canada (Attorney General), 2015 ABCA 253 **Leave to appeal dismissed, [2015] SCCA No 394** ROWBOTHAM & WAKELING JJA:— **To establish that privilege has been waived, it must be shown that:** **(i) the presence or absence of the legal advice is material to the lawsuit; and** **(ii) the party who received the legal advice must make the receipt of it an issue in the claim or defence.**	
C. Statutory Restrictions on Disclosure EDITOR'S NOTE: **The parameters of disclosure set out in the Rules of Court can be altered by statute**. This was recently confirmed by the Supreme Court of Canada's unanimous ruling in *British Columbia v. Philip Morris International Inc*., 2018 SCC 36. The Court held that, irrespective of their relevance to the litigation, health records in the possession of the plaintiff were not compellable because their production was restricted under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, which formed the basis of the litigation.	Remember, disclosure ambit/scope set out in the rules can be altered by statute

Chapter 17: Disclosure of Records	
See Rules Part 5, Division 1, Subdivisions 1-2.	
Division 1 **How Information Is Disclosed** **Subdivision 1 - Introductory Matters** **When something is relevant and material** 5.2(1) For the purposes of this Part**, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected** **(a) to significantly help determine one or more of the issues raised in the pleadings, or** **(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.** (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material. **Modification or waiver of this Part** 5.3**(1)** The Court may modify or waive any right or power under a rule in this Part or make any order warranted in the circumstances if (a) a person acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or tediously lengthy, or (b) the expense, delay, danger or difficulty in complying with a rule would be grossly disproportionate to the likely benefit. **(2)** In addition to making a procedural order, the Court may do any one or more of the following: (a) make a costs award under Part 10 or require an advance payment against costs payable, or both; (b) increase or decrease the amount of interest to which a person is entitled; (c) order future questioning to be conducted before a judge, master or person designated by the Court; (d) make any other order respecting the action or an application or proceeding the Court considers necessary in the circumstances.	

Appointment of corporate representatives **5.4(1)** Unless the Court otherwise orders, every corporation that is a party must appoint a corporate representative. **(2) Corporate representatives must** **(a) inform themselves of relevant and material records and relevant and material information before being questioned under this Division,** **(b) if questioned under this Division, bring to the questioning any records likely to be required in respect of which there is no claim of privilege, and** **(c) give appropriate evidence of the relevant and material records and relevant and material information.** **(3)** The corporate representative's evidence is evidence given by the corporation. **(4)** On application, the Court may order corporate representatives to inform themselves of relevant and material records or relevant and material information, or both. **(5)** The Court may appoint a corporate representative for a party that is a corporation if the party has not done so. **(6)** The Court may appoint an additional or a substitute corporate representative for a party that is a corporation if (a) an appointed corporate representative is not suitable, or (b) an appointed corporate representative failed to inform himself or herself of relevant and material records and relevant and material information before being questioned.	Counsel's role is limited (listen intently to other side's questions and object when relevant)
Subdivision 2 **Disclosing and Identifying Relevant and Material Records** When affidavit of records must be served 5.5(1) **Every party must serve an affidavit of records on each of the other parties in accordance with the time period specified** in subrule (2), (3) or (4). (2) **The plaintiff must serve an affidavit of records on each of the other parties within 3 months after the date the plaintiff is served with a statement of defence, or the first statement of defence if more than one is served.** (3) **The defendant must serve an affidavit of records on each of the other parties within 2 months after the date the defendant is served with the plaintiff's affidavit of records.**	90 day rule 5.5(2) – plaintiff from date they receive SoD 60 day rule (informally) – defendant from date the defendant is served with P affidavit of records

(4) A third party defendant who has filed a statement of defence must, within 3 months after that filing, serve an affidavit of records on each of the other parties . AR 124/2010 s5.5;140/2013	
Rule 5.6 – Form and contents of affidavit of records 5.6**(1)** An affidavit of records must (a) be in Form 26, and (b) disclose all records that (i) are relevant and material to the issues in the action, and (ii) are or have been under the party's control. **(2)** The affidavit of records must also specify (a) which of the records are under the control of the party on whose behalf the affidavit is made, (b) which of those records, if any, the party objects to produce and the grounds for the objection, (c) for those records for which there is no objection to produce, a notice stating (i) the time when the record may be inspected, which must be within 10 days after the affidavit is served, and (ii) the place where the record may be inspected, which must be (A) the address for service of the party serving the affidavit, (B) a place agreed on by the parties or ordered by the Court, or (C) if the record is in constant use, the place where it is usually kept, (D) which relevant and material records the party previously had under the party's control, and (i) the time when, and the manner in which, those records ceased to be under that party's control, and (ii) the present location of the records, if known, and (e) that the party does not have and has never had any other relevant and material record under the party's control.	**Exam:** **Schedule 1 – in their possession/producible documents** **Schedule 2 – privileged documents** **Schedule 3 - was in their control, no longer in their control**

(3) If a party does not have and has never had any relevant and material records under the party's control, the affidavit must say so.	
Rule 5.7 – Producible records 5.7**(1) Each producible record in an affidavit of records must** **(a) be numbered in a convenient order, and** **(b) be briefly described.** **(2)** A group of records may be **bundled and treated as a single record if** **(a) the records are all of the same nature, and** **(b) the bundle is described in sufficient detail to enable another party to understand what it contains.**	
Rule 5.8 – Records for which there is an objection to produce 5.8 Each record in an affidavit of records that a party objects to produce must be numbered in a **convenient order**, and the affidavit must identify the grounds for the objection in respect of each record.	Goes to Suncor – how you describe bundle of documents in terms of privilege, litigation or solicitor client
Who makes affidavit of records **5.9(1)** Subject to subrule (2), an affidavit of records must be sworn by (a) the party, (b) if the party is a corporation, by the corporation's corporate representative, or (c) if a litigation representative is appointed for a party, by the party's litigation representative. **(2)** A suitable person, other than the lawyer of record of the party, may swear the affidavit of records if (a) it is inconvenient for the party, the corporate representative or the litigation representative to do so, and (b) the parties agree or the Court so orders.	
Subsequent disclosure of records 5.10 **If, after a party has served an affidavit of records on other parties, the first party finds, creates or obtains control of a relevant and material record not previously disclosed, the first party must** **(a) immediately give notice of it to each of the other parties,**	If you are in a live trial and documents have been disclosed, request for reasonable adjournment is probably your only option at that time. You have an **ongoing obligation to continue disclosure.**

(b) on written request and on payment of reasonable copying expenses, supply each of the other parties with a copy of it, and **(c) prior to scheduling a date for trial, serve a supplementary affidavit of records on each of the other parties.**	
Order for record to be produced 5.11(1) On application, the Court may **order a record to be produced if the Court is satisfied that** **(a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or** **(b) a claim of privilege has been incorrectly or improperly made in respect of a record.** (2) For the purpose of making a decision on the application, the Court may (a) inspect a record, and (b) permit cross-examination on the original and on any subsequent affidavit of records	Can apply under this rule for disclosure **Note**: In practice, put it in an envelope, sealed, and send up to Master or Justice to determine relevance or materiality
Penalty for not serving affidavit of records 5.12(1) In addition to any other order or sanction that may be imposed, **the Court may impose a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C, or any larger or smaller amount the Court may determine**, on a party who, without sufficient cause, (a) does not serve an affidavit of records in accordance with rule 5.5 or within any modified period agreed on by the parties or set by the Court, (b) does not comply with rule 5.10, or (c) does not comply with an order under rule 5.11. (2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court. (3) A penalty imposed under this rule applies irrespective of the final outcome of the action.	Main Rules: • 1. Don't miss your 2 year limitation to file SOC • 2. Be on time with affidavit of records Ask for reasonable extension ASAP if you know you will not make the 90 day rule for affidavit of record production. If counsel agree on extension for the 90 days, court doesn't have to agree. If other side doesn't agree, you can well be subject to application for cost penalty. Usually just a threat.

Obtaining records from others **5.13(1) On application**, and after notice of the application is served on the person affected by it, **the Court may order a person who is not a party to produce a record at a specified date, time and place if** **(a) the record is under the control of that person,** **(b) there is reason to believe that the record is relevant and material, and** **(c) the person who has control of the record might be required to produce it at trial.** **(2)** The person requesting the record must pay the person producing the record an amount determined by the Court.	
Inspection and copying of records 5.14**(1)** Every party is entitled, with respect to a record that is relevant and material and that is under the control of another party, to all of the following: **(a) to inspect the record on one or more occasions on making a written request to do so;** **(b) to receive a copy of the record on making a written request for the copy and paying reasonable copying expenses;** **(c) to make copies of the record when it is produced.** **(2) This rule does not apply to a record for which a claim of privilege is made unless the Court orders the record to be produced for inspection.** **(3)** The Court or a party to an action who receives a computer-generated document that was filed with the court clerk may request the person filing that document or causing it to be issued to provide a copy of it in an electronic format.	Original Will situation where there is estate litigation 1. One side wants to get access to the original will, one side claiming undue influence over the testatrix 2. Go views original will, may even request copies but will be responsible for copying fees
Admissions of authenticity of records **5.15(1)** In this rule, "authentic" includes the fact that (**a) a document that is said to be an original was printed, written, signed or executed as it purports to have been, and** **(b) a document that is said to be a copy is a true copy of the original.** **(2)** Subject to subrules (3), (4), (5) and (6), a party who makes an affidavit of records or on whose behalf an affidavit of records is filed and a party on whom an affidavit of records is served are both presumed to admit that	

(a) a record specified or referred to in the affidavit is authentic, and (b) if a record purports or appears to have been transmitted, the original was sent by the sender and was received by the addressee. **(3)** Subrule (2) (a) does not apply if the maker or the recipient of the affidavit objects in accordance with subrule (4), (b) does not prejudice the right of a party to object to the admission of a record in evidence, and (c) does not constitute an agreement or acknowledgment that the record is relevant and material. **(4) The maker or recipient of an affidavit of records is not presumed to make the admission referred to in subrule (2) if, within 3 months after the date on which the records are produced, the maker or recipient serves notice on the other party that the authenticity or transmittal of a record, as the case may be, is disputed and that it must be proved at trial.** **(5)** Notwithstanding that the maker or recipient of an affidavit of records does not serve a notice under subrule (4) within the time provided by that subrule, the Court may order that the maker or recipient is not presumed to make the admission referred to in subrule (2). **(6)** This rule does not apply to a record whose authenticity, receipt or transmission has been denied by a party in the party's pleadings.	If author doesn't come to court to confirm the evidence's authenticity, it is hearsay Authenticity of records can be challenged – get around it by bringing in author to swear under oath as to authenticity Ex: real estate lit.
Undisclosed records not to be used without permission 5.16 A party who **(a) does not disclose a relevant and material record in an affidavit of records referred to in** rule 5.6**,** **(b) does not disclose as required by** rule 5.10 **a relevant and material record that is found, created or obtained, or** **(c) does not produce a relevant and material record in accordance with a valid request to do so under** rule 5.14 **may not afterwards use the record in evidence in the action unless the parties otherwise agree or the Court otherwise orders on the basis that there was a sufficient reason for the failure to disclose.**	If don't disclose upfront, then down the road this rule prohibits the use

A. Records Under a Party's Control	
McAllister v Calgary (City), 2012 ABCA 346 PAPERNY JA:— ••• **Analysis** ***Meaning of "control" in the discovery rules*** **The current Alberta *Rules of Court*, Alta Reg. 124/2010, require a party to disclose all relevant and material records that "are or have been under the party's control": r. 5.6**. The language under the previous incarnation of the discovery rules was somewhat different, requiring disclosure of records in a party's "possession, custody or power": see rules 187.1 and 208, Alta. Reg. 390/68. Under the old rules, Alberta courts have held that for a party to have power over a record being held by a non-party, the party had to have a legal right to access the record or to get copies of it from the non-party: see *Brown v. Nguyen*, 2006 ABQB 783 (Alta. Master), aff'd 2007 ABQB 270 (Alta. Q.B.). The right to access records in the hands of a non-party might arise in a number of ways, including by contract, by statute, at common law or at equity. In my view, this remains the test for disclosure in Alberta. **The simplification of the language to "control" in the current Rules of Court does not alter the test. There is no substantive difference in meaning between the two phrases. I would add that <u>the right to access the record must be specific to the party from whom disclosure is sought</u>; merely having the ability to bring an application for third party disclosure under the Rules of Court, an application equally available to any party to the litigation, is not sufficient to indicate control.** Nor is it enough, as the respondent suggests, that the party may be able to request the record from the non-party because of an existing relationship between them. **If the requesting party does not have a corresponding ability to enforce compliance with the request, he or she does not have "control" over the record.**	
B. Identification & Description of Records	
1400467 Alberta Ltd v Adderley, 2013 ABQB 656 VEIT J:— **Summary** Based on what it characterizes as abusive prolixity, Lynco asks the court to require each of the defendants, except Pro-Canada, to file new affidavits of records limited to the records which are primarily	**Exam:** Prolixity will be on exam Veit breaks down in this decision prolixity

and secondarily relevant and material to the issues between themselves and Lynco. **Pro-Canada's affidavit of records is 13,000 pages long; each of the other defendants' affidavits of records merely adopts Pro-Canada's affidavit of records, even though the issues, as defined in the pleadings, do not involve all of the defendants in the same way, at the same time, and in connection with the same activities.** FACTS: • The defendants respond that they are all friends and that, at trial, they intend to rely on each other's records. • The defendants assert that the plaintiff has no grounds for objection to the production of documents by which they agree to be bound. • They also claim that the Pro- Canada documents are documents which they control. • **This court has both the inherent and the explicit power to advance the objectives articulated in R. 5.1(1) by ordering the removal of prolix affidavits and requiring the filing of new affidavits.** However, that remedy is at one end of a spectrum of remedies which should be chosen according to the circumstances. • Here, because the plaintiff must review all 13,000 pages of disclosure for questioning of the defendant Pro-Canada, the appropriate remedy is to require all defendants other than Pro-Canada to amend the affidavits of records already filed by identifying from amongst the 13,000 pages of disclosure those pages which deal specifically with their own inter-action on the issues raised in the pleadings. • In this application, Lynco asks the court to order each of the defendants other than Pro-Canada to file an affidavit of records which refers only to the records relating to that defendant's primary or secondary association with the issues raised in the pleadings. • The defendants reply that they are all friends, that they accept one another's records and are willing to be bound by those other records, and that they intend to rely at trial on the records identified by their friends. **Can the court remedy mere prolixity?** The Rules set out the purpose and objectives of pretrial document discovery: R. **5.1(1)** Within the context of rule 1.2,	There was an affidavit of record in this case which was 13,000 pgs long.

the purpose of this Part is ... (b) to narrow and define the issues between parties, ... (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.	
"Prolixity" **Alberta's Rules do not specifically address prolixity or provide a remedy for prolixity where it exists. Indeed, the case law interpreting the rules relating to discovery of documents usually deals with a failure to provide adequate and timely discloser rather than with the problem caused by excessive, potentially irrelevant, disclosure. However, in *Hill,* the English Court of Appeal long ago addressed this type of problem:** **Although there is no rule of court specially giving power to the Court to take pleadings or affidavits off the file for prolixity, yet the Court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. (from the head-note).** ***Hill*** was a case in which 4,216 letters had been separately set out in the equivalent to an affidavit of records by their dates and names of the writers and recipients; in addition, a "vast number" of receipts had been disclosed. It was argued against the motion in that case that the court should not and could not, at that juncture, decide on the relevancy of the contested disclosure. If the equivalent of the affidavit of records was too long, then, it was argued, the appropriate remedy was to "inflict" costs. In support of the unanimous decision that, on the facts of the particular case, only costs would be awarded although the Court did have the jurisdiction to remove the offending affidavit, one of the Law Lords said: **I am not inclined to express any opinion whether the documents set out in the affidavit are relevant or not. But assuming that they are, it is perfectly plain to my mind that they might have been set out in a way which would not have been oppressive. There is a prolixity in this affidavit of which no account can be given except a desire to cause vexation and costs to the Defendant**.	**Exam:** This slide is on the final Prolixity is delay or inadequate disclosure which is timely; untimely disclosure or untimely delay This is prolix = overly voluminous

Dunn v. Grass Systems (UK) Ltd. [2007] EWHC B2 (Q.B.) ***Dunn*** is an example of a modern English decision which, even though it dealt with a much more serious matter which was the removal of a pleading rather than a mere affidavit, concluded that, in the circumstances, the only relief that was appropriate was the striking out of the pleading. **Alberta courts have the same inherent power as to English courts to ensure that purported compliance with the Rules of Court does not, in fact, become a technique for unnecessarily increasing the cost of litigation. In addition, Alberta courts have the explicit power to advance the objectives articulated in R. 5.1(1): R.5.1(2).**	Prolix = **become a technique for unnecessarily increasing the cost of litigation**
How should the court deal with prolixity in the circumstances here? Lynco argues that it should not have to wade through 13,000 pages of documents in preparation for the discovery of each defendant when each of the defendants themselves, other than Pro-Canada, acknowledges that all of the records in their affidavit of records do not refer to their own, separate, conduct. As in the ***Hill*** case, it is not necessary - or perhaps possible - to decide at this stage if any of the records in the affidavits of records of each of the defendants other than Pro-Canada are relevant and material as defined in the Rules of Court. The defendants' own position on this application, however, strongly suggests that many of the records in their affidavits have only tertiary relevance and materiality. In any event, however, **the issue of how to deal with the very lengthy disclosure of records remains.** Here, just as in ***Hill***, Lynco already has the contested affidavits. More pertinently perhaps, Lynco will, admittedly, have to review all 13,000 pages of disclosure with respect to its questioning of Pro-Canada. **In all the circumstances, the appropriate remedy here is to require all defendants other than Pro-Canada to amend the affidavits of records already filed by identifying from amongst the 13,000 pages of disclosure those pages which deal specifically with their own actions.**	**Exam: s**o prolixity on the final

***Canadian Natural Resources Ltd v ShawCor Ltd*,** 2014 ABCA 289

Fraser CJA, Conrad, Watson JJA:
Tension has always existed between discovery and privilege in the civil justice system. Discovery facilitates a practical and effective search for the truth by ascertaining and limiting the real issues and facts in dispute. Privilege protects the integrity of the adversarial system and shields parties from damage to legitimate interests and relationships. Despite the culture shift, both competing values remain of importance in civil litigation. Any error in the parameters of discovery or privilege may impair the fairness of the process and deter or defeat *bona fide* litigants. Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek with the seeker blindfolded.

Reforms to the civil justice system have enhanced the role of case management judges as gatekeepers in the litigation process. But this more active judicial role was not designed to lighten the burden on the parties or the responsibilities of their counsel. **Thus, the *Rules* should be interpreted in a manner that maximizes the ability of opposing counsel or parties to resolve disputes over privilege and minimizes the time and expense involved in further litigation steps or judicial intervention. Simply put, resort to the courts on privilege issues should not be the first stop on the litigation highway.**

We have concluded that a party preparing an affidavit of records must, short of revealing information that is privileged, provide a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege. While the objective is to reduce the need for parties to seek recourse to other time-consuming and costly litigation steps, we are equally satisfied that this can be accomplished in a manner that does not injure valid privileges. **In addition, where a judge is nevertheless called on to determine privilege issues, a sufficient description of records will assist the judge in determining whether a more probing assessment is required and, if so, the confines of that assessment**.

This result is premised on a number of specific conclusions. Rule 5.7 was intended to apply to all relevant and material records, even those a party objects to produce. **Thus, in an affidavit of records, a party must number all records in a convenient manner and briefly**

describe them (Rule 5.7(1)). The right to bundle and treat that bundle as a single record under Rule 5.7(2) applies equally to records over which privilege is claimed. Rule 5.8 imposes additional responsibilities on a party who objects to produce a *prima facie* producible record. The particular ground(s) of the objection must be identified with respect to each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege.	**Exam:** know this section
Enforcement	
Sun Life Assurance Company of Canada v Tom 2003-1 Limited Partnership #2**,** 2010 ABQB 815 TILLEMAN J:— ••• Sufficient cause has been judicially addressed under the old Rule 1908 and to me it still means a neglect that is excusable on sufficient grounds based on diligence of the party that has not been relieved by any other section of the Rules, or a statute, or a related Court ruling that may otherwise affect the disposition of the matter. On the last point see e.g. *Anderson v. Airsprint Aircraft Management Inc.,* 2004 ABQB 12, 352 A.R. 59 at para. 31. **Diligence means the filing party did everything it could but ran into extraordinary circumstances over which it had no practical control.** Sufficient cause under Rule 5.12 will be a hard test to meet and certainly will never be captured by facts that suggest "oops, I forgot". It is a Rule that contemplates excusable neglect but it faces a high bar. While excuses are rare, they may include such things as flood damage, fire, documented proof of failed courier, or sudden medical emergency. I only set out potential excuses to describe the extraordinary nature of the event, and not to describe a closed list. •••	Issue of enforcement Important part of referencing this case → Will be times you cant meet deadline for disclosure – do have to show sufficient cause
Documents in Possession of a Non-Party (3rd party)	

Cullihall v Liyanage, 2016 ABQB 551
Master MASON:

Facts:
[1] Darren Cullihall commenced this negligence action against Kasun Chandana Borala Liyanage in relation to a motor vehicle accident that took place on April 4, 2013 on an off ramp from Highway 1 to Highway 22, west of Calgary.
[2] Mr. Cullihall alleges that as a result of the accident, he suffers from serious impairment of physical and cognitive functions. He claims that he is substantially unable to perform the essential tasks of his employment and occupation. He alleges that he has and will continue to incur medical and rehabilitation expenses and loss of income.
[3] Mr. Liyanage defended the claim on a variety of grounds, including a denial that Mr. Cullihall suffered the injuries, losses, or damages alleged, or alternatively that they pre-existed the accident. Mr. Liyanage also alleges that Mr. Cullihall failed to mitigate, including by failing to return to the workforce in a reasonable and timely fashion.
[6] Counsel for Mr. Liyanage asked Mr. Cullihall to make a request for employment records from Kentz (now known as Callisto Construction Ltd.), Corona and Westwood (the "Employers"). His counsel declined to make the request, on the basis that "we don't control them". This exchange followed:

> **Mr. Dear**: Would you provide your consent for the defendant to make a request of your former employers for their employment file?
> **Mr. Conway**: No.
> **Mr. Dear**: Why not?
> **Mr. Conway**: Because that's not the means by which you obtain that information. It's a third party that we don't control. If you want to make an application, then you can do that.
> **Mr. Dear**: Right. I'm asking if he would consent to that application.
> **Mr. Conway**: I'll wait to see the application.

[7] On September 16, 2016, Mr. Liyanage applied in morning chambers under rule 5.13 for an order directing the Employers to provide records to him. Of the Employers, only Callisto Construction Ltd attended, but took no position on the merits.
[8] **Mr. Cullihall opposed the application, on the basis that the proper procedure under rule 5.13 is to have the non-party's**

records go first to the plaintiff for assessment of relevance, materiality and privilege. [9] **For the reasons that follow, I conclude that it is the court's function to determine relevance, materiality and privilege under rule 5.13. There is no blanket procedure as suggested by Mr. Cullihall. While there is no serious dispute about the existence of typical records on the Employers' file, and the relevance and materiality of their typical contents, <u>the breadth of some of the defendant's requests and the lack of clarity in the plaintiff's claimed entitlement to privilege require further submissions in order for the court to make the necessary determinations.</u>**	The Master wasn't able to give a ruling on the spot – was uncomfortable, asking for further submissions from the parties – to determine relevance, materiality, and privilege, before ordering certain documents be sent to the other side.
Rule 5.13 [10] Rule 5.13 provides a mechanism for litigants to obtain records from a non-party: **5.13(1)** On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if (a) The record is under the control of that person, (b) There is reason to believe that the record is relevant and material, and (c) The person who has control of the record might be required to produce it at trial. **(2)** The person requesting the record must pay the person producing the record an amount determined by the Court.	
Cullihall contd. The Old Rule 209 and New Rule 5.13 [17] As with its predecessor rule 209, rule 5.13(1)(b) continues to recognize that relevance and materiality need not be guaranteed in order for records to be directed to be produced by non-parties: see for example, *Yellowbird v Lytviak* (1997), 210 AR 81 (QB) at 84-85, citing *Frenette v Metropolitan Life Insurance Co.*, [1992] 1 SCR 64. [18] In ***Yellowbird***, Ritter J stated: **In my view, the test is not one of likely relevance but rather…it is one of whether or not the party requesting has reason to believe that the document relates to the matter in issue. Such reason to believe must be beyond something that raises a scintilla of a reason, but likelihood of relevancy can only be established if the**	Reason to believe, must be something that raises a scintilla of a reason – scintilla means that all is required (per Atilla Dogan) that all that is required for a pleading, is a scintilla of evidence.

party has actually seen the document. To conclude that likelihood of relevance is required would be to render rule 209 meaningless. I draw support for this conclusion from the decision of the Supreme Court of Canada in [***Frenette v Metropolitan Life Insurance Co.***]…wherein…L'Heureux-Dube J...states:

> **It follows from this that an applicant need not show that a document is admissible in evidence at the trial as the condition of his obtaining an order under this rule. If a party seeking the order is able to satisfy the judge that the document, or information in the document, *may relate* to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, e.g., the document is privileged. (emphasis L'Heureux-Dube J's)**

[27] **Similarly here, I do not consider that every record on the Employers' files will be relevant and material to this litigation and that is not what the defendant asked for. For the most part, the defendant has identified and requested specific types of records, and set its requests in the context of this personal injury action in which the plaintiff has alleged past loss of income, and placed his future ability to work in issue.**

[28] The existence and typical contents of the records can generally be ascertained without difficulty. However, some of the defendant's requests appear to be overly broad and further submissions are needed to determine relevance and materiality. In my view, this approach is consistent with ***Phillips.***

[29] Mr. Cullihall also refers to ***Lund v Lauzon***, [1996] AJ No 980 (QB), ***Burton v Berci***, 2006 ABQB 523 (CanLII) and ***Knor v Fehr***, [1994] AJ No 1252 (QB). Each of those cases addresses the obligation of a plaintiff to disclose relevant and material records in his or her possession. Master Funduk recognizes this distinction at paragraph 2 of his reasons in ***Knor v Fehr***.

[30] Mr. Cullihall further argues that the records sought may potentially contain privileged information.

[31] As with objections on the basis of relevance, the court is also obliged to consider objections on the basis of privilege under rule 5.13. In some cases, it may be necessary for the court to review the disputed documents in order to resolve the question of privilege. This too is consistent with ***Phillips***. At paragraph 10 of its reasons, the Court of Appeal notes that the Supreme Court of Canada directed some flexibility in regard to the mode of determination, citing the reasons of McLachlin J (as she then was) in ***A.M. v Ryan***, 1997 CanLII 403 (SCC), [1997] 1 SCR 157 at paragraph 39:

In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. <u>While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry.</u> On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the court minutely examine numerous and lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law [32] **However, the person objecting has to provide some cogent basis for expecting that privileged records may exist, and the basis of the claim to privilege. Mr. Cullihall's submissions do not do so in a sufficiently clear fashion. He indicated that "there is a first for everything." The non-party records at issue in this application are contained in employment files, which do not raise obvious matters of privilege, as for example, a lawyer's file would.** [33] I do not suggest that information subject to privilege in favor of an employee could never be found in an employer's file. **However, Mr. Cullihall is asserting claims of privilege in this action which he has commenced to recover alleged damages for income loss and impairment of future ability to work. Further submissions are necessary in order for the defendant and the court to understand the basis of the privilege claimed.** [34] Counsel for Mr. Cullihall also referred to consent orders reached with another lawyer from the defendant's firm, in which a procedure such as he suggests be ordered here was set out. **Again, there is no blanket procedure, and each case is to be determined on its own facts. The existence of those other orders, which were all issued by consent in one action, is not determinative of this matter, and do not demonstrate a "general practice" as suggested by counsel for Mr. Cullihall. They simply reflect an agreement between counsel to follow that procedure in that particular lawsuit.**	Pithy substance about what necessary for privilege

Determination of relevance and materiality

[35] **There is no serious dispute about the existence of typical records maintained by the non-party Employers, and their typical contents. Counsel for the plaintiff concedes that most of the records requested contain relevant and material information. The breadth of some of the defendant's requests and the lack of clarity in the plaintiff's claimed entitlement to privilege require further submissions in order for the court to make the necessary determinations. Court review of some of the records may or may not be necessary.**

[36] **Counsel shall make an appointment to attend before me at a 2 pm sitting to make further submissions on relevance, materiality and privilege. No briefs are necessary. I encourage counsel to discuss the requested records and attempt to narrow their disputes in advance of the hearing. Counsel for Mr. Cullihall shall advise the court in advance of the hearing, what categories of records remain in dispute, along with the specific bases of objection and their grounds. Counsel may also consider that further affidavit evidence may assist the court in making the necessary determinations. In that event, counsel shall exchange the affidavits in advance of the hearing and provide courtesy copies to the Masters' office.**

Chapter 18: Questioning	
Subdivision 3 Questions to Discover Relevant and Material Records and Relevant and Material Information **People who may be questioned** 5.17**(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:** (a) each of the other parties who is adverse in interest; (b) if the party adverse in interest is a corporation, (i) one or more officers or former officers of the corporation who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation, and (ii) the corporate representative; (c) if a litigation representative is appointed for a party, (i) the litigation representative, and (ii) with the Court's permission, the person on whose behalf the litigation representative is appointed if that person is competent to give evidence; (d) one or more other persons who are or were employees of the party adverse in interest who have or appear to have relevant and material information that was acquired because of the employment; (e) an auditor or former auditor engaged by a party adverse in interest, but not an auditor or former auditor engaged solely for the purpose of the action; (f) if a partnership is a party adverse in interest, a partner or former partner of the partnership; (g) in an action with respect to a negotiable instrument or chose in action, (i) an assignor of the negotiable instrument or chose in action, (ii) a prior endorser, drawer, holder or maker of the negotiable instrument, and (iii) an employee or former employee of an assignor of the negotiable instrument or chose in action, and if the assignor is a corporation, an officer or former officer of the corporation. **(2)** If a questioning party questions more than one person of a party adverse in interest under subrule (1) and the person questioned is	**There is no limitation period/timeframe by which the parties have to schedule questioning** • Want to be mindful of your 'drop dead' timeline – used to be 2 years, is now 3 years under current rules from the date that the last step which significantly advanced the action. If nothing has happened in 3 years from the last step which significantly advanced the action, defence can apply to court to have the entire claim dismissed. • Rule 4.33 Drop Dead Rule • Rule 4.31 is another type of drop dead but it is called the **inordinate delay rule**. – dismissing for inordinate delay in excess of 3 years usually, upwards of 10 years. If court doesn't let you on 4.33 then try 4.31.

(a) an officer or former officer of a corporation described in subrule (1)(b)(i), (b) an employee or former employee of the party adverse in interest described in subrule (1)(d), (c) an auditor or former auditor described in subrule (1)(e), (d) a partner or former partner of a partnership referred to in subrule (1)(f),or (e) an employee, former employee, officer or former officer described in subrule (1)(g)(iii), other than a corporate representative, the costs of questioning the second and subsequent persons are to be paid by the questioning party unless (f) the parties agree otherwise (g) the court orders otherwise	If your going to question a representative from a corporation for example, have to serve them with conduct monies. If not by agreement, definitely have to issue conduct monies. Notice of Appointment for questioning together with conduct money which is calculated by assistant and that will make the person get questioned. Check attached to service. If don't show can be comtempt
Persons providing services to corporation 5.18**(1)** Subject to subrules (2) and (3), if (a) a party cannot obtain relevant and material information from an officer or employee or a former officer or former employee of a corporation that is a party adverse in interest, (b) it would be unfair to require the party seeking the information to proceed to trial without having the opportunity to ask questions about the information sought, and (c) the questioning will not cause undue hardship, expense or delay to, or unfairness to, any other party or to the person to be questioned, the party may question, under oath, a person who has provided services for the corporation and who can provide the best evidence on the issue. **(2)** A person described in subrule (1) may be questioned only (a) by written agreement of the parties, or (b) with the Court's permission. **(3)** An expert engaged by a party for the purposes of the action may not be questioned under this rule. **(4)** Evidence from a person questioned under this rule is to be treated as if it were evidence of an employee of the corporation. **(5)** The costs related to questioning a person under this rule are to be borne by the questioning party unless (a) the parties otherwise agree, or (b) the Court otherwise orders	
Limit or cancellation of questioning 5.19 On application, the Court may do either or both of the following:	What he was just talking about as serving other side with appointment for questioning, other side can apply to have it cancelled if vexatious

(a) limit the number of persons subject to questioning by a party; (b) cancel an appointment for questioning that the Court considers unnecessary, improper or vexatious.	
When questioning is to take place **5.20(1)** Unless the parties otherwise agree, or the Court in exceptional circumstances otherwise orders, **a party may not question a party or person under this Division unless the questioning party has served an affidavit of records on the party adverse in interest.** **(2)** Subject to subrule (1), **the questioning of a person is to take place as follows:** **(a) questioning by the plaintiff, at any time after** **(i) a statement of defence has been served on the plaintiff, or** **(ii) the time for serving the statement of defence has expired;** **(b) questioning by the defendant and every other party, at any time after a statement of defence has been served.**	No time limit on when questioning is to take place
Appointment for questioning 5.21**(1)** A party may question a person whom the party is entitled to question under this Part by **serving on the person a notice of appointment for questioning in Form 29.** **(2)** Rules 6.16 to 6.19 and 6.38 apply for the purposes of subrule (1) with one modification, namely, unless the parties otherwise agree, **the notice of appointment for questioning must be served 20 days or more before the appointment date.**	Notice has to be accompanied by conduct monies (witness money) – half day appearance he thinks its $50 and they get conduct money for meals, travel/accommodation if out of province.
Questioning options 5.22 Subject to rule 5.24, **questioning may be conducted** **(a) orally, under oath, or** **(b) by written questions**, answered under oath, subject to the limitations of rule 5.28.	Other phrase for questioning by written questions – **interrogatories**
Preparation for questioning 5.23 A person to be questioned under this Division, other than a corporate representative, must **(a) reasonably prepare for questioning, and** **(b) bring to the questioning any records likely to be required in respect of which there is no claim of privilege.**	Getting at schedule 1 producible documents

Oral and written questioning limitations 5.24 Unless the parties otherwise agree or the Court otherwise orders, **(a) if more than one party is entitled to question a person, the questioning must be oral, and** **(b) a party may not question a person both orally and by written questioning.**	10am usual start time for questioning
Appropriate questions and objections 5.25(1) During questioning, a person is required to answer only (a) relevant and material questions, and (b) questions in respect of which an objection is not upheld under subrule (2). **(2)** A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons: **(a) privilege;** **(b) the question is not relevant and material;** **(c) the question is unreasonable or unnecessary;** **(d) any other ground recognized at law.** **(3)** A corporate representative may object to an oral or written question during questioning on the basis that it would be unduly onerous for the corporate representative to inform himself or herself in the circumstances. **(4)** If an objection to a question cannot be resolved the Court must decide its validity. **(5)** After the questioning party has finished questioning a person, that person may be questioned by the party for whom the person is or may be a witness to explain, elaborate or provide context for an answer initially given. **(6)** Following answers to the explanatory, elaborative or contextual questions, the person may be questioned again about the person's answers.	Particularly because of the educational value in terms of teaching us advocacy out of the gates and putting us in litigator mode to delineate the areas where there can be a proper objection during questioning **Exam:** Be aware of this slide for final particularly bolded parts "objection, privilege" put hand out in front of witness → Have dialogue with counsel if they agree with your objection or not. "objection relevance" "objection unreasonable or unnecesary" If validity of objection not agreed upon between counsel, court can decide
Transcript of oral questioning **5.26(1)** Oral questioning under this Part must be recorded word for word by a person qualified to do so **(a) by a method that is capable of producing a written transcript, and** **(b) in a manner agreed on by the parties or directed by the Court.** **(2)** The questioning party must make necessary arrangements to record the questioning.	Usually taken by court reporters Impeachment – key way to use the transcript at trial; use transcript to attack and discredit party

(3) Exhibits produced at the questioning must, unless otherwise agreed by the parties or ordered by the Court, **(a) be incorporated in or attached to the transcript, or** **(b) be produced at the trial of the action without a notice to produce.** **(4)** The person recording the oral questioning must (a) keep in safe custody the recorded questioning, (b) if required to do so, honestly and accurately transcribe the recorded questioning and deliver a copy of the transcript, as required, and (c) on or attached to any transcript (i) state the person's name, (ii) specify the date and place where the questioning occurred, and (iii) certify the transcript, or the portion of the questioning transcribed, as complete and accurate. **(5)** A person is qualified to record and transcribe oral questioning under this Part if the person is (a) an official court reporter, (b) a person appointed by the Court as an examiner under the *Alberta Rules of Court* (AR 390/68), or (c) a shorthand writer, sworn to record the questioning word for word and to impartially fulfill the duties imposed by subrule (4), who (i) is an agent or employee of an official court reporter or an examiner, or (ii) has been approved by the parties.	
Continuing duty to disclose 5.27**(1)** A **person who is or has been questioned must, by affidavit, correct an answer if** **(a) the answer was incorrect or misleading, or** **(b) the answer becomes incorrect or misleading as a result of new information.** **(2) The correcting affidavit must be made and served on each of the other parties as soon as practicable after the person realizes that the answer was or has become incorrect or misleading.**	

Written questions (written interrogatories) 5.28**(1)** Unless the Court otherwise orders or the parties otherwise agree, the following rules apply with respect to written questions and the answers to them: **(a) the written questions must be numbered and succinct;** **(b) the answers provided to the questions must be given by affidavit and must state the question being answered;** **(c) the party being questioned must serve the answers to the questions on each of the other parties within a time agreed on by the parties or ordered by the Court.** **(2)** A party is entitled to ask **(a) one set of follow-up written questions as a result of the answers to the initial written questions, or** **(b) follow-up oral questions if agreed by the parties.** **(3)** If the answers to the written questions or the answers to the follow-up written or follow-up oral questions are unsatisfactory, the questioning party may apply to the Court for an order for either or both of the following: **(a) oral or further oral questioning;** **(b) further written questions to be answered.**	
Acknowledgment of corporate witness's evidence 5.29**(1)** The evidence given by a corporate witness during questioning may not be read in as evidence at trial unless a corporate representative of the corporation, under oath, acknowledges that the evidence forms some of the information of the corporation. **(2)** Subject to subrule (3), the corporate representative may refuse to acknowledge some or all of the evidence of the corporate witness and, if so, must state why, but is not entitled to refuse to acknowledge the corporate witness's information just because the corporate representative disbelieves or disagrees with it. **(3) If the corporate representative disbelieves or disagrees with some or all of the evidence of a corporate witness, the corporate representative** **(a) must acknowledge the evidence as information of the corporation unless it is inadmissible under the laws of evidence, and** **(b) may then qualify the acknowledgment with further evidence that is contrary to or inconsistent with the**	How to get disagreeing corp rep evidence in

corporate witness's evidence if the further evidence is based on either or both of the following: **(i) the corporate representative's personal knowledge;** **(ii) a record prepared by the corporate representative or provided to the corporate representative by a person having personal knowledge of the issue in question**	
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, or** **(b) has under the person's control a relevant and material record that is not privileged,** **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.**	Take under advisement – if unsure
Use of transcript and answers to written questions 5.31**(1) Subject to** rule 5.29**, a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 or 5.18 and any of the evidence in the answers of that other party to written questions under** rule 5.28**.** **(2)** Evidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence or the answers to the written questions, and is evidence only against the party who was questioned. **(3)** If only a portion of a transcript or a portion of the answers to the written questions is used, the Court may, on application, direct that all or each other portion of the transcript or answers also be used if all or any other portion is so connected with the portion used that it would or might be misleading not to use all or any other portion of the transcript or other answers.	May use for impeachment Where the witness has been questioned at his office in 2021 and asked what model was the car and they say it's a grey Ford and then what happens is transcript is generated, matter proceeds to trial, and the same witness is being crossed examined on the stand and says the car was red. You can put the transcript to them and say do they remember being questioning, and you swore to tell the truth, etc. and show them they said grey. -→ impeached the witness; impugned their credibility
When information may be used 5.32 **The transcript of questioning, including exhibits, made under this Division, an affidavit of records, affidavits and answers to written questions, and correcting affidavits under this Division**	No requirement to file Affidavit of Records with the court, only requirement is to serve sworn copy on opposing counsel

(a) must not be filed and must not be put before the Court except during an application, proceeding or at trial, and **(b) may be filed and put before the Court only as permitted by these rules,** in which case the person relying on the documents filed must provide the material in writing or in any other form permitted by the Court	**On exam** – must an affidavit of records be filed to the rules court? No – only requirement is to serve a sworn copy to opposing party;
Confidentiality and use of information 5.33**(1)** The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record for the purpose of carrying on the action in which the information or record was provided or disclosed unless **(a) the Court otherwise orders,** **(b) the parties otherwise agree, or** **(c) otherwise required or permitted by law.** **(2)** For the purposes of subrule (1) the information and records are: **(a) information provided or disclosed by one party to another in an affidavit served under this Division;** **(b) information provided or disclosed by one party to another in a record referred to in an affidavit served under this Division;** **(c) information recorded in a transcript of questioning made or in answers to written questions given under this Division.**	
A. Who Can Question Whom	
Turta v CPR**,** (1951) 2 WWR (NS) 628 (Alta SCTD) The application involves in the first instance a perusal of the Rule of Court whereby examinations for discovery are authorized. Rule 240(1) provides: Any party to an action, any officer of a corporate party and any person who is or has been employed by any party to an action . . . may be orally examined on oath or affirmation before the trial of the action touching the matter in question by any person adverse in interest . . .	

***Golden Estate v. Neilson*, 2011 ABCA 338**

A. Facts

[3] The Public Trustee of Alberta, the personal representative of the estate of Tyson Golden, the deceased, brought an action against the appellants and Capital Health, operator of the University of Alberta Hospital (not a party to this appeal). This action was brought on behalf of the estate for funeral expenses; on behalf of Michael and Carol Golden, the deceased's parents, for damages for statutory bereavement; and on behalf of the deceased's infant son and the deceased's spouse, Jessica Chapman, for damages for statutory bereavement and loss of financial support.

[4] The deceased committed suicide within days of his release from the hospital. The appellants were the physicians responsible for his care. The Public Trustee alleges that the death was caused by the negligence of the appellants and other hospital staff. Among other things, the Public Trustee alleges that the appellants discharged the deceased without arranging for a proper psychiatric examination.

[5] The appellants' statements of defence essentially deny that they were negligent.

[6] Examinations for discovery under the old *Rules* (Alta Reg 390/68) were held. The Public Trustee produced a representative, who, although he informed himself, was unable to answer many of the appellants' questions. Over 50 undertakings had to be given and complying with them took over a year. The appellants submit that the information provided by the Public Trustee conflicted on a number of important issues impacting on entitlement to bereavement damages, liability and quantum.

[7] From documents and information obtained at discovery, the appellants question whether the deceased's mother and spouse may have failed to take reasonable steps to monitor and assist the deceased upon his discharge from hospital, giving rise to a possible break in the chain of causation. The appellants seek further information from the deceased's mother and spouse in this regard. The appellants also seek information from the deceased's spouse and mother as to the deceased's marital status at the time of his death and his finances.

Note: Involved discrete issue for application to compel testimony of certain witnesses and what the court did with a claim re deceased persons.

EXAM: Need to know FAA and other SAA likely long answer that involves one or both.

Claim brought by certain persons and involved public trustee of Alberta in that they were the PR of deceased. They brought action against defendants and Capital Health. Matter brought on behalf of estate in respect of funeral expenses – FAA discusses funeral expenses – go back and check this – ensure you are also aware of the kinds of costs you can claim under FAA v SAA.

Brought on behalf of child and parents. Brought claim for statutory bereavement on behalf of deceased's infant some and spouse.

Claim death of Mr. Golden was because of negligence of appellant and other hospital staff. When we look to wording of FAA, it arises typically form a wrongful act. In this case, we get reference to negligence – court refers to negligence or other wrongful act. **Know for final** is that most likely, your going to be faced with fact pattern on final that involves situation that likely touches on this tort of negligence – appellants had discharged deceased before arranging appropriate psychological assessment. Appellants denied they were negligent.

[8] The appellants' application for an order permitting questioning of the deceased's spouse and mother was dismissed and they appeal to this Court. [20] The respondent argued that a bereavement claim under the *Fatal Accidents Act* is not a cause of action, but rather is merely a head of damages, citing *Chochla v Visa Truck Rentals (1991) Ltd,* 2009 ABCA 413 (CanLII), 469 AR 118. In our view, *Chochla* is distinguishable because in that case the underlying cause of action for wrongful death was prohibited by the *Workers' Compensation Act*, RSA 2000, c W-15. Likewise, *Cable Estate v Ferguson*, 2009 ABCA 333 (CanLII), 464 AR 89, is distinguishable on the basis that the underlying cause of action in that case (medical malpractice) had been settled. **The cause of action contemplated under the *Fatal Accidents Act* is death caused by negligence or a wrongful act. Without that no claim can be advanced under the *Fatal Accidents Act*. The issue in this case, is whether the parties who are seeking bereavement damages have a cause of action for the wrongful death. In our view, they do.** [21] **In conclusion, we have adopted a "TRUE PARTIES" approach to the assessment of questioning under the new *Rules*. In our opinion, the mother and the spouse of the deceased are, indeed, true parties whose evidence would enhance speed, economy, fairness and disclosure, the factors referred to in *Wilbur v Miller,* 2005 ABCA 220 (CanLII) at para 11, 367 AR 191. Not only are the claimants in a position to provide essential evidence, they are also in a position to provide the best evidence on the issues of entitlement, liability and quantum, issues which flow from the *Fatal Accidents Act* and the *Survival of Actions Act*, RSA 2000, c S-27.** [22] **The appeal is allowed. The appellants are entitled to question Jessica Chapman and Carol Golden.** [23] The appellants are entitled to one set of costs in Column 3 on the appeal together with costs in Queen's Bench on the initial application, all to be taxed if they cannot be agreed upon.	Distinguishable because wrongful death is prohibited under WCA Know Schedule C of the Rules – **print for exam**
Employees and Officers	
Cogent Group Inc v ***EnCana Leasehold Ltd Partnership*****,** 2011 ABQB 335 – Master Mason **Rule 5.18 states in part**:	

5.18(1) Subject to subrules (2) and (3), if (a) a party cannot obtain relevant and material information from an officer or employee or a former officer or former employee of a corporation that is a party adverse in interest, (b) it would be unfair to require the party seeking the information to proceed to trial without having the opportunity to ask questions about the information sought, and (c) the questioning will not cause undue hardship, expense or delay to, or unfairness to, any other party or to the person to be questioned, the party may question, under oath, **a person who has provided services for the corporation and who can provide the best evidence on the issue**. ... (4) **Evidence from a person questioned under this rule is to be treated as if it were evidence of an employee of the corporation**. [*Emphasis added*.]	
Former Rule 200 **[13]** Employees and officers of an adverse party were discoverable under former Rule 200. Employees could be examined if they had or appeared to have knowledge of a matter in issue that was acquired "by virtue of that employment". [14] **Alberta case law decided under Rule 200 permitted pre-trial examination of individuals who did not strictly meet the legal definitions of "officer" or "employee" of an adverse party, yet still had relevant and material evidence to offer by virtue of the services they had provided to the party**. See for example: *Cana Construction Co. v. Calgary Centre for Performing Arts*, (1986), 1986 ABCA 175 (CanLII), 71 A.R. 158 (C.A.); *Petro-Canada Products Inc. v. Dresser-Rand Canada Inc.*, 2003 CarswellAlta 1939 (Q.B.), aff'd (2004), 2004 ABCA 144 (CanLII), 348 A.R. 81 (C.A.).	
New Rule 5.18 [21] New Rule 5.17 is the successor to former Rule 200. It permits examination of officers and employees with relevant and material information acquired "because" the person is or was an officer or employee of the party.	

[22] This requirement in Rule 5.17 is consistent with former Rule 200. [23] **Rule 5.18 captures decisions** such as *Cana Construction Co. v. Calgary Centre for Performing Arts* and *Petro-Canada Products Inc. v. Dresser-Rand Canada Inc.* **in its express provision for the pre-trial questioning of persons who have "provided services for the corporation and who can provide the best evidence on the issue". <u>Rule 5.18 is an extension of Rule 5.17 and fills the gap identified in the prior case law.</u>**	What does this all mean in context when we apply the rule? See in Cogent Group case
Cogent Group Inc v **EnCana Leasehold Ltd Partnership,** 2011 ABQB 335 [24] Rule 5.18 does not expressly state that the information of the person sought to be questioned needs to have been acquired by virtue of the services provided to the corporate party. **In my view, however, the purpose of the Rule is to allow questioning of persons akin to employees who have gained relevant and material knowledge as a result of providing services to a party corporation. The required connection is implicit in the rule and fundamental to the Alberta approach to questioning non-parties prior to trial.** [25] At the hearing, I queried why an officer or employee could only be examined under Rule 5.17 if their relevant and material knowledge was obtained because of their employment or role as officer, yet a service provider would not similarly be subject to that requirement. Counsel for Cogent was not able to supply a rationale. [26] **In my view, it would be inconsistent with the requirements of Rule 5.17 and former Rule 200, the judicial interpretation of which is now captured in Rule 5.18, to conclude that service providers who may have acquired relevant and material knowledge outside of the service relationship, can be questioned prior to trial in the same fashion as an employee of a party<u>. It is the provision of services in relation to the matters at issue in the action that transforms a mere witness into a service provider within the meaning of Rule 5.18</u>.**	**Exam:** Might be one or two questions about what it means to be a service provider and how might a service provider by subject to questioning at the pre-trial stage Scope is narrowed by Rule 5.18 – this case confirms there is a more narrow scope when it comes to service providers who may be subject to witness testimony subject to Rule 5.18.
CDM Direct Mail v Centre for Immigration Policy Reform, 2015 ABCA 168 ***1. Did the trial judge err in allowing CDM to read in evidence from Ms. Kopala's questioning?***	Dealing with use of evidence given by parties adverse in interest and transcripts from questioning

Paperny, Martin, McDonald JJA: [20] **Rule 5.31 <u>permits a party to use any of the evidence given by the adverse party in a transcript of questioning in support of its own case at trial</u>. That general rule is expressly qualified, however, in the case of evidence in questioning given by a corporate witness. The use to which the evidence of a corporate witness may be put is governed by rule 5.29:** **5.29(1) <u>The evidence given by a corporate witness during questioning may not be read in as evidence at trial unless a corporate representative of the corporation, under oath, acknowledges that the evidence forms some of the information of the corporation</u>.**	**Exam:** Concept of a read-in at trial – wont have to know this particular advocacy technique at depth, just what is in the powerpoints Important rule because were going to see case law where this didn't happen and what the consequences were. → if this doesn't happen then in not compliance of rules
[21] **The authorities make clear that, under the *Rules of Court*, a party may examine a corporate party's employee, "but the evidence so used cannot be read in at trial". Such statements are admissible only where the statements are admitted or adopted by the corporate representative. The statements are then open to qualification and can be rebutted by *viva voce* evidence during trial**: *Esso Resources Canada Ltd v Stearns Catalytic Ltd* (1993), 1993 CanLII 7255 (AB QB), 156 AR 178, 20 Alta LR (3d) 327 (ABQB) at paras 4 and 19.	Viva voce evidence – oral rather than written evidence (live voice – direct translation from latin). →Viva voce evidence should be contrasted from written evidence of the witness. Live voice or oral evidence
[22] **These principles are codified in the remainder of r 5.29, which provides that the corporate representative may refuse to acknowledge the evidence of the corporate witness, but is not entitled to refuse to acknowledge the evidence simply because he or she disagrees with it: r 5.29(2). <u>If the corporate representative disbelieves or disagrees with the evidence, he/she must acknowledge it as information of the corporation and may then qualify the acknowledgement with further evidence</u>.**	Have not admitted or adopted the statements as those of the corporation – want to ensure you have regard to this case if you encounter situation where party is giving evidence and they have not done what r. 5.29 requires (acknowledging evidence forms some evidence of the corporation) Have to make acknowledgement, then qualify acknowledgment with further evidence if corporate rep disagrees with evidence.
[23] In this case, Ms. Kopala was questioned as a corporate witness, but not as the corporate representative chosen by CIPR; Jurshevski was the corporate representative. He was never asked to acknowledge the evidence given in questioning by Ms. Kopala, never given the opportunity to refuse to acknowledge it, or to acknowledge it with qualifications. To allow Ms. Kopala's evidence to be read in at trial in order to bind the corporate party, CIPR, in these circumstances is a clear breach of rule 5.29. Ms. Kopala's evidence on questioning was inadmissible under the *Rules of Court*.	Once they adopt the evidence, they are binding the corporation to that evidence.
[24] CDM argues that the court is granted the authority, pursuant to r 5.4(6)(a), to appoint an additional corporate representative if the representative appointed by the corporate	

party is not suitable. But that is not what was done here; the trial judge was not asked to, and did not, appoint an additional or a substitute corporate representative (we make no comment on whether such an application would have been successful if made at trial). He permitted CDM to read in portions of the questioning transcript of a corporate witness who was not the appointed corporate representative. That is not permitted by the rules.	**Note:** Good case that tells us what has to occur when a corporate rep is disagreeing with or disbelieving the evidence • **<u>If the corporate representative disbelieves or disagrees with the evidence, he/she must acknowledge it as information of the corporation and may then qualify the acknowledgement with further evidence</u>** **Exam:** Maybe 2 questions about this particular rule.
3. Infants, Persons of Unsound Mind See Alberta's Evidence Act, RSA 2000, c A-18, s19. **Evidence of child** 19**(1) In a legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given on oath if, in the opinion of the judge, justice or other presiding officer<u>, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.</u>** **(2) No case shall be decided on the evidence unless the evidence is corroborated by other material evidence**.	**Exam:** On final not going to ask specifically with any questions dealing with s. 19
4. The Crown See Alberta's *Proceedings Against the Crown Act*, RSA 2000, c P-25, s 11. **Documents and questioning** **11 In proceedings against the Crown, the *Alberta Rules of Court* as to production and inspection of records and questioning apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a record or to make answer to a question in questioning on the ground that the production of it or the answer would be injurious to the public interest.**	**Exam:** This is key – production of it or the record of the document, or the answer, **would be injurious to the public interest.**
5. Even If No Defence When questioning is to take place 5.20(1) Unless the parties otherwise agree, or the Court in exceptional circumstances otherwise orders, **a party may not question a party or person under this Division unless the**	This slide is really important – what happens when a party has not filed defence Threshold requirement

questioning party has served an affidavit of records on the party adverse in interest. **(2)** Subject to subrule (1), the questioning of a person is to take place as follows: (a) questioning by the plaintiff, at any time after (i) a statement of defence has been served on the plaintiff, or (ii) the time for serving the statement of defence has expired; (b) questioning by the defendant and every other party, at any time after a statement of defence has been served.	As a questioner (unless court otherwise orders or the parties otherwise agree), have to serve affidavit of records on the party adverse in interest – **precondition to question a party adverse in interest; not enough to file SoC or to receive SoD** **Exam:** Whole scenario in subrule (2) is subject to (1) precondition – on the final. Scope of the rule – talking about where a party – the limitation on the party's ability to proceed to questioning is subject to precondition (5.20(1)) which requires that questioning party serve affidavit of records on the party adverse in interest. Plaintiff files SOC, defendant files SOD, then 90 day rules triggers for plaintiff to serve affidavit of records, once this has happened, don't have to wait per se for the defence to serve their record within 60 days, this rule says, they have to have served Aff of Rec on party adverse in interest. Same with defence, can only question if served Aff of Rec. Subject to that change of records, sub 2 indicate there are other conditions of questioning but this is after subrule 1.
B. Undertakings	
***Psychologists Association of Alberta v Schepanovich*,** (1991) 45 CPC (2d) 108 (Alta CA) COTE JA (orally): An undertaking to the court, particularly to avoid answering compulsory questions, is not a one-sided matter. It is not like an offer in contracts law which can be revoked. **In my view there can be no such thing as unilateral revocation of an undertaking of that sort. The party can doubtless move the court to be relieved of his undertaking,** for example, on showing that **(a) it was given inadvertently,** **(b) (with proper evidence) that it should not have been given, and** **(c) that the other side has not been prejudiced, or offering to repair the prejudice**	**TO DISCHARGE YOURSELF FROM AN UNDERTAKING** Cote making the point in that if you want to get out of an undertaking that you have given, particularly to the court, you will have to demonstrate that you fall within one of these areas (a, b, and c). You have to comply with all elements of this in order to discharge yourself from undertaking to the court. This is why giving an undertaking is a serious matter – you are taking a promise to the other side to your best to answer the undertaking request.
410675 Alberta Ltd v Trail South Developments Inc, 2011 ABQB 151 [17] **Civil litigation turns on a fine balancing of the evidence. If an admission from discovery is not addressed by the plaintiff in chief it must be assumed that it was not an oversight and it is open to the defendant to also leave the admission unaddressed at trial and to rely on the favorable admission received through the discovery process. This is particularly so if the admission is material to the plaintiff's case.**	A few classes ago, he was giving us the example of how we use admissions from a witness in discovery to impeach them at trial when they give contradictory evidence on the same question they were asked years prior in discovery, they change their answer at trial, this case indicates using helpful evidence at trial. PLAINTIFF IN CHIEF = New wording is direct evidence (para 17). Could be read against if the admission is material to the plaintiff's case.

[18] However, often the matter is not this clear. **Usually the witness has made comments at trial around an issue related to a read-in sought by the defendant. The question will be whether the read-in adds to the answer given at trial or does it contradict the answer given at trial. Assuming the read-in adds to and contradicts the trial evidence then it may be admissible unless it amounts to a prior consistent statement.**	What your trying to do with a read in is present a prior inconsistent statement to the witness who is testifying on the state and you are so apprised of the questioning transcript, that when they give inconsistency on the stand, you are poised to locate the question in the transcript and be ready to present that contradictory evidence from discovery to execute your impeachment.
2. Implied Undertaking of Confidentiality ("implied undertaking")	Dense slides, but important issues.
Juman v Doucette**,** 2008 SCC 8 The implied undertaking rule BINNIE J:— ••• ***A. The Rationale for the Implied Undertaking*** Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, **there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.** [24] In the first place, pre-trial discovery is an <u>invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous</u>. At least one side in every lawsuit is a reluctant participant. **Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way <u>of imprisonment or fine</u> pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.**	**EXAM:** Tested on this last year on final in MC section – on our final – rule of implied undertaking

[25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest but the latter is nevertheless entitled to a measure of protection. <u>The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone</u>. Although the present case involves the issue of self incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v Baker*. **The general idea, metaphorically speaking, 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.** [26] **There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery.** This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 1986 CanLII 167 (BC CA), 5 B.C.L.R. (2d) 1 (C.A.), *per* Esson J.A. dissenting, at pp. 10-11. [27] **For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).** See *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.); *Lac d'Amiante*; *Hunt v. T& N plc*; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310 (QL), 2007 BCSC 866 (CanLII), at para. 21; *Rayman Investments and Management Inc. v. Canada Mortgage and Housing Corp.*, [2007] B.C.J. No. 628 (QL), 2007 BCSC 384 (CanLII); *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011 (CanLII); *Laxton Holdings Ltd. v. Madill*, 1987 CanLII 4867 (SK CA), [1987] 3 W.W.R. 570 (Sask. C.A.); *Blake v. Hudson's Bay Co.*, [1988] 1 W.W.R. 176 (Man. Q.B.); *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1990 CanLII 6665 (ON SC), 1 O.R. (3d) 649 (Gen. Div.); *Rocca Enterprises Ltd. v. University Press of New*	Key! **Exam:** On final, implied undertaking rule going to be on it. May have to address first and second rationale – what are they – in MC or SA scenario.

Brunswick Ltd. (1989), 103 N.B.R. (2d) 224 (Q.B.); *Eli Lilly and Co. v. Interpharm Inc.* (1993), 161 N.R. 137 (F.C.A.). A number of other decisions are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), vol. 2, at pp. 42-36 *et seq.*, and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96.	
***Hall v Willcox*,** 2011 ABQB 78 **Use of Transcripts** [47] As an initial comment, the examination of Mr. Willcox on December 21st should not have proceeded without leave of the Court under s. 69 of the *BIA*. Notwithstanding the examination had been ordered by Burrows J., Mr. Willcox's intervening bankruptcy had the effect of staying all proceedings relating to the judgment debt against Mr. Willcox. The examination had nothing to do with collection proceedings against Mr. Willcox's co-defendant. [48] Nevertheless, the examination proceeded as Mr. Willcox voluntarily appeared. [49] **Rule 5.33 codifies the common law implied undertaking of confidentiality on testimony and records produced under the compulsion of discovery processes in civil litigation. There is a difference between the confidentiality attaching to records which have been produced and answers to questioning under subdivision 3 of Part 5 of the Rules on the one hand, and cross-examination on an affidavit or statutory declaration, or for the purposes of an application under Part 6 of the Rules, on the other. <u>The common law implied undertaking applied to the affidavit of records, records produced, examinations for discovery, undertakings on examinations and records produced arising out of the discovery process. The implied undertaking did not apply to cross-examinations on affidavits, which were treated as being akin to testimony in court to which the open court principle applies.</u>** [50] **The new Rules did not change this difference. Because the transcript of Mr. Willcox is of a cross-examination on an affidavit or statutory declaration, the transcript is not subject to Rule 5.33. Even though the cross-examination went beyond questioning on the affidavit or statutory declaration and went into issues relevant to the contempt application, that questioning**	Take note of this para This case says a line should be drawn between the application of implied undertaking to cross examinations on Affidavit and questioning writ large as well as records being produced pursuant to document disclosure process in civil litigation. Implied undertaking wont apply to cross examination on affidavit.

would be akin to questioning under Rule 6.8 (like the old Rule 266 examination). Such questioning would not have been protected by the implied undertaking and is not now protected by R. 5.33. [51] **Thus I do not see that Ms. Hall needs court approval, or an order under R. 5.33, to allow use of the transcript in other proceedings**.	
3. Unavailable Witnesses	
Dame v Wong Estate**,** 2018 ABQB 486 RENKE J: **FACTS:** [1] Dr. Keet Peng Wong was a Defendant in this action. He was examined for discovery on June 9, 2009. Discovery was conducted under the rules of court then in force (AR 390/68, the Former Rules). [2] On November 1, 2010, the current *Alberta Rules of Court* (the New Rules) came into effect. **[3] Dr. Wong died on June 4, 2014.** **[4] The Defendants have applied under rule 8.14 to read into evidence part of Dr. Wong's discovery (the Proposed Evidence).** **[5] The Plaintiffs oppose this application on the following grounds: the Former Rules should apply; if the New Rules apply, the requirements for admissibility under r. 8.14 are not satisfied; and if those requirements are satisfied, the Court should exercise its discretion under r. 8.14 not to permit the Defendants to introduce the Proposed Evidence. Further, if the Court does admit the Proposed Evidence, this evidence may only be used respecting issues involving Dr. Wong and not respecting issues involving Dr. Phiri, another Defendant in this action.** ***Presumptive Application of the New Rules*** [6] Under r. 15.2(1) of the New Rules, "[e]xcept as otherwise provided in an enactment, by this Part or by an order under rule 15.6, these rules apply to every existing proceeding." [7] Under r. 15.1(a), "existing proceeding" means a court proceeding commenced but not concluded under the former rules. [8] Rule 15.2 confirms the common law presumption that changes to procedural rules apply to litigation that is "in the system" at the time of the change. Professor Ruth Sullivan wrote as follows	

in *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis: Markham, Ontario, 2014) at §25.107: **§25.107 *Procedural legislation is presumed to have immediate application.* There is a common law presumption that procedural legislation applies immediately to both pending and future facts. This presumption is formulated in a variety of ways: (1) persons do not have a vested right in procedure; (2) the effect of a procedural change is deemed to be beneficial for all; (3) procedural provisions are an exception to the presumption against retrospectivity; and (4) procedural provisions are ordinarily intended to have an immediate effect.**See also *R v Dineley*, 2012 SCC 58 (CanLII) at para 47. **[9] Hence, as a starting point, r. 8.14 is presumed to apply to this proceeding and the Defendants' application is properly under this rule.** [13] **There is no doubt about the "application or operation" of the New Rules to the current proceeding. If the New Rules apply, the application for admissibility is properly under r. 8.14. Neither is there any "difficulty" or "impossibility" that would arise through applying r. 8.14. It may or may not permit the admission of the Proposed Evidence. That is all. This operation or application would not result in any absurd or ridiculous result:** see ***Phillips v Whyew***, 2014 ABQB 495, Wacowich M at para 34; ***Park Avenue Flooring Inc v EllisDon Construction Services Inc***, 2016 ABCA 211 (CanLII) at para 11. [14] **Insofar as there is a "doubt" about the application of r. 8.14, it concerns whether an "injustice" or an "unreasonable result" would arise by applying r. 8.14 rather than by relying on the Former Rules and the authoritative interpretations of those rules.** [32] **It is important to bear in mind that neither a Plaintiff nor a Defendant has a legally-protected interest in suppressing admissible evidence.** Recognizing such an interest would run athwart the truth-seeking functions of trials: *R v Grant*, 2015 SCC 9 (CanLII), Karakatsanis J at para 18; *R v Corbett*, 1988 CanLII 80 (SCC), [1988] 1 SCR 670, Dickson CJC at 691. [33] **Rule 8.14 can be understood as balancing the interests of examining and examined parties. The adverse impact on examining parties is acknowledged; but as against that, reading-in by the examined party is permitted only if it is necessary, only if it is**	Finds the application was properly brought under R 8.14. **Exam:** On the final, might see a question about what are the aspects/ what is the scope of type of evidence permitted to be adduced to the court pursuant to R 8.14. → What elements comprise this type of evidence under R. 8.14 is in this para 33

appropriate, and only to the extent required to ensure fairness for the examined party – r. 8.14 countenances only minimal impairment of the examining party's interests.

[34] An additional argument might be made that the amendment to the admissibility of discovery or questioning evidence in r. 8.14 is in line with developments in law of hearsay: ***Whitecourt General Hospital***; ***Dillabough v Johnson***, 2014 MBQB 186 (CanLII) at para 14. In my opinion, however, the issues at stake in the present litigation may be decided under the rules themselves without moving farther afield into the general law of evidence.

[35] **I conclude, then, that in answer to the question "Would applying r. 8.14 work an injustice respecting discoveries taken under the Former Rules?", the answer is No.**

[36] **In answer to the question, "Do the Former Rules or the New Rules govern the admissibility of the Proposed Evidence?", the answer is that the New Rules apply. Rule 8.14 applies respecting examinations for discovery made under the Former Rules.**

Are portions of Dr. Wong's discovery admissible under r. 8.14?

[37] The Plaintiffs read into evidence part of the evidence given at examinations for discovery of Dr. Wong as set out in Exhibit 24.

[38] The Defendants seek to read into evidence part of the evidence given at examinations for discovery of Dr. Wong, comprising about 5 pages, set out in *Voir Dire* Exhibit 1 (VD 1). This evidence includes passages that the Plaintiffs contended were properly connected to the passages sought to be tendered by the Defendants. The Defendants agreed to include these connected passages in VD 1.

[39] The Proposed Evidence relates, first, to two documents that formed part of the Agreed Exhibits for the trial, document 43, a discharge summary, and document 50, an ultrasound report. These are important documents in the litigation. Counsel for the Plaintiffs has emphasized the particular importance of Document 50. Counsel for the Defendants submitted that the Proposed Evidence is very important to explain an alleged "disparity" or "discrepancy" between the ultrasound record and the discharge summary. The Proposed Evidence would be relied on to provide an explanation that otherwise would not be in evidence. The passages on pp. 44.13 – 47.1 concern documents 43 and 50 and particularly the notation on document 50 that the baby was "small for dates."

[40] Second, the Proposed Evidence concerns Dr. Wong's role in covering for Dr. Phiri when Dr. Phiri was away. The passages on pp. 48.6 – 49.19 concern Dr. Wong's role when Dr. Phiri was away**.**

Issue Before the Court

[41] The issue is whether the Proposed Evidence should be admitted under r. 8.14.

[42] Rule 8.14 provides as follows:

8.14(1) Subject to subrules (2) and (3), a party may, with the judge's permission, read into evidence all or part of the evidence given at questioning conducted under Part 5 as the evidence of the person questioned, to the extent that it would be admissible if the person were giving evidence in Court, if the person questioned

(a) is dead,

(b) is unable to give evidence before the Court because of accident, ill health or disability,

(c) refuses to take an oath or to answer proper questions, or

(d) for any other sufficient reason cannot be required to attend at the trial.

(2) Before deciding whether to give permission, the judge must consider

(a) the general principle that evidence should be presented orally in court,

(b) how thoroughly the person was questioned under Part 5, and

(c) any other appropriate factor.

(3) The judge may grant permission under this rule only if

(a) the fact or facts sought to be proved through the questioning under Part 5 are important aspects of the party's case,

(b) the fact or facts cannot be proved in any other manner, and

(c) the permission is restricted to the portion or portions of the questioning that relate to the fact or facts.

1. Non-contentious Matters

[43] **Two aspects of the application of r. 8.14 are not in dispute. First, Dr. Wong is dead, so the para (a) condition for reading-in under r. 8.14(1) is satisfied. Second, if I were to grant permission to read-in, the Proposed Evidence is restricted to the portion of the examination for discovery relating to the facts in**

In a way, asking for guidance on how to proceed.

issue, as contemplated by r. 8.14(3)(c). A "bolus" introduction of Dr. Wong's evidence is not proposed: see *Whitecourt General Hospital* at para 38.

2. Preclusion on the Basis of Inadmissibility: Does the Proposed Evidence contain Inadmissible Information?

[44] **Rule 8.14 authorizes the admissibility of a source of evidence, the transcript of questioning or examination for discovery. It does not cure any inadmissibility of the contents of the transcript. That is, permitting reading in does not make admissible what would not have been admissible had the proposed evidence been tendered in testimony. Under r. 8.14(1), evidence given at questioning is only admissible "to the extent that it would be admissible if the person were giving evidence in Court."**

[45] Is the Proposed Evidence precluded from admissibility under r. 8.14 because testimony with the same content would be inadmissible? (See ***Dillabough v Johnson*** at paras 18 – 21.)

[46] **In my opinion, the Proposed Evidence would not be inadmissible if tendered through testimony. <u>Were Dr. Wong alive, he could have testified to the information disclosed in the Proposed Evidence.</u>**

3. Further Aspects of Necessity

[51] **The necessity criterion is satisfied in part because Dr. Wong is deceased. Again, r. 8.14(1)(a) is satisfied. Physical unavailability, however, does not exhaust the scope of the necessity criterion. Subrule 8.14(3) may be understood to address further aspects of necessity –**

(3) The judge may grant permission under this rule only if

(a) the fact or facts sought to be proved through the questioning under Part 5 are important aspects of the party's case,

(b) the fact or facts cannot be proved in any other manner,

(c) the permission is restricted to the portion or portions of the questioning that relate to the fact or facts.

The Plaintiffs referred to these conditions as "mandatory conditions" for reading-in under r. 8.14 and I agree with that characterization. As indicated above, para (c) is not at issue.

All in regards to judge's exercise of discretion to grant permission to use of this kind of evidence under necessity criterion – know this slide for final (3)(a, b, c).

Exam: For the final, know the mandatory conditions

[52] **Dr. Wong has been sued for medical negligence. L.L. has suffered a devasting injury. Dr. Wong has no voice now on whether he is responsible. Again, Plaintiffs' counsel has emphasized the importance of document 50. The Proposed Evidence contextualizes Dr. Wong's words on that document. Dr. Wong covered during Dr. Phiri's absence during a critical time. Dr. Wong's words address his role during that time. In my opinion, the Proposed Evidence does address important aspects of the Defendants' case. Put another way, reading-in is necessary in the sense that it supports Dr. Wong's right to make full answer and defence to the claims made against him.**	This is an important statement from the court that this kind of reading in is necessary, because in certain circumstances, it supports the defendant's right to make full answer and defence, particularly if the plaintiff is no longer alive.
[53] Plaintiffs' counsel has contended that there is no "disparity" or "discrepancy" that needs to be addressed through the Proposed Evidence. No explanation derived from the Proposed Evidence is necessary.	
[54] **I am not deciding at this point whether the Defendants shall succeed in establishing a disparity or discrepancy or in providing an explanation for the disparity or discrepancy. I am only deciding at this point that there is a live issue respecting the relationship of documents 43 and 50 and the Proposed Evidence. <u>The Defendants should not have this live issue, an issue that may well have an important bearing on Dr. Wong's liability,</u> summarily taken away from them. <u>At this point, only admissibility is at stake.</u>**	Gatekeeper – Ranke (underlined)
[55] **Whether or not there is in fact a disparity or discrepancy and an explanation and what the impact of findings on these points should be are, in my opinion, matters for consideration after final argument.**	
Could the facts addressed in the Proposed Evidence have been proved in any other manner? [58] Dr. Wong practiced until February 2014. On or about February 10, 2014, he was admitted to hospital. He was diagnosed with cancer. He remained in hospital for most of the rest of his life. He learned he was dying in April, 2014. He died on June 4, 2014.	Para 58 answers
[59] **The aspect of necessity at work in r. 8.14(3)(b) is whether the facts may only be proved through the Proposed Evidence or whether other sources of evidence (presumably of similar value) are available; if other another source of evidence is available, the introduction of the Proposed Evidence would not be necessary.**	
[60] **One way to put the problem under r. 8.14(3)(b) might be to ask whether the Defendants made all reasonable efforts to secure the evidence of the declarant in a manner that also**	

preserves the rights of the other party: *R v Khelawon*, 2006 SCC 57 (CanLII), Charron J at para 104; *R v Baldree*, 2013 SCC 35 (CanLII), Fish J para 68. [62] **On the facts as set out in Defendants' counsel's representations, the seriousness of Dr. Wong's condition was not manifest until some point in April 2014. He died June 4, 2014. There was, then, only about a month following the terminal diagnosis and death that would have permitted an examination on an urgent basis. I observe that the time from the terminal diagnosis until death would not reasonably have supported the taking of *de bene esse* evidence.** [63] **If the prospect of a *de bene esse* examination should have been considered after the cancer diagnosis in February, 2014, that left less than 4 months to complete the examination.** [64] There was no evidence about the state of Dr. Wong's physical or psychological health as he approached death, so I cannot draw a conclusion about what would have been the last practical date for such an examination – that date would likely have passed some time before June 4, but how much before I cannot say. An examination was no doubt possible sometime after February 4 and before June 4, but when in that period I cannot say. [66] **I note that r. 8.14(3)(b) is in the present tense ("cannot be proved") and in fact there is now no source of evidence other than the Proposed Evidence addressing the matters in the Proposed Evidence. The language of r. 8.14(3)(b) therefore suggests that the r. 8.14 decision is to be made given the evidence that does exist not based on evidence that might have existed**. Justice Graesser commented in ***Brennenstuhl Estate v Trynchy***, 2007 ABQB 647 (CanLII) at para 36 that "[w]here the witness has died without being examined *de bene esse*, for example, resort to prior statements or testimony is clearly necessary, as that witness's evidence cannot be obtained in any other way." This, I note, was not a r. 8.14 case and r. 8.14 would have permitted consideration of other currently available evidence. [67] **I find that the facts addressed in the Proposed Evidence cannot be proved in any other manner now.** [68] **I find that an examination *de bene esse* could not have reasonably been conducted after Dr. Wong was notified of his imminent death.**	**Exam:** *De bene esse*– take something for what it is worth (bonus on the exam if not in MC)

[69] **It is possible that an examination *de bene esse* could have been conducted after Dr. Wong first went to hospital. The evidence permits no definite conclusions. The Defendants, though, bear the burden of proof on this issue as proponents of the admissibility of the Proposed Evidence under r. 8.14.**

[70] **Nonetheless, no examination *de bene esse* occurred. The test under r. 8.14(3)(b) is not whether the evidence could have been gathered in some other way, but whether the facts "cannot be proved in some other manner." In this case, the relevant facts cannot be proved except through the Proposed Evidence.**

[71] **The Defendants have satisfied the mandatory conditions of r. 8.14(3).**

[72] The failure to attend to an examination under r. 6.21 is relevant, nonetheless, under r. 8.14(2)(c). What "could have been" may be a consideration under r. 8.14(2)(c) ("any other appropriate factor").

Factors Bearing on the Discretion to Permit Discovery Evidence to be Read-In

[73] **Satisfaction of the rr. 8.14(1) and (3) conditions does not require that the Proposed Evidence be read into evidence. Factors must also be considered under r. 8.14(2) to guide the discretionary decision of whether to permit the Proposed Evidence to be read into evidence.**

[74] Under r. 8.14(2),

> (2) Before deciding whether to give permission [to read into evidence all or part of evidence given at questioning], the judge must consider
>
> (a) the general principle that evidence should be presented orally in court,
>
> (b) how thoroughly the person was questioned under Part 5, and
>
> (c) any other appropriate factor.

(a) Principle of Orality

[75] **Of course, the fact is that Dr. Wong cannot testify. The principle of orality is necessarily limited by death as a foundation for reading in discovery or questioning evidence as contemplated by r. 8.14.**

Exam: Be aware of 8.14(1) and 8.14(3) for exam

[76] **It is true that, historically, procedure in civil trials has been shaped, at least to a significant degree, by the principle of orality**. See Sir Jack I.H. Jacob, *The Fabric of English Civil Justice* (Agincourt, Ontario: Carswell, 1987) 19 – 21. **However, as Sir Jack has noted, modern civil procedure increasingly relies on various forms of records, whether in hard copy or now in e-form. Indeed, this trial began with the filing of the Agreed Exhibits, a big book of documents.**

[77] More importantly, the Plaintiffs have relied on documentary records of oral examinations that have been read-in. What the Defendants seek to have read-in is as documentary and as oral as the Plaintiffs' read-ins.

[78] **I do not dispute that it would have been preferable to have Dr. Wong's testimony. The principle of orality, though, should no more serve as a barrier to the admission of his examination responses when tendered by the Defendants than when tendered by the Plaintiffs.**

[79] **The principle of orality does not preclude admissibility of the Proposed Evidence.**

(b) Thoroughness of Questioning

[80] The Proposed Evidence comprises Dr. Wong's answers to Plaintiffs' counsel's questions. **The Proposed Evidence does contain connected evidence added at the urging of the Plaintiffs. In my opinion, the questioning was thorough, given the parts of the discovery put before me in the *voir dire*.**

[81] **I recognize that examination for discovery cannot delve into issues of credibility alone, as could cross-examination at trial**: ***Otis Canada Inc v Condominium Plan 782-0751***, 1992 CarswellAlta 351, 126 AR 303, Veit J at para 14 (CarswellAlta); ***Alberta (Attorney General) v Alberta Power (2000) Ltd***, 2017 ABQB 195 (CanLII), Wittmann CJQB at para 24.

[82] However, as r. 8.14 contemplates the admission of questioning evidence and questioning does not extend to credibility issues, the "thoroughness" contemplated by r. 8.14 cannot include questioning relating to credibility.

[83] The "thoroughness of questioning" factor does not weigh against the admissibility of the Proposed Evidence

5. Conclusion

[95] Therefore, **given my findings that the Proposed Evidence satisfies the condition in r. 8.14(1)(a) and the mandatory conditions of r. 8.14(3) and that the Proposed Evidence does not**

contain otherwise inadmissible representations, and having considered the factors set out in r. 8.14(2), I grant permission to read the Proposed Evidence into evidence. [96] Given this conclusion, it is not necessary to embark on a further discussion of whether the Proposed Evidence would be admissible under the principled exception to the hearsay rule. **I will simply observe that r. 8.14 is consistent with the evolution of the hearsay rules. Generally, the hearsay rules have evolved to broaden the scope of admissible evidence, thereby enhancing the truth-seeking purpose of trial.** **C. How may the Proposed Evidence be Used?** **[97] Rule 8.14(1) provides that evidence of the person questioned is admissible "to the extent that it would be admissible if the person were giving evidence in Court." If Dr. Wong were to have testified, his evidence would have been evidence "at large." The evidence may certainly be used for or against him. The evidence would remain governed by other admissibility rules, including the rule that evidence that amounts to an admission is only evidence against the party making the admission, not a co-defendant. Of course, not all evidence adduced by a party is characterizable as an admission.** **[98] The whole of the Proposed Evidence, including the connected evidence that forms part of that evidence, is evidence "at large" and not subject to the restrictions of r. 5.31. See *Whitecourt General Hospital* at para 38.** **[99] The evidence admissible under r. 8.14 is just that – evidence. It has no special or privileged status, reliability, or weight. It must be considered along with all the other evidence in the case in determining the facts.** [100] As indicated above, in assessing the weight of the Proposed Evidence, the absence of cross-examination of Dr. Wong must be taken into account: ***Dillabough v Johnson*** at para 30; ***Toronto Dominion Bank v Leigh Instruments Ltd (Trustee of)***, 1998 CarswellOnt 718 at para 6 (CJ); ***Aujla v Hayes***, 1997 CanLII 4459 (ON CA), 1997 CarswellOnt 1824, 100 OAC 129 at paras 19, 22, 23. **[101] Thus, the Proposed Evidence is admissible and it may be used as Dr. Wong's testimony respecting the matters contained in the Proposed Evidence could have been used.**	Evolution of how R 8.14 have been judicially interpreted – understand Wong **Exam:** Highlighted/bolded know for the exam
What is "de bene esse"? **ANSWER: To take something for what it is worth**	

CHAPTER 19: ADMISSIONS	
Division 5 **Facilitating Proceedings – R. 6.37(1)** **Notice to admit** 6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, summary trial or trial, either or both of the following: (a) any fact stated in the notice, including any fact in respect of a record; (b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based. (2) A copy of the notice must be served on each of the other parties. (3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that (a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or (b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part, (i) privileged, or (ii) irrelevant, improper or unnecessary. (4) A copy of the statement must be served on each of the other parties. (5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder (6) A party may amend or withdraw an admission or denial made under this rule only (a) with the Court's permission, or (b) by agreement of the parties. (7) An admission under this rule is made only for the specific purpose for which it is made and may not be used as an admission against the party making it on any other occasion, or in favour of a person other than the person requesting the admission, without the agreement of the party making the admission.	Rule 6.37 not on final

(8) On application, the Court may set aside a notice to admit.	

Stringer v Empire Life Insurance Company**,** 2015 ABCA 349 The issue on appeal is whether the respondents should be permitted to withdraw certain deemed admissions that arose under the *Rules of Court* when they failed to reply in a timely way to a Notice to Admit Facts. *Paperny, Slatter, Rowbotham JJA:* **Facts and Proceedings Leading to this Appeal** [2] The underlying action was for the proceeds of a life insurance policy. The appellant insurance company has refused to pay the proceeds on the ground that the policy was obtained through material misrepresentations. [3] The trial of the action was scheduled to commence on December 9, 2013, based on trial readiness forms filed in August 2013. On October 2, 2013 (about 10 weeks before the scheduled trial), the appellant served a Notice to Admit Facts/Notice to Admit Opinion on the respondents. The Notice to Admit consisted of 124 paragraphs over 15 pages, plus over 200 pages of attached documents. Under R. 6.37(3) the respondents had 20 days (until October 22, 2013) to respond, failing which the facts would be "presumed to be admitted". [4] On October 18, 2013, counsel for the respondents wrote requesting an extension of time to reply, because counsel would be out of the country until November 4, 2013. That letter was received on October 21, and counsel for the appellant replied on October 22, pointing out that prejudice might arise because the trial was to commence in a few weeks. The reply did not expressly deny or agree to the request for an extension. The Reply to the Notice was ultimately received by the appellant on November 11, 2013, 20 days late. That Reply made 29 admissions, but denied or declined to admit many other parts of the Notice to Admit. [5] Three days before the scheduled trial, the parties appeared before the assigned trial judge, and the respondents advised that they wished to withdraw the deemed admissions. Rule 6.37(6) provides that admissions can only be withdrawn by consent, or with the Court's permission. The trial judge ruled that an application for that relief was required, and he adjourned the trial.	Already say in previous slide that fact is admitted if not within 20 days a denial is submitted **Certificate of Readiness Form**

The trial judge took the opportunity to conduct a judicial dispute resolution session with the parties, but it was unsuccessful. [6] In May 2014, the respondents brought an application before a Master for leave to withdraw the deemed admissions. The Master noted that there were approximately 100 deemed admissions in dispute. The Reply had refuted or refused to agree with them, but the respondents had not filed any evidence to show that the admissions were untrue. **The Master ruled that it was incumbent on a party wishing to withdraw an admission to provide at least some evidence to demonstrate that there was a reason to send the disputed facts to trial. He therefore denied the application.** [7] **The respondents appealed the Master's decision to a judge of the Court of Queen's Bench. Having lost on the basis that they had not filed any evidence, they took advantage of the opportunity under R. 6.14(3) to file new evidence in support of the appeal. The respondents also raised a new argument. They argued that the Notice to Admit had impermissibly been filed after the appellant had certified that it was ready for trial, and they accordingly applied for an order under R. 6.37(8) to have the Notice set aside.** [8] The chambers judge declined to set aside the Notice, but he did grant the application to withdraw the remaining disputed deemed admissions. **He identified four elements requiring consideration from *Dwyer v Fox*** (1996), 1996 ABCA 95 (CanLII), 181 AR 223, 47 CPC (3d) 342 (CA): **(a) whether the person who made the admission, whether explicit or deemed, has demonstrated to the satisfaction of the judge that the evidence available about the facts in question is such that a determination of the truth at a trial is the only satisfactory means to settle the issue (para. 16);** **(b) whether the decision to admit was conscious and deliberate and without reasonable excuse (para. 22);** **(c) whether the withdrawal of the admission would cause substantial prejudice not compensable in costs (para. 17); and** **(d) in the case of intentional admissions, whether a penalty should be applied (para. 20).** Conclusion: The chambers judge concluded that the admissions here were not made deliberately. While not every disputed admission had been directly contradicted by evidence, the trial judge paraphrased ***Dwyer v Fox*** and determined that "a determination of the truth at trial is	What is the standard of review – correctness on all issues Remember the section about appeals from masters order – **there is a standard of review of correctness for all issues arising from appeals of masters order to QB judge,** it is an appeal de novo. **Exam:** Know *Dwyer v Fox* 4 **elements required to be considered when bringing an application to withdraw a deemed admission**

the only satisfactory way to settle the issue". He reserved the appellant's right to make submissions after trial about costs of the refused admissions. The Court of Appeal's Observations <u>Setting Aside Admissions</u> [9] **Our system of civil procedure is designed to narrow the issues to determine the true nature of the dispute: R. 1.2(2)(a).** This facilitates settlement, and if settlement is not possible it shortens the eventual trial. The system encourages admissions at many stages: in the pleadings, during the questioning of adverse parties, and by more formal admissions. [10] **Rule 6.37 allows any party to state facts that it believes are not truly in dispute, and to call on the other party to admit those facts. The responding party has 20 days to reply to the Notice to Admit, or to indicate, in substance, why the facts are still in dispute. If no response is received within 20 days, the facts are deemed to be admitted. Under R. 10.33(2)(b) costs can be imposed on a party that unreasonably refuses to admit facts.** [11] **Admissions of fact should not lightly be set aside, as that can cause prejudice to a party who has relied on those admissions, and it disrupts the natural flow of the proceedings toward settlement or trial.** On the other hand, parties would be discouraged from making admissions if, once made, there could never be any retreat**. A balancing of these competing objectives is required, and the Court does have the ability to permit a litigant to withdraw an admission.** The Court of Appeal's Observations Overlapping Factors [12] **The case law confirms that the court will consider a number of overlapping factors in deciding whether permitting withdrawal of an admission is overall in the interests of justice**: **(a) Was the admission intentionally made, or was it inadvertently made, or inadvertently permitted to arise by operation of the Rules;** **(b) What is the explanation for permitting the admission to arise, or for having made an admission which is now said to be inaccurate;** **(c) If there has been any delay in moving to withdraw the admission, what is the explanation for that delay;** **(d) Has the applicant provided sufficient evidence to demonstrate that the admitted fact may not be true, and that there is a genuine issue about an important enough fact to warrant sending the disputed fact to trial;**	References to foundational rule of court. (D) Language is to the effect that there is a genuine issue, important enough to warrant sending the disputed fact to trial (**summary judgment and dismissal type language**).

(e) Would the withdrawal of the admission cause prejudice to the other party that cannot be remedied by costs or other terms: R. 1.5(4). **None of these considerations is overriding or determinative of the issue**: *Hamilton v Ahmed* (1999), 28 CPC (4th) 139 at para. 11 (BC Master). **The relevant factors must be balanced, and, in the end, the judge or Master has a discretion whether to allow withdrawal of the admission**: *Goundar v Ngyuen*, 2013 BCCA 251 (CanLII) at para. 28, 45 BCLR (5th) 68, 37 CPC (7th) 259. Where withdrawal of an admission is permitted, it will generally be done on terms as to costs or otherwise. [13] *How the Admission Arose* **If an admission was intentionally made, the court will inquire into whether the admission, or the proposed withdrawal, are for tactical reasons.** Those circumstances call for special scrutiny. In this case, the chambers judge found the admissions were not intentionally made. They were deemed to have been made under the Rules due to failure to respond in time. It would obviously have been preferable for the respondents to have asked a Master or judge to extend the time to reply. It was clear, however, that the appellant knew that the respondents always intended to respond in substance and deny many of the posited facts. [14] *The Explanation for the Admission*. The explanation for allowing the admissions to arise was that counsel was out of the country and was briefly ill on his return. **The short timelines, and some lack of clarity in the communications between counsel explain how the admissions came to arise. There is also some reason to question why the requested extension was not consented to.** [15] *Delay*. While it was immediately clear that the respondents would be seeking to withdraw the deemed admissions, there was some delay before the application to withdraw was heard. The issue was initially raised with the trial judge three days before the trial was scheduled to begin, which was about three weeks after the late Reply was served, but it is unclear what communication there was between counsel during that time. **The trial was adjourned because of this issue, and the parties then attempted to resolve the dispute through judicial dispute resolution. The delay here is not inordinate.** [16] *The Supporting Evidence*. The main point of contention is whether the respondents brought forward sufficient evidence to demonstrate that some of the facts	**Note:** 5 factors to consider in deciding whether permitting withdrawal of admission

deemed to be admitted were untrue, and that those facts should be proven at the trial. **The Master had correctly dismissed the initial application, when no evidence had been brought forward to dispute the admitted facts. The appellant does not suggest that a party seeking to withdraw an admission must prove positively that an admitted fact is inaccurate. Rather, the appellant argues that the burden is analogous to that of a party seeking to avoid summary judgment: there must be sufficient evidence to show that there is some genuine dispute about the fact, and that a trial is the way to resolve that dispute**.

[17] As noted, the respondents eventually admitted some of the facts unconditionally, admitted that some medical records could be filed as evidence, and admitted other facts with qualifications. They refused to admit other facts, generally for specified reasons. **With respect to the disputed facts, the respondents did not always provide direct evidence to dispute them, and in some instances merely stated that they did not know whether they were true or not. The appellant argues that there must be direct evidence disputing every deemed admission before the admission can be set aside. It argues that the chambers judge was required to examine the evidence brought forward on each admission and determine if the underlying fact was untrue, or at least doubtful. It challenges the "global" approach taken by the chambers judge, particularly with respect to denials that could not be within the individual respondent's knowledge, and with respect to facts where the respondent merely deposed that the fact was outside his knowledge.**

[18] The nature of the facts that are in dispute is relevant to determining whether the evidence brought forward is sufficient to raise a genuine issue requiring a trial. The chambers judge characterized the asserted facts as follows:
The notice is lengthy and detailed. It is not restricted to what might be called bare facts. It selects passages from various documents, many of them medical; makes characterizations that must be highly contentious, such as that Ms. Heibert misrepresented her condition and family history in many ways; and asks for conclusions on matters that, at least from the Plaintiffs' perspective, must be speculative and again contentious (for example, asking for an admission that Ms. Heibert was uninsurable or that coverage would have been declined on certain assumed facts).

Some of the requested admissions are remarkable. For example, in paragraph 115 the Plaintiffs are called upon to admit that if Heibert had accurately represented her medical history on the application, coverage by Empire Life would have been denied, or rated requiring additional premiums. It could not seriously be expected that statements of this nature would be admitted. To do so, would be tantamount to throwing the action away.
Thus, while there are some basic facts for which admission is requested, much of the notice goes much further. That does not necessarily make it bad, but it is relevant in answering the question of whether it is proper for these matters to be determined at trial. . . .

It is clear that the asserted facts cover the entire spectrum from bare statements of empirical fact, inferences to be drawn from the facts, some expert opinions, mixed questions of fact and law (including whether certain documents were admissible in evidence), and actual admissions on components of liability. **The nature of the "facts" is relevant to determining whether withdrawal of the admissions should be permitted, and the type of evidence that the court might expect will vary depending on their characterization.**

This reasoning, however, contains no error of principle: it does not consider any irrelevant factors, nor ignore any relevant factors, and it properly analyses whether the disputed facts should be sent to trial. **An application to withdraw admissions should not be turned into a form of partial summary judgment, nor into a substitute for the trial itself: *Goundar v Ngyuen* at para. 31. It was within the mandate of the chambers judge to determine that all of the related and overlapping facts surrounding the core issue of liability should go to trial. No reviewable error has been disclosed in the chambers judge's approach to the evidence.**

[20] *Prejudice*. The appellant argues that the chambers judge failed to consider the prejudice that would arise from allowing a withdrawal of the admissions. An extension of time to reply was originally denied by the appellant's counsel because of prejudice that would arise because of the impending trial. Counsel's response included that, for example, if the respondents ultimately denied admissibility of the medical records: "That makes for a very compressed time to arrange for live witnesses to establish treatment records . . .". **If, 10 weeks before the scheduled trial, the appellant did not have the necessary witnesses lined up, that cannot fairly be laid at the feet of the respondents. At that point**

the appellant should have been able to proceed whether or not the admissions were made. The appellant had, after all, certified that it was ready for trial, and that "no other pre-trial steps are required": R. 8.4(3)(i). The short requested extension would not have exacerbated the appellant's position. In the end, the trial was adjourned, so this form of prejudice never arose.

[24] *Terms to Remedy Prejudice*. The appellant argues that even if withdrawal of the admissions should be allowed, the trial judge erred in not awarding thrown away costs. **Generally speaking, a party seeking to withdraw admissions, or to have any other procedural irregularity overlooked, should be required to pay wasted costs. If any prejudice has resulted from the irregularity, the court should impose terms to address that prejudice: R. 1.5(4).**

[25] The chambers judge left it to the trial judge to determine if any of the withdrawn admissions should in fact have been admitted. After having heard all of the evidence, the trial judge will be in an excellent position to determine whether some of the withdrawn admissions (especially those respecting expert opinions) were never really in dispute, and how much trial time was wasted on them. **Under R. 10.33(2)(b) the trial judge should always consider whether a party unreasonably refused to make admissions, but particularly when one party has successfully applied to withdraw deemed admissions.**

[28] As the chambers judge pointed out, the issue of thrown away costs was not clear cut. Initially, there was some dispute as to whether this was an application to withdraw admissions, or an application to extend the time to serve the late Reply. If it is viewed as an application to withdraw admissions, one can argue that the trial had to be adjourned because of it. However, the application takes on a different perspective if it is viewed as one to extend time. From that perspective, the respondents did not fail to respond to the Notice to Admit, they were merely late in doing so. The appellant knew well within the time limit that at least some of the facts were going to be denied. The entire problem was exacerbated by the service of the Notice to Admit on the eve of trial. In all the circumstances, it was not entirely reasonable for the appellant to think that the trial was going to proceed as scheduled based on the deemed admissions.

[**29]** **Chambers judges have a significant discretion in awarding costs. While it is unusual not to award costs when an irregularity is cured, in the particular circumstances of this case it**

Thrown away costs – where a respondent on a court application is forced to have to show up to court to respond to the application where there is really no contest over the fact that the position of the applicant is meritless, yet the applicant is proceeding with the hearing on notice to the respondent and the respondent is forced to show up/submit response affidavit. Assuming respondent is correct, respondent probably asking for thrown away costs (can be solicitor client costs).

cannot be said that the chambers judge exercised the discretion unreasonably. [30] The appellant also points to the statement in ***Dwyer v Fox*** at para. 20 that ". . . where the failure to deny is not merely inadvertent, the party must be subject to a substantial and exemplary penalty". Since the failure to deny in this case was not intentional, this comment does not apply. While R. 1.5(4)(c) does contemplate appropriate sanctions, that remedy would generally be invoked in circumstances involving misconduct beyond mere inadvertence. <u>Conclusion</u> [31] As pronounced after the oral argument, the appeal is dismissed. [32**]** **After the result was announced, counsel advised that a formal offer had been made to resolve the appeal: the respondents would pay costs of $1,000, and the appeal would be abandoned. A more favourable result having been achieved, the respondents are entitled to costs of the appeal (on column 4), doubled after the offer**.	This is related to formal offers – offer was beaten on appeal and because of that respondents are entitled to double the costs after offer was served.
CHAPTER 20: EXPERT REPORTS	
Division 2 **Experts and Expert Reports** **Rule 5.34 – Service of Expert's Report** 5.34 **An expert's report must** **(a) be in Form 25 and contain the information required by the form, or any modification agreed on by the parties, and** **(b) be served in the sequence required by rule 5.35.**	The expert is opining on the ultimate issue – which often times is causation – what is the cause of XYZ? Talks about the fact that the report has to be in Form 25. When you attach the report, have to attached Expert CV. **Expert is a friend of the court**
Rule 5.35 – Sequence of exchange of experts' reports 5.35**(1)** If a party intends to use the evidence of an expert at trial, the expert's report must be served in the sequence described in subrule (2). **(2) Unless the parties otherwise agree or the Court otherwise orders, experts' reports on which a party intends to rely must be served in the following sequence:** **(a) the party who bears the primary onus of proof must serve on each of the other parties the report of that party's expert;**	In most cases, the parties that goes first and bears the onus of proof is the plaintiff – plaintiff serves expert report first, then triggers the obligation of the other side to serve a rebuttal report. They can address issues raised in original report proffered by the plaintiff but also can raise issues not in the plaintiff report. Plaintiff gets the last right of reply. They can proffer a sur-rebuttal report that addresses new issues in the rebuttal report offered by the defense. **These are the 3 events that happen sequentially in any piece of litigation – no timelines on when a party has to serve an expert repo**rt – this is purposeful – **Legislature intended to not require parties to extend timelines on their expert reports**

(b) the other party or parties must serve their expert's rebuttal report, if any, and may include in the report issues not raised in the initial expert's report; **(c) the party who served the initial expert's report may serve a sur-rebuttal expert's report that responds only to the new issues raised in the rebuttal report.**	May have request for costs if served day before trial
Rule 5.36(1) – Objection to expert's report **5.36(1)** A party who receives an expert's report must notify the party serving the report of **(a) any objection to the admissibility of the expert's report that the party receiving the report intends to raise at trial, and** **(b) the reasons for the objection** **(2)** No objection to the admissibility of an expert's report is permitted at trial unless (a) reasonable notice of the objection was given to the other party, or (b) the Court permits the objection to be made.	Have to state your reasons for the objection
Rule 5.37 – Questioning experts before trial 5.37**(1)** The parties may agree, or in exceptional circumstances the Court may direct, that an expert be questioned by any party adverse in interest to the party proposing to call the expert witness at trial. **(2) The questioning must be limited to the expert's report.** **(3)** The Court may impose conditions about questioning with respect to all or any of the following: **(a) limiting the length of questioning;** **(b) specifying the place where the questioning is to take place;** **(c) directing payment of costs incurred;** **(d) any other matter concerning the questioning**. **(4)** Evidence of an expert under this Division is to be treated as if it were evidence of an employee of the party who intends to rely on the expert's report.	(2) is key – can only question about report not about all issues at litigation if not addressed in report; confined to the four corners of the expert report Areas where the court can impose conditions on the questioning
Rule 5.38 & 5.39 – Use of expert's report at trial without expert 5.38 **if after an expert report has been provided by one party to another the expert changes his or her opinion on a matter in the report, the change of opinion must be**	

(a) disclosed by the expert in writing and **(b) immediately served on each of the other parties** 5.39**(1) A party serving an expert's report may, at the same time, also serve notice of intention to have the report entered as evidence without calling the expert as a witness**. **(2) If a party serves a notice of intention under subrule (1), no objection may be made at trial to entering the expert's report as evidence unless, within 2 months after service of the notice under subrule (1), any other party serves a statement on the party serving the notice of intention** **(a) setting out all or parts of the report that that other party objects to being entered as evidence under this rule, and giving reasons for the objection, or** **(b) serving on the party a request that the expert attend the trial for cross-examination.** **(3)** Agreeing to have the expert's report entered as evidence without calling the expert as a witness, either explicitly or by allowing subrule (2) to operate without objection, is not an admission of the truth or correctness of the expert's report.	Viva voce (live) evidence within 2 months
Rule 5.40 – Expert's attendance at trial **Expert's attendance at trial** 5.40**(1) A party who agrees to have all of an expert's report entered in evidence at trial, either explicitly or by allowing rule 5.39(2) to operate without objection, may, at the same time as responding to the notice of intention, serve a request that the expert be in attendance at trial for cross-examination.** **(2) The expert whose entire report is to be entered at trial must not give oral evidence at trial unless** **(a) a request that the expert attend for cross-examination has been served, or** **(b) the Court permits.** **(3)** The party who requests an expert's attendance for cross-examination must pay the costs of the expert's attendance, determined under Schedule B, unless the Court is satisfied that the cross-examination is of sufficient assistance to warrant a different order about who is to pay those costs. **(4) If the party proposing to enter the expert's report receives a request that the expert attend for cross-examination, the party proposing to enter the report may question the expert at trial.**	**Note:** Do have to pay for expert's attendance under Schedule B, there will be witness fee have to pay. **Note:** When you get to trial, has to be a qualification stage for the determination of admissibility of the expert report, and the expert giving express evidence and being cross examined. This is where you could challenge qualification of expert – voi dur

***Kon Construction Ltd v Terrahova Developments Ltd*,** 2015 ABCA 249

[35] Thus, there would appear to be at least three categories of "witnesses with expertise", who in some respects are witnesses of fact, and in other respects opinion witnesses:

(a) INDEPENDENT EXPERTS who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by White Burgess and Mohan.

(b) WITNESSES WITH EXPERTISE who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.

(c) LITIGANTS (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. Marinus Scheffer and Klaver fall into this category.

The rules relating to expert witnesses – first category (independent witnesses)

→ The rules of evidence and civil procedure relating to expert witnesses are primarily designed to deal with the first category of expert witness.

[36] The first category of "independent experts" must always be qualified by the trial judge under the *Mohan* procedure, and advance notice of their opinions must be given under the *Rules of Court*. External witnesses who are not so qualified are not permitted to give opinion evidence requiring specialized expertise. External expert witnesses are expected to display a basic level of independence and objectivity.

The second category: witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants

[37] It is sometimes argued that the evidence of witnesses in the second category is not "opinion" evidence: ***Westerhof*** at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional

***R. v. Mohan* set a precedent by indicating that expert evidence should be excluded if it does not pass the following tests:**

1. **Relevance;**
2. **Necessity in assisting the trier of fact;**
3. **The absence of any exclusionary rule; and**
4. **A properly qualified expert.**

expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. **Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. Further, the overall objective of comprehensive disclosure found in R. 5.1(1)(c & d) supports the pre-trial disclosure of the opinions of participating experts.** **The third category: litigant-witnesses** [38] The final category of litigant-witnesses with expertise does not fall neatly into the *White Burgess* and *Mohan* analysis. **First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in *White Burgess*. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.** [39] Under the common law, no witness with an interest in the outcome of the case was allowed to testify, on the assumption that their evidence was somehow "tainted": J.H. Baker, An Introduction to English Legal History, (4th ed.) (London: Butterworths, 2002) at p. 91. Thus, the parties to the litigation (who usually knew the most about the case) could not testify, and even the accused in a criminal case could not testify in his own defence. These rules were gradually stripped away by statute, and those provisions still exist in the *Alberta Evidence Act*, RSA 2000, c. A-18: *3(1) No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest.* *(2) A person offered as a witness shall be admitted to give evidence notwithstanding that the person has an interest in the matter in question or in the event of the action or that the person has been previously convicted of a crime or offence* *4(1) The parties to an action and the persons on whose behalf the action is brought, instituted, opposed or defended are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of themselves or of any of the parties.*	Live litigants – no longer disqualified

(2) The spouses and adult interdependent partners of the parties and persons mentioned in subsection (1) are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of any of the parties. *(3) Nothing in this section makes the defendant in a prosecution under an Act of the Legislature compellable to give evidence for or against himself or herself.* **The rule in *White Burgess* requiring external expert witnesses to have some level of independence and objectivity before they will be permitted to express opinions on matters requiring specialized knowledge is properly regarded as a narrow exception to these provisions, arising as a precondition to them giving opinion evidence.** [40] **Secondly, it is generally not necessary to qualify the last class of witnesses with expertise as "experts" under the *Mohan* procedure. As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues.** The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did. Since these witnesses are available for pre-trial questioning, formal advance notice of their opinions or their evidence is not needed.	
Diotte v Canada, 2008 TCC 244 (CanLII), 2008 DTC 4558 [41] The issues are neatly illustrated by ***Diotte v Canada***, 2008 TCC 244 (CanLII), 2008 DTC 4558, where the valuation of certain shares was in issue. Diotte was both the taxpayer involved in the litigation, one of the persons who had initially set the valuation of the shares, and a long-time employee of the securities industry. The attempt to have him qualified as an expert witness was summarily dismissed at para. 28, because ". . . it is unreasonable to believe that the Appellant Mr. Diotte could have offered an entirely objective opinion uninfluenced by his personal interest". **Nevertheless, he was allowed to give evidence on how he set the value of the shares, and why that valuation was appropriate. His interest in the outcome of the case was not a barrier to his testimony. This evidence was, presumably, given by him as a lay witness, even though it clearly engaged his opinions about the value of the shares. Diotte was a witness with expertise, who was involved in**	

the underlying events, and so was permitted to give evidence arising from his expertise even though he was not qualified as an "expert" under the *Mohan* test. The Court's assessment of Klaver's expertise [42] **In this case, Klaver testified that he confirmed the amounts certified in the invoices by analyzing the raw data compiled in Exhibits 105 and 106. It would have been possible for the respondents to have attempted to qualify him as an expert to that extent, but the failure to do so is not fatal. The nature of his opinion about the invoices was well known, and lay at the heart of the litigation**. The raw data he relied on had been disclosed, and was available for analysis by the appellant's external expert witness. Terranova was able to cross-examine Klaver fully to the extent that he justified his methodology using his expertise and experience. It is not apparent that the ***Mohan*** process has to be applied to a witness like Klaver, but in any event there was no miscarriage of justice.	
***Piikani Nation v Raymond James Ltd*,** 2018 ABCA 234 [50] The Piikani Nation asserted litigation privilege over the Navigant Report. An application by Ms. Kostic to have the Piikani Nation produce a copy of the Navigant Report was dismissed on March 18, 2014 (EKE CIBC Trust R1). Two non-parties to the action then filed affidavits attaching copies of the Navigant Report. On June 12, 2014 the case management judge ordered those affidavits sealed (EKE R125). An application by a non-party to vary the sealing order was dismissed on September 2, 2014, although that order confirmed that non-privileged documents attached to the sealed affidavits could be used (EKE R154). An application by Ms. Kostic to vary the sealing order was dismissed on November 27, 2014 (EKE R3). **An appeal from the sealing order was dismissed: *Piikani Nation v Kostic*,** 2015 ABCA 60 (CanLII)**. As noted, Ms. Kostic has made repeated attempts to have the report produced. The respondents note these many attempts to have the report unsealed, and correctly assert that the issue is *res judicata*: *Ernst and Young Inc. v Central Guaranty Trust Co.*,** 2006 ABCA 337 (CanLII) **at paras. 29-30, 66 Alta LR (4th) 231, 397 AR 225.** [51] Ms. Kostic submits that the Navigant Report is relevant and material. That might be so, but that is not sufficient to override the litigation privilege**. EXPERT REPORTS PREPARED FOR THE DOMINANT PURPOSE OF LITIGATION ARE PRIVILEGED. The discontinuance of the action against Piikani Investment**	Res judicata - a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.

Corporation does not change the report's STATUS, AS THE PRIVILEGE EXISTS UNTIL ALL RELATED LITIGATION IS CONCLUDED: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 (CanLII) at para. 36, [2006] 2 SCR 319. The litigant that commissions such a report can assert evidentiary privilege and suppress the report, even though it is relevant and material, and even though it might be of benefit to the litigant's opponent. **Litigants who commission such reports routinely waive that privilege, and use the reports at trial, but the decision to waive or to assert the privilege lies with the party who commissioned the report: R. 5.35. The case management judge did not err in refusing to examine the Navigant Report to see if it exonerates Ms. Kostic. Even if it did, she is not entitled to a copy.** [52] Ms. Kostic argues that there is no point in maintaining the privilege over the Navigant Report, because it has been widely distributed to Piikani band councillors, some of whom gave copies to band members. **An entity can show a privileged document to those, like band councillors, who control the entity without waiving privilege**. It is unfortunate that some of those councillors distributed the report, perhaps without realizing it was privileged. **In any event, no individual councillor has authority to waive privilege on behalf of the Piikani Nation. Even if the Navigant Report is no longer a secret, the privilege that attaches to it still prevents its use in court, which is the main point of the privilege.**	
***Reid v Bitangol*,** 2016 ABQB 122 *Goss J:* **Introduction** [1] The Plaintiffs in this action claim medical negligence in the care of a 16-year-old male who sustained a spinal cord injury following a type B aortic dissection in March 2007. [2] The Defendants apply for an order compelling the Plaintiffs to produce certain records under Rule 5.44. **Background** [3] In July 2014, the Plaintiffs served on the Defendants all the expert reports on which they intend to rely at trial, pursuant to Rule 5.35 of the *Alberta Rules of Court*, Alta Reg 124/2010, including reports of Dr. John F. Keegan (Keegan Report), Dr. David R. Atkinson (Atkinson Report), and Christine Whitelaw regarding Mr. Reid's occupational performance evaluation (Whitelaw Report). The Whitelaw Report and the Atkinson Report contain references to the	

Independent Comprehensive Vocational Evaluation Report of R.D. Michaels (Michaels Report). The Keegan and Atkinson Reports contain expert opinions in respect of Mr. Reid's psychological and vocational status based on multiple assessments and testing of Mr. Reid. [4] Defence medical examinations (MEs) have taken place pursuant to Rule 5.41 by: Dr. Hill, a specialist in physical medicine and rehabilitative medicine, in February 2014; Mr. Berger, an occupational therapist, on August 27, 2014; and Dr. Mandell, a vocational psychologist, on June 2 and 3, 2015. [5] Despite the Plaintiffs' requests for the reports of all MEs under Rule 5.44(3)(a), the Defendants have not delivered the reports. The report of Dr. Hill is no longer in issue. [6] The Plaintiffs wish to move the matter toward trial and to obtain the Defendants' rebuttal reports. The Defendants apply for an order directing the Plaintiffs to: (a) produce the Michaels Report of March 25, 2010; and (b) make arrangements with their expert witnesses, Dr. Keegan and Dr. Atkinson, to provide to the Defendant's expert witness, Dr. Mandel: (i) raw test data underlying the Keegan Report regarding the Plaintiff Adam Reid's neuropsychological status and functioning, including a list of tests that were done, copies of test forms, test scores and computer printouts; and (ii) raw test data underlying the Atkinson Report regarding Mr. Reid's vocational psychological status and employability, including a list of tests that were done, copies of test forms, test scores and computer printouts [18] I am not satisfied that the common law in Alberta supports the Defendant's application for disclosure of documents, test protocols, and raw data from tests underlying the expert reports on which plaintiff's intend to rely for the completion of MEs under Rule 5.44. As state in *Erketu*, **disclosure of the plaintiff's expert reports upon which they intend to rely at trial must occur first under Rule 5.35. However, this mandatory disclosure doesn't include disclosure of documents, test protocols and raw data from tests underlying the expert reports.**	This paragraph is important – no mandatory disclosure requirement for disclosure of data, documents, etc. **Exam: disclosure re expert reports there is no mandatory disclosure of documents, test protocols and raw data from tests underlying the expert reports.**

[19] A party delivering a detailed written report of the health care professional's findings and conclusions under Rule 5.443)(a) is entitled to receive, on request, every ME previously or subsequently made of the physical or mental condition of the person under Rule 5.44(3)(b). The continuing litigation privilege over related documents doesn't disappear until Rule 5.44(3) comes fully into play, in other words, when the reports under Rule 5.44(3)(a) have been provided and a request has been made for Rule 5.44(3)(b) disclosure. ***Court's determination on the issue of waiver of privilege*** [25] **In this case, the Plaintiffs' experts received a copy of the Michaels Report as part of the process of facilitating investigation and preparation of the Plaintiffs' case for trial, not to assess the Plaintiff pursuant to a statutorily determined process under the** *Minor Injury Regulation*. **I find that the Plaintiffs have not waived privilege through provision of the Michaels Report to their experts in the circumstances.** ***Conclusion*** ■ [26] Accordingly, the Defendants' application for production is denied.	
Henderson (Estate) v Arnett, 2011 ABQB 198 BINDER J:— ••• **Issue** The parties frame the issue as follows: Is it improper for a party to have filed an Expert Report without the consent of an opposing party, and if so, should the offending filed Expert Report be purged from the Court file by Order? ••• [14] **In my view, the new Rules reflect a policy of efficiency and economy. Restricting filing to essentials promotes those goals. Unnecessary filing wastes court resources in terms of clerk's time and storage space. Counsel should communicate honestly, openly and in a timely way amongst themselves. Expert reports should only become part of the court record by consent or with the approval of the court. Counsel should advise the trial coordinators of the names of the experts at the time of setting down the matter for trial, in order to avoid conflicts between experts and the judge hearing the matter.**	All of this should be done in consultation of counsel and put in expert reports with consent

Conclusion [15] Expert reports should only become part of the court record by consent or with the approval of the court. Accordingly, the Court grants an order to remove the Substances of Opinion from the court file. [16] As the rules are silent as to filing expert reports this is a matter that required clarification by the Court and therefore each party shall bear their own costs.	With consent, or by approval of the court – should expert reports become part of court record
Adacsi v Amin, 2013 ABCA 315 **Hunt J.A. (for the Court):** [1] This is an appeal from the decision of the chambers judge ordering the appellant to undergo a blood test to determine if she carries the Huntington's disease (HD) mutant gene. [2] The appeal is dismissed. [3] The appellant is the plaintiff in a suit claiming damages arising from the negligence of the respondents. The respondents were the landlords of a house in which there was a fire. Three others died in the fire. The appellant survived, but was hospitalized for several months while being treated for various injuries. She claims that her debilitating injuries are a result of the fire and will prevent her from ever working again. She is in her late thirties. [4] Several members of her family have suffered from Huntington's disease, which is indicated by the presence of the HD mutant gene. Medical professionals have opined that some of the symptoms suffered by the appellant may relate to that disease. The respondents applied under Rule 5.44(2) for an order requiring the appellant to submit to a blood test. They say that if the result is positive that could greatly affect the quantum of damages to which she may be entitled. [5] **The chambers judge granted the order under Rule 5.44(2). She inferred from the evidence that the proposed test was reliable and useful. She noted that the test would not determine whether the appellant's symptoms were a result of Huntington's, but would indicate whether Huntington's could be eliminated as a possible explanation. She considered this relevant to the lawsuit. Although a blood test is intrusive, she stated that it involved no real health risks to the appellant. She took account of the fact that the appellant did not wish to have the test and considered that it would be stressful. Balancing all the factors, the chambers judge concluded that the potential good to be achieved outweighed other considerations, such as the appellant's reluctance.**	

[6] The chambers judge was required to interpret the rule correctly and to exercise her discretion judicially. We are satisfied that she did both.

[7] The appellant makes several arguments about how to interpret Rule 5.44(2), which provides: "... if the Court so orders, the examining health care professional may (a) take or obtain samples from the person being examined, and make an analysis of the samples, and (b) perform any test recognized by medical science.".

(A) The word "samples" is not broad enough to include blood samples

[8] This argument would perhaps be convincing if there were other words modifying "samples", but there are not. Given the medical context of the Rule and the use of such a broad word, it would be strange if blood samples were not contemplated by the Rule, since blood samples are one of the most common diagnostic tests used by doctors.

(B) The Rule says that the "examining health care professional" may take samples, and does not contemplate a third party such as a laboratory technician taking samples

[9] This argument might be more compelling were it not for the fact that the Rule says "take or obtain". The definition of the word "obtain" includes the word "acquire". There is nothing about this language that restricts who may obtain the sample.

(C) The Rule does not say that a court may require a person to attend for a test.

[10] On the other hand, it says samples may be obtained from the person being examined "if the Court so orders". It is hard to see how the court could make a meaningful order without requiring a person to attend for the taking of a sample.

(D) The sample must be taken at the time the person is examined, because the Rule refers "to the person to be examined".

[11] As the respondents point out, such an interpretation would render the Rule meaningless, since it is only as a result of an examination that the examining health care professional may be able to identify the need for a sample.

[12] The appellant's arguments about the interpretation of the Rule cannot be accepted. This leaves the argument that the chambers judge improperly exercised her discretion in ordering the blood samples.

[13] We do not agree. The appellant's affidavit states her belief that taking the test will cause her severe panic, stress and anxiety, and further her pain and suffering. Importantly, her affidavit does not say she is fearful of the knowledge that could result from the test, or discuss any possible psychological impact of such knowledge. [14] The courts must balance the interests of all the parties to the litigation. The possibility of Huntington's is not frivolous in this case, given the appellant's family history and the fact that several doctors have noted that she has symptoms consistent with that disease. If the blood test shows that to be a live possibility, it may indeed be relevant to assessing damages. Since the appellant has chosen to sue for damages, she cannot deprive the respondents from acquiring evidence that may assist in their defence. [15] Accordingly, the appeal is dismissed.	Upheld chambers judge decision

CHAPTER 21: OTHER EVIDENCE	(spent 10 mins)
A. Affidavit Evidence at Trial **Proving facts** 8.17**(1)** A fact to be proved at trial by the evidence of a witness must be proved by questioning the witness in Court unless (a) these rules or an enactment otherwise requires or permits, (b) the parties agree to that fact, or (c) the Court otherwise orders. **(2)** The Court may not order that a fact be proved by affidavit evidence of a witness if (a) a party, for good reason, wishes to cross-examine the witness, and (b) the witness may be required to attend the trial. **(3)** Evidence taken in any other action may be presented at trial but only if the party proposing to submit the evidence gives each of the other parties written notice of that party's intention 5 days or more before the trial is scheduled to start and obtains the Court's permission to submit the evidence.	
*Toliver v Koepke***,** 2013 ABCA 304 **•••** It is a litigant's responsibility to tender evidence it wishes entered in the record. Pursuant to **Rule 8.17,** there is a presumption that evidence at trial is given *viva voce,* and if the appellant wanted to enter affidavit evidence it was incumbent upon him to provide an acceptable reason for doing so. **•••**	Default rule is viva voce – incumbent upon appellant who wants to adduce affidavit evidence to provide an acceptable reason to do so.
B. Preservation and Inspectionof Evidence **Unavailable or unwilling witness** 8.14**(1)** Subject to subrules (2) and (3), a party may, with the judge's permission, read into evidence all or part of the evidence given at questioning conducted under Part 5 as the evidence of the person questioned, to the extent that it would be admissible if the person were giving evidence in Court, if the person questioned (a) is dead, (b) is unable to give evidence before the Court because of accident, ill health or disability, (c) refuses to take an oath or to answer proper questions, or	This rule is where the doctor gave de bene esse evidence.

(d) for any other sufficient reason cannot be required to attend at the trial. **(2)** Before deciding whether to give permission, the judge must consider (a) the general principle that evidence should be presented orally in court, (b) how thoroughly the person was questioned under Part 5, and (c) any other appropriate factor. **(3)** The judge may grant permission under this rule only if (a) the fact or facts sought to be proved through the questioning under Part 5 are important aspects of the party's case, (b) the fact or facts cannot be proved in any other manner, and (c) the permission is restricted to the portion or portions of the questioning that relate to the fact or facts.	
Court Assistance – Rule 6.40 **Division 6** **Resources to Assist the Court** **Subdivision 1** **Court Experts** **Appointment of court expert** 6.40**(1)** The Court may appoint a person as a court expert to give evidence on a matter. **(2)** The court expert must give independent evidence to the Court. **(3)** If possible, the parties must agree on the court expert to be appointed under subrule (1). **(4)** The appointment of a court expert does not affect the right of a party to call the party's own expert as a witness. **(5)** If the court expert is a health care professional, the court expert has all the authority and responsibility conferred on a health care professional by these rules.	
Rule 6.41 – Instructions or questions to court expert 6.41**(1)** If the parties do not agree on the directions or instructions to be given or questions to be put to a court expert, the Court may decide what directions or instructions are to be given or questions are to be put to the court expert.	

(2) The Court may give any direction or instruction or pose any question to the court expert that the Court considers necessary, whether the parties agree or not. **(3)** The court expert's report (a) must be in writing, verified by affidavit, (b) must be served on the parties by the court clerk, and (c) is admissible in evidence.	
Rule 6.42 – Application to question court expert 6.42**(1)** Within 20 days after receipt of a copy of the court expert's report, a party may apply to the Court to question the court expert on the report. **(2)** The Court may order the questioning of the court expert before or at a hearing of an application or originating application or before or at trial. **(3)** The questioning may take the form of cross-examination.	
Costs of Court Expert Rule 6.43 6.43 The costs of a court expert are to be paid by the parties in equal proportions unless the Court otherwise orders.	

CHAPTER 22: MANAGING LITIGATION	
Part 4 - Managing Litigation **Division 1** **A. Responsibility of Parties** **Responsibility of parties to manage litigation** 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way	
Rule 4.2 – What the responsibility includes 4.2 The responsibility of the parties to manage their dispute and to plan its resolution requires the parties (a) to act in a manner that furthers the purpose and intention of these rules described in rule 1.2, (b) in an action categorized as a standard case, to respond in a substantive way and within a reasonable time to any proposal for the conduct of an action, (c) in an action categorized as a complex case, to meet or to adjust dates in a timely way in a complex case litigation plan, (d) when the complexity or the nature of an action requires it, to apply to the Court for direction, or request case management under rule 4.12, and (e) to consider and engage in one or more dispute resolution processes (DRP) described in rule 4.16(1) unless the Court waives that requirement.	Expressly laid out Number of issues to consider vis-à-vis responsibility "DRP" - understand, that this process currently in Alberta is mandatory - Unless waived
Rule 4.3 - Categories of court action 4.3**(1) For the purpose of these rules, actions are categorized as** **(a) standard cases, or** **(b) complex cases.** **(2)** In deciding whether an action should be categorized as a standard or complex case, the parties or the Court, as the case requires, must consider the following factors: (a) the amount of the claim, the number and nature of the claims, and the complexity of the action; (b) the number of parties; (c) the number of documents involved; (d) the number and complexity of issues and how important they are; (e) how long questioning under Part 5 is likely to take;	

(f) whether expert reports will be required and, if so, the time it will take to exchange reports and to question experts under Part 5; (g) whether medical examinations and reports under Part 5, Division 3 will be required; (h) any other matter that should be considered to meet the purpose and intention of the rules described in rule 1.2; (i) whether a third party claim has been or is likely to be made.	Are there 5 parties v 2? If there are 5, that probably will impact length of questioning having to take place on quantum and issues
Rule 4.3(3) – Categories of court action **(3)** 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.	
Rule 4.4 – Standard case obligations 4.4**(1)** Unless the parties otherwise agree, or the Court otherwise orders, and subject to matters arising beyond the control of the parties, the parties to an action categorized as a standard case must, within a reasonable time considering the nature of the action, complete each of the following steps or stages in the action: (a) close of pleadings; (b) disclosure of information under Part 5; (c) at least one of the dispute resolution processes described in rule 4.16(1), unless the requirement is waived by the Court; (d) application for a trial date. **(2)** A party to an action categorized as a standard case may serve on the other party a proposed litigation plan or a proposal for the completion or timing of any stage or step in the action, and if no agreement is reached, any party may apply to the Court for a procedural or other order respecting the plan or proposal	**"reasonable time" not defined in the rules – can take years – may be issues that delay the action to be prosecuted by the plaintiff – outstanding answers to undertakings can delay** **Note:** Important – because if you do civ lit - conscientious counsel **may serve litigation plan for timing dealings for completion of pre-trial steps in the litigation.**
Rule 4.5 – Complex case obligations **4.5(1)** The parties to an action categorized as a complex case must, within 4 months after the date that the parties agree to the categorization or the Court determines that the action is a complex case, (a) agree on a complex case litigation plan, and	

(b) unless reasons are given in the plan not to do so, (i) establish a date by which the real issues in dispute will be identified, (ii) agree on a protocol for the organization and production of records, (iii) set a date by which disclosure of records will be completed under rule 5.5, (iv) set a date by which questioning under Part 5 will be completed, (v) set a date by which all experts' reports and rebuttal and surrebuttal expert reports will be served, (vi) set a date by which reports of any health care professionals will be obtained, and (vii) agree on an estimated date to apply for a trial date. **(2)** When a complex case litigation plan or an amendment to the plan is agreed to, the plaintiff must file it and serve it on all parties.	Could be that parties will exchange affidavit of records by a date certain including schedule 1 A litigation plan would be a valuable tool at this stage of the litigation as it results in an Order of the Court requiring the parties to be held accountable to the specific dates they have agreed on for the completion of the pre-Trial steps outlined in the Order. As such, plaintiffs have a particular interest in proposing a litigation plan as it mitigates against the possibility that a plaintiff is "dilatory" in the prosecution of their claim which may expose them to either a "drop-dead" application to dismiss for delay under R 4.33; or, an application to dismiss for inordinate delay under 4.31.
Rule 4.6 – Settling disputes about complex case litigation plans 4.6 If no agreement is reached on a complex case litigation plan within the period referred to in rule 4.5(1), or if the parties cannot agree on an adjustment to a date in the plan, the Court may (a) establish or amend a complex case litigation plan for the action, or (b) make a procedural order with respect to the action generally or to deal with particular issues or issues that may arise. **Rule 4.7 – Monitoring and adjusting dates** 4.7**(1)** The parties must monitor progress in their action and adjust the dates by which a stage or step in the action is expected to be completed if a party is added to the action or as circumstances require. **(2)** On application, the Court may adjust or set dates by which a stage or a step in the action is expected to be completed.	
Rule 4.8 – Court may categorize actions 4.8**(1)** On application, the Court may direct whether an action is to be categorized as a standard or complex case.	

(2) The Court may change the categorization of an action to complex or standard at any time.	
B. Court Assistance in Managing Litigation	
Rule 4.9 – Orders to facilitate proceedings 4.9 If a party or the Court is not satisfied that an action is being managed in accordance with rule 4.2, (a) the party may apply for a procedural order, an order under rule 4.10 or any other appropriate order; (b) the Court may make a procedural order, an order under rule 4.10 or any other appropriate order.	
Rule 4.10 – Assistance by the Court 4.10**(1) The Court may, at any time, direct the parties and any other person to attend a conference with the Court.** **(2)** The participants in the conference may consider (a) dispute resolution possibilities, the process for them, and how they can be facilitated; (b) simplification or clarification of a claim, a pleading, a question, an issue, an application or a proceeding; (c) a complex case litigation plan or a modification to the plan; (d) case management by a judge; (e) practice, procedural or other issues or questions and how to resolve them; (f) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding or otherwise meet the purpose and intention of these rules described in rule 1.2. **(3)** If a party files an application for a conference under this rule, that party must (a) give a reason for the conference, and (b) file and serve on every other party notice of the application and any material to be relied on in support of the application a reasonable time before the date the conference is scheduled to take place. **(4)** The Court may make a procedural order before, at or following the conference.	Simplifying and truncating the issues through DRP **Note:** Material to be relied on – typically when filing court application is application and affidavit in support of application

Rule 4.11 – Ways the Court may manage action 4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly: (a) the Court may make a procedural order; (b) the Court may direct a conference under rule 4.10; (c) on request under rule 4.12, or on the initiative of the Chief Justice under rule 4.13, the Chief Justice may appoint a case management judge for the action; (d) the Court may make an order under a rule providing for specific direction or a remedy.	
Rule 4.12 – Request for case management **4.12(1) A request for a case management order must be made in writing to the Chief Justice and a copy of the request must be served on each of the other parties.** **(2)** The request must state (a) **the reason for the request, and** **(b) whether any of the other parties agrees with the request.** **(3)** An action commenced or continued under the *Class Proceedings Act* must have a case management judge appointed for the action unless the Chief Justice decides otherwise, and the request for a case management judge must be made no later than the date on which the first application in respect of the class proceeding is made under section 2(2) of the *Class Proceedings Act*.	**Note:** If requesting case management have to write letter to CJ
Rule 4.13 – Appointment of case management judge 4.13 **The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action for one or more of the following reasons:** **(a) to encourage the parties to participate in a 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 the scheduling of a trial date.**	

Rule 4.14 – Authority of case management judge 4.14**(1)** A case management judge, or if the circumstances require, any other judge, may (a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute, (b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it, (c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding, (d) make an order to promote the fair and efficient resolution of the action by trial, (e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial, (f) make any procedural order that the judge considers necessary, or (g) **as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to** **(i) the admissibility of evidence,** **(ii) expert witnesses,** **(iii) admissions, and** **(iv) adverse inferences.** **(2)** Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed. **(3) A decision that results from the exercise of the power referred to in subrule (1)(g) is binding on the parties for the remainder of the trial, even if the judge who hears the evidence on the merits is not the same as the case management judge, unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.**	**Exam:** These 4 factors on final as MC **Exam:** Also know subrule 3 for the final
Rule 4.15 – Case management judge presiding at summary trial and trial 4.15 Unless every party and the judge agree, **a case management judge must not hear an application for judgment by way of a summary trial or preside at the trial of the action for which the case management judge is appointed**	Can be opportunity for a party to have certain issues fact or law, decided early on, which is by way of a summary trial Recuse themselves (the CM judge) when it comes to presiding over summary trial or presiding at the trial of the action

C. Dispute Resolution by Agreement Division 3 Subdivision 1	
Subdivision 1 Dispute Resolution Processes 4.16**(1) The responsibility of the parties to manage their dispute includes <u>good faith participation</u> in one or more of the following dispute resolution processes with respect to all or any part of the action:** (a) a dispute resolution process in the private or government sectors involving an impartial third person; (b) a Court annexed dispute resolution process; (c) a judicial dispute resolution process described in rules 4.17 to 4.21; (d) any program or process designated by the Court for the purpose of this rule. **(2) On application, the Court may waive the responsibility of the parties under this rule, but only if** (a) before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial, (b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties, (c) there is a compelling reason why a dispute resolution process should not be attempted by the parties, (d) the Court is satisfied that engaging in a dispute resolution process would be futile, or (e) the claim is of such a nature that a decision by the Court is necessary or desirable. **(3)** The parties must attend the hearing of an application under subrule (2) unless the Court otherwise orders	**Exam:** Know this rule for final – identify list of DRPs (a-d) and explain an example of each (a) Mediation (b) Court directed mediation (c) JDR Important in practice Why would legislature throw in phraseology "good faith participation" because many parties go to DRPs in bad faith – so they don't want to settle, they fel they're forced to settle, so don't want to negotiate anything, that behavior isn't going to meet criteria of this rule. Ex:**Private Mediation** – where parties typically agree on appointment of third party private mediator Ex: plaintiff filed civil claim, gets served of def, def files dispute note, matter gets assigned to court **directed mediation** – 2 mediators appointed automatically by the court to facilitate the mediation (interest based mediation) **ex: JDRs:** Extremely popular, total lack of availability by sitting justices to hear the sheer number of matters that the parties which to have facilitated by way of JDR. **Note:** Court can waive responsibility to participate in a DRP
Subdivision 2 Judicial Dispute Resolution **Purpose of judicial dispute resolution** 4.17 The purpose of this Subdivision is to provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.	
Rule 4.18 – Judicial dispute resolution process	

4.18**(1) An arrangement for a judicial dispute resolution process may be made only with the agreement of the participating parties and, before engaging in a judicial dispute resolution process, and subject to the directions of the presiding judge, the participating parties must agree to the extent possible on at least the following:** **(a) that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have complete agreement;** **(b) rules to be followed in the process, including rules respecting** **(i) the nature of the process,** **(ii) the matters to be the subject of the process,** **(iii) the manner in which the process will be conducted,** **(iv) the date on which and the location and time at which the process will occur,** **(v) the role of the judge and any outcome expected of that role,** **(vi) any practice or procedure related to the process, including exchange of materials, before, at or after the process,** **(vii) who will participate in the process, which must include persons who have authority to agree on a resolution of the dispute, unless otherwise agreed, and** **(viii) any other matter appropriate to the process, the parties or the dispute.** **(2)** The parties who agree on the proposed judicial dispute resolution process are entitled to participate in the process. **(3)** The parties to a proposed judicial dispute resolution process may request that a judge named by the parties participate in the process	If your in JDR the presiding justices, will set out to the parties the matter is confidential and without prejudice and that the justices will review the materials submitted (JDR Briefs) – JDR judge will recruise self from judge at trial Reference to "persons who have authority to agree on a resolution" – insurance defence work – insurance examiner assigned, had to have some certain level of authority to settle.
Rule 4.19 - Documents resulting from judicial dispute resolution 4.19 The only documents, if any, that may result from a judicial dispute resolution process are (a) an agreement prepared by the parties, and any other document necessary to implement the agreement, (b) a consent order or consent judgment resulting from the process, and (c) a transcript of proceedings made in open court at the time of the judicial dispute resolution process which records the outcome of the judicial dispute resolution process.	Only 3 areas where there can be documents that arise from a JDR but in terms of facilitating the JDR, parties exchange written JDR briefs beforehand. And those materials are sent to the judge before the JDR occurs and the materials will be returned to counsel.

Rule 4.20 – Confidentiality and use of information 4.20**(1)** A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute. **(2)** Unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute (a) are privileged and are made or generated without prejudice, (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and (c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature. **(3)** Subrule (2) does not apply to the documents referred to in rule 4.19. **(4)** Subrule (2) does not prevent the use of statements made or documents generated for or in the judicial dispute resolution process to prove the fact that a settlement was reached or the terms of a settlement.	
Rule 4.21 – Involvement of judge after process concludes 4.21**(1)** The judge facilitating a judicial dispute resolution process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge. **(2)** The judge facilitating a judicial dispute resolution process must treat the judicial dispute resolution process as confidential, and all the records relating to the process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except (a) the agreement of the parties and any document necessary to implement the agreement, and (b) a consent order or consent judgment resulting from the process. **(3)** The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature.	

CHAPTER 23: CHAMBERS PRACTICE	
Subdivision 1 **Application Process Generally - Rule 6.3** **6.3(1)** Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered. **(2)** Unless the Court otherwise permits, an application to the Court must (a) be in the appropriate form set out in Schedule A, Division 1 to these rules, (b) state briefly the grounds for filing the application, (c) identify the material or evidence intended to be relied on, (d) refer to any provision of an enactment or rule relied on, (e) specify any irregularity complained of or objection relied on, (f) state the remedy claimed or sought, and (g) state how the application is proposed to be heard or considered under these rules. **(3)** Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application**, 5 days or more before the application is scheduled to be heard or considered**, (a) notice of the application, and (c) any affidavit or other evidence in support of the application.	**Note**: Always set out a-g on the application **Exam:** Wont have to know the format of application on final, but have to know Rule 6.3(2); what to include on typical court application Know the 5 day mandatory requirement to serve application on other side but can apply to dispense with 5 day service requirement
Rule 6.4 – Applications without notice 6.4 Despite any other rule to the contrary, notice of an application is not required to be served on a party if an enactment so provides or permits or the Court is satisfied that (a) no notice is necessary, or (b) serving notice of the application might cause undue prejudice to the applicant.	In the old days, application without notice was called an **ex parte application** (without notice) Example: EPO doesn't need notice Example: Consent order does not need notice
Masters v Justice Chambers	

Jurisdiction of a Master – s 9 of the *Court of Queen's Bench Act*	**Exam:** Know this slide
9(1) In regard to all matters brought or proposed to be brought in the Court, a master in chambers **(a) has the same power and may exercise the same jurisdiction as a judge sitting in chambers except in respect of** **(i) appeals, applications in the nature of appeals, applications concerning the hearing of appeals and applications to vary or rescind an order made by a judge,**	Sets out jurisdiction of master of ABQB – what master can and cannot do when presiding over matters in court Cannot hear appeals
(ii) subject to subsection (2), stays of proceedings after verdict or on judgment after trial or hearing before a judge, unless all parties consent to the exercise of that jurisdiction by the master, and **(iii) a matter for which the Chief Justice has given a direction that a master is not to exercise that jurisdiction, and** **(b) with the consent of the parties, has the same power and may exercise the same jurisdiction as a judge for hearing, determining and disposing of all applications and other matters.**	**Note:** Know restrictions on masters jurisdiction
(2) A master in chambers may, under section 181(1)(a) of the *Traffic Safety Act*, order that a suspension of a licence be stayed.	
(3) Notwithstanding subsection (1), **the power of and the jurisdiction exercisable by a master in chambers does not include** **(a) the trial of actions,** **(b) the determination of disputed or contentious questions of fact unless the parties agree to the disposition of the questions in chambers on affidavit evidence and without the trial of an issue or the hearing of oral evidence,**	(b) Can only decide on affidavit evidence where there is contentious questions of fact
(c) any matters relating to criminal proceedings or the liberty of the subject, **(d) applications relating to civil contempt or for an injunction or a judgment or order in the nature of certiorari, prohibition, mandamus or quo warranto, or** **(e) anything that by law is required to be done by a judge.**	
(4) Notwithstanding subsection (3), a master in chambers has the same power and may exercise the same jurisdiction as the Court under sections 17 and 27 to 32 of the *Maintenance Enforcement Act*.	

South Side Woodwork (1979) Ltd v RC Contracting Ltd (1989), (1989), 95 AR 161 (Alta QB) MASTER FUNDUK:— ••• Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder. I am bound by decisions of Queen's Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts judicial ladder. I do not overrule decisions of a judge of this Court. **The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.** •••	
***Janvier v 834474 Alberta Ltd*,** 2010 ABQB 800 MACKLIN J:— ••• The Master generally does not have jurisdiction to determine disputed or contentious questions of fact: *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s.9(3)(b). **If there remains a dispute on material facts at the time of the application, there must be a trial.** However, if one party's evidence on material facts is either destroyed by cross-examination on affidavit or the introduction of other evidence rendering that party's evidence completely non-credible, then the Master may accept certain facts or may draw inferences of fact. ••• *Appeal allowed.*	Jurisdictional masters – you can bring forward a summary judgment application to master but clearly contriversal facts being stated – that should indicate to the master they cannot dispose of the matter and must go to trail for a trial judge
Schaffer v Lalonde, 2014 ABQB 222 MASTER SCHLOSSER:— ••• **Masters act as gatekeepers, preforming a 'triage' function to separate meritorious from unmeritorious lawsuits**. There is much virtue in having Masters exercise this function widely. Their opinion binds no one other than the immediate parties, except by persuasive force. Decisions are easily appealed. There is no deference. An appeal is subject to the lowest standard 'correctness'	

(***Bahcheli v. Yorkton Securities Inc***, 2012 ABCA 166), and it is open to litigants to rebuild their case on appeal if the evidence was deficient. **The Master's power set out in section 9(2)(b) of the Act should be broadly exercised, as it is in line with the 'culture shift' spoken of by the Supreme Court of Canada in *Hryniak v. Maudlin***, 2014 SCC 7. ••• **Appeals**	
Subdivision 4 **Appeal from master's judgment or order** 6.14(1) If a master makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge. (**2) A notice of appeal in Form 28 must be filed and served within <u>10 days after the judgment</u> or order is entered and served and returnable within a reasonable time, <u>not exceeding 2 months</u>, after the date the notice of appeal is filed.** (3) An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material. (4) The record of proceedings is (a) the application before the master, (b) affidavits and other evidence filed by the parties respecting the application before the master, (c) any transcript of proceedings before the master, which must be ordered and paid for by the appellant, unless the Court determines, or the parties agree, that transcripts are not needed, and (d) the master's judgment or order and any written reasons given for the decision. (5) The appellant must file and serve on the respondent to the appeal, within one month after service of the notice of appeal, (a) any transcript of proceedings described in subrule (4)(c), (b) any additional evidence referred to in subrule (3), and (c) any further written argument.	

(6) The respondent to the appeal must file and serve on the appellant, within 20 days after service of the documents referred to in subrule (5), (a) any further written argument the respondent wishes to make, and (b) any additional evidence referred to in subrule (3). (7) The appellant may, within 10 days after service of the documents referred to in subrule (6), file a brief written argument responding to any unanticipated additional evidence or further argument raised by the respondent. (8) A party may rely on its original written argument, if any, that was before the master or any further argument filed under subrule (5)(c) or (6)(a), or both the original argument and the further argument.	
Section 12 – *Court of Queen's Bench Act* **Appeal** 12 An appeal lies to a judge in chambers from a decision of a master in chambers.	
Bahcheli v Yorkton Securities Inc, 2012 ABCA 166 ***Cote JA:*** ***3. What the Standard of Review Should Be*** **In my view, the standard of review on appeal from a Master to a judge, on all issues, is still correctness.**	
Affidavits	
Subdivision 2 **Form and Contents of Affidavits and Exhibits** **Types of affidavit** 13.18**(1) An affidavit may be sworn** **(a) on the basis of personal knowledge, or** **(b) on the basis of information known to the person swearing the affidavit and that person's belief.** **(2)** If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit. **(3)** If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the	"I am informed by my counsel and believe that…" Important – if seeking summary dismissal, file affidavit in support of person's personal knowledge of the issues you are deposing to. (cannot be indirect knowledge)

basis of the personal knowledge of the person swearing the affidavit.	
Rule 13.19 – requirements for affidavits 13.19**(1) In addition to complying with rule 13.13, an affidavit under these rules must comply with all of the following:** **(a) be in Form 49,** **(b) state, on the front page, the full name of the person swearing the affidavit and the date the affidavit was sworn,** **(c) state the place of residence of the person swearing the affidavit,** **(d) be written in the first person,** **(e) be divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer,** **(f) be signed or acknowledged and sworn before a person empowered to administer oaths, whether that person prepared the affidavit or not,** **(g) contain a statement of when, where and before whom the affidavit was sworn, and** **(h) be signed by the person administering the oath.** **(2)** An affidavit is not invalid or otherwise improper just because it was sworn before a commencement document was filed.	**Exam:** Wont be asking us to fill in the blank on form 49 but know what may have to be included (these subrules in 13.19) Jurat – where the commissioner of oath signs
Rule 13.20 – Changes in affidavits 13.20 An affidavit with an insertion, alteration or erasure must not be used without the Court's permission unless the insertion, alteration or erasure is authenticated by the initials of the person administering the oath.	
Rule 13.21 – requirements for exhibits to affidavit 13.21**(1) A record to be used with an affidavit must be** **(a) an exhibit to the affidavit, and** **(b) identified by a certificate of the person administering the oath.** **(2) If the total number of pages of an affidavit and attached exhibits is 25 or more,**	Affidavits often rejected if lawyer/commissioner for oaths forgot to sign each exhibit

(a) the exhibits must be separated by tabs, and the pages within each tab must be numbered consecutively, or **(b) the pages of the affidavit and all exhibits must be consecutively numbered using a single series of numbers.** **(3) An exhibit to an affidavit must be attached or appended to the affidavit when the affidavit is filed unless** **(a) the exhibit is unduly large or bulky and can be adequately identified,** **(b) the exhibit has already been filed and is identified, or** **(c) the Court otherwise orders.**	
Rule 13.25 – Use of filed affidavits 13.25 In an application or proceeding in an action, a party may use and refer to any affidavit filed in the action.	
Rule 13.26 – Exhibits: filing and return 13.26**(1) Exhibits filed with the court clerk in a hearing or trial must** **(a) be dated and numbered,** **(b) indicate the parties involved in the action, application or proceeding for which the exhibit is filed, and** **(c) state who owns the exhibit and by whom the exhibit is filed.** **(2) A list of exhibits filed in the hearing or trial, briefly describing the exhibits and who filed them, must be noted in the Court file.** **(3) After the time for an appeal has expired, the court clerk may, subject to any order, return a record or exhibit to the owner or person who filed it.** **(4) The court clerk may destroy or dispose of a record or exhibit if the court clerk** **(a) <u>gives at least 3 months' written notice</u> by ordinary mail to the owner or person who filed it of the court clerk's intention to destroy or dispose of the record or exhibit, and** **(b) receives no response to the notice by the end of the notice period given under clause (a).**	

***Alberta Evidence Act*, RSA 2000, c A-18**

Administration of oath

15**(1)** An oath may be administered in the form and manner following:

> The person taking the oath shall hold the Bible or New Testament, or Old Testament in the case of an adherent of the Jewish religion, in the person's uplifted hand and the officer administering the oath shall say: "You swear that the evidence you give as touching the matters in question in this action or matter shall be the truth, the whole truth and nothing but the truth. So help you God", to which the person being sworn shall say "I do" or give his or her assent to it in a manner satisfactory to the court or to the officer administering the oath.

(2) Without in any way limiting or restricting the manner in which an oath may be administered, the oath may be taken or sworn on any one of the 4 Gospels.

Scottish oath

16 If a person to whom an oath is to be administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland the person shall be permitted to do so, and the oath shall be administered to the person in that form and manner without further question.

Affirmation, etc., instead of oath

17**(1)** If, in an action or on an occasion when an oath is required or permitted, a person called as a witness, or required or desiring to give evidence or to make an affidavit or deposition, objects to taking an oath or is objected to as incompetent to take an oath, if the presiding judge or the person qualified to take affidavits or depositions is satisfied that the witness or deponent objects to being sworn

(a) from conscientious scruples,

(b) on the ground of the religious belief of the witness or deponent, or

(c) on the ground that the taking of an oath would have no binding effect on the conscience of the witness or deponent, the witness or deponent may make an affirmation and declaration instead of taking an oath.

(2) The affirmation and declaration of that person is of the same force and effect as if that person had taken an oath in the usual form. **(3)** When the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied the person that the deponent was a person entitled to affirm.	
2. Questioning on Affidavit – Rule 6.7 **Questioning on affidavit in support, response and reply to application** 6.7 A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on 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.	On four corners of the affadivit only
Rule 6.11 – Evidence at application hearings 6.11**(1)** When making a decision about an application the Court may consider only the following evidence: (a) affidavit evidence, including an affidavit by an expert; (b) a transcript of questioning under this Part; (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31; (d) an admissible record disclosed in an affidavit of records under rule 5.6; (e) anything permitted by any other rule or by an enactment; (f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence; (g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial. **(2)** An affidavit or other evidence that is used or referred to at a hearing and that has not previously been filed in the action must be filed as soon as practicable after the hearing.	Remember we looked at implied undertaking rule – this would apply generally speaking unless applying to the court to waive implied undertaking somehow.

Rule 6.15 – Appointment for questioning Subdivision 5 Procedure for Questioning 6.15 If a party is entitled to question a person under this Part, that party may do so by serving on the person a notice of appointment for questioning in **Form 29**, and rules 6.16 to 6.20 apply.	
Rule 6.16 – Contents of notice of appointment 6.16**(1) A notice of appointment for questioning must** **(a) specify a reasonable date, time and place for the appointment for questioning,** **(b) describe any records the person is required to bring to the appointment for questioning, and** **(c) request the person to be questioned to specify any arrangements necessary to accommodate the person's reasonable needs which, to the extent reasonably possible, must be accommodated.** **(2)** The notice of appointment for questioning must be served 5 days or more before the appointment date (a) on the person to be questioned, or if a lawyer acts for that person, on the lawyer, and (b) on each of the other parties. **(3)** On application, the Court may resolve a dispute over the date, time, place and person to be questioned and any related matters, and the records to be produced at the appointment for questioning. **(4)** The attendance of a person to be questioned and the records to be produced at the appointment for questioning may be required by an order under rule 6.38.	
Rule 6.17 – Payment of allowance 6.17**(1)** When a notice of appointment for questioning is served, an allowance must be paid by the questioning party to or on behalf of the person to be questioned, unless the Court dispenses with an allowance. **(2)** If an allowance is not paid, the person who is the subject of the notice of appointment for questioning need not attend the appointment unless ordered to do so by the Court. **(3)** The allowance to be paid is	

(a) the amount determined under **Schedule B**, or (b) if there is a dispute over the amount to be paid, the amount ordered by the Court.	He thinks its $50.00 → Not schedule C we have been dealing with
Rule 6.18 – Lawyer's responsibilities 6.18**(1)** If a lawyer is served with a notice of appointment for questioning and an allowance is also paid, the lawyer must, (a) as soon as practicable, inform the person to be questioned about the appointment, and (b) use the allowance only for the purpose for which it is paid. **(2)** If a person to be questioned does not attend the appointment for questioning, the allowance must, unless the parties otherwise agree or the Court otherwise orders, be repaid to the person who paid it by (a) the lawyer, or (b) if the lawyer paid the allowance to another person, that other person.	
Rule 6.19 – Interpreter 6.19**(1)** If a person to be questioned will not be able to understand the questions or be able to answer the questions without the aid of an interpreter, the person to be questioned must give reasonable notice of that fact to the party who served the notice of appointment for questioning, and the questioning party must then notify every other party that an interpreter will be present. **(2) The questioning party must provide an interpreter** **(a) who is impartial and competent, and** **(b) who takes an oath to interpret the questions and answers correctly and honestly.** **(3)** The cost of the interpreter must initially be borne by the questioning party	
Rule 6.20 – Form of questioning and transcript 6.20**(1)** A person questioned on an affidavit under this Part or a person questioned as a witness for the purpose of obtaining a transcript under this Part for use at a hearing may also be questioned by any other party, and the person questioned may then be questioned again by the questioning party on that person's answers to the questions of other parties.	

(2) Questioning and questioning again under this rule by parties adverse in interest may take the form of cross-examination. **(3)** The questions and answers must be recorded word for word by a person qualified to do so (a) by a method that is capable of producing a written transcript, and (b) in a manner agreed on by the parties or directed by the Court. **(4)** The person recording the oral questioning must (a) keep in safe custody the recorded questioning, (b) if required to do so, honestly and accurately transcribe the recorded questioning and deliver a copy of the transcript, as required, and (c) on or attached to any transcript (i) state the person's name, (ii) specify the date and place where the questioning occurred, and (iii) certify the transcript, or the portion of the questioning transcribed, as complete and accurate. **(5)** The questioning party must (a) make necessary arrangements for the questioning to be recorded, and (b) file the transcript unless the Court otherwise orders. **(6)** A person is qualified to record and transcribe oral questioning under this Part if the person is (a) an official court reporter, (b) a person appointed by the Court as an examiner under the *Alberta Rules of Court* (AR 390/68), or (c) a shorthand writer, sworn to record the questioning word for word and to impartially fulfil the duties imposed by subrule (4), who (i) is an agent or employee of an official court reporter, or (ii) has been approved by the parties.	
Penn West Petroleum v Devon Canada Corp., 2017 ABQB 26 Prowse J: In conclusion, I am in full agreement with Master Prowse that the deponent of an Affidavit of Records can be cross examined as of right. If the party to be examined believes, in the particular	**Can file complaint if upset with conduct of counsel**

circumstances of the case, that the cross examination is unnecessary or abusive, a motion can be made to set aside the appointment.	
Smith v Coperstone Capital Inc*.,** 2013 ABCA 17 Slatter JA: As the chambers judge noted, an adverse party has a very wide right to cross-examine an applicant for summary judgment on his affidavit: R. 3.13, 6.7; ***Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd., 2004 ABCA 53 at para. 7, 25 Alta LR (4th) 220, 346 AR 171. It is no answer that the applicant will be inconvenienced by any delay where the request to cross-examine is made in a timely way. It is also no answer for the applicant to say that he does not "know why the Receiver would want to question me". Smith, as an applicant for summary judgment, was required to demonstrate a clear entitlement to that relief. The refusal to grant a short adjournment on these inadequate materials reflects reviewable error.	
***Rozak Estate v Demas*,** 2011 ABQB 239 Graesser J: The statement that an affiant cannot be required to inform him or herself is not the law in Alberta. An affiant being questioned is in a similar position to that of a witness being cross-examined at trial. Witnesses are expected to have taken reasonable steps to inform him or herself as to the subject matter on which they are expected to testify. They are expected to bring with them all records in their possession or control which are relevant to the issues in the lawsuit. They may be cross-examined not only on their evidence in chief, but on any other matter within their knowledge.	
Orders	
Division 1 **Preparation and Entry of** **Judgments and Orders** **Form of judgments and orders** 9.1**(1)** Judgments and orders must be divided into consecutively numbered paragraphs. **(2)** Every judgment and order must include (a) the date on which and the location at which it was pronounced,	

(b) the name of the master or judge who made it, and (c) the date of entry.	
Rule 9.21 – Preparation of judgments and orders 9.2**(1)** The Court may direct which party is to prepare a draft of the judgment or order pronounced by the Court, but if the Court does not do so, the successful party is responsible for preparing the draft. **(2)** The following rules apply, unless the Court otherwise orders: (a) **within 10 days after the judgment or order is pronounced, the responsible party must prepare a draft of the judgment or order in accordance with the Court's pronouncement and serve it on every party in attendance at the hearing, but if the responsible party does not prepare and serve the draft then any other party may do so;** (b) within 10 days after the draft judgment or order is served, each party served may (i) approve the draft, or (ii) object to the draft, providing particulars of the objection; (c) if a party does not approve or object to the draft judgment or order within the 10 days described in clause (b) but all other requirements are met and service of the draft is proved, the judgment or order may be signed and entered.	
Rule 9.3 – Dispute over contents of judgment or order 9.3 If there is a dispute about the contents of a judgment or order, the disputants may apply to the Court to resolve the dispute	
Rule 9.4 – Signing judgments and orders 9.4**(1)** A judge or master may sign a judgment or order when it is pronounced. **(2)** If a judge or master does not sign a judgment or order when it is pronounced, the court clerk may sign the judgment or order in any of the following circumstances: (a) in a proceeding which a party adverse in interest did not attend; (b) if the party adverse in interest approves the form of the judgment or order or waives approval of its form; (c) if the Court directs that approval of the form of the judgment or order by a party is not required;	Many times applies to self reps – self rep doesn't have to sign the order or approve it

(d) if the Court directs the court clerk to sign the judgment or order. **(3)** In any circumstance other than those described in subrule (2), a judgment or order must be signed by a judge or master.	
Rule 9.5 – Entry of judgments and orders 9.5**(1)** Subject to subrule (2), every judgment and every order is entered by filing it with the court clerk, who must make a note in the court file of the entry and the date of entry. **(2)** A judgment or order is not to be entered more than 3 months after it is pronounced except with the Court's permission, which may only be obtained on application and after notice is served on each of the other parties.	
Rule 9.6 – Effective date of judgments and orders 9.6 Every judgment and every order, whether or not it has been entered, comes into effect on (a) the date of pronouncement, or (b) if the Court orders the judgment or order to come into effect before or after the date of pronouncement, the date so ordered.	Date the reasons for judgment were given/pronounced
Rule 9.7 and Rule 9.8 **Certified copies** 9.7(1) On entry of a judgment or order, the court clerk must, without additional charge, certify a copy of it for the party who enters the judgment or order. (2) A certified copy of a judgment or order has the same effect as the original. **Service of judgments and orders** 9.8 Unless these rules otherwise provide or the Court otherwise orders, the party who enters the judgment or order must serve a copy of the entered judgment or order on each of the other parties.	
Division 3 Corrections, Further Orders, Setting Aside, Varying and Discharging Judgments and Orders	

Correcting mistakes or errors 9.12 On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission. **Re-opening case** 9.13 At any time before a judgment or order is entered, the Court may (a) vary the judgment or order, or (b) on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it.	
Rule 9.14 – Further or other order after judgment or order entered 9.14 On application, the Court may, after a judgment or order has been entered, make any further or other order that is required, if (a) doing so does not require the original judgment or order to be varied, and (b) the further or other order is needed to provide a remedy to which a party is entitled in connection with the judgment or order.	
Rule 9.15 – Setting aside, varying and discharging judgments and orders 9.15**(1)** On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made (a) without notice to one or more affected persons, or (b) 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. **(2)** Unless the Court otherwise orders, the application must be made within 20 days after the earlier of (a) the service of the judgment or order on the applicant, and (b) the date the judgment or order first came to the applicant's attention. **(3)** The Court may, on any terms the Court considers just, (a) permit a defence to be filed by a party who has been noted in default, (b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in	

default, or whose statement of defence was struck out under rule 3.37, or (c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39. **(4)** The Court may set aside, vary or discharge an interlocutory order (a) because information arose or was discovered after the order was made, (b) with the agreement of every party, or (c) on other grounds that the Court considers just.	
Rule 9.16 – By whom applications are to be decided 9.16 An application under rule 9.12, 9.13, 9.14 or 9.15 must be decided by the judge or master who granted the original judgment or order unless the Court otherwise orders.	