# LAW 452

# CIVIL PROCEDURE

# Schlosser

## Chapter 1: Introduction

- History of procedure is history of writs
- Writ = form of pleading that categorizes the claim and permits entrance to a particular forum
- Below demonstrates transition from forms of action to causes of action
- **1830** – 72 forms of action, choose a writ to take you from commencing action to particular court
    - Sets your mode of proof
    - Gives you remedy
    - Form not substance prevails
- Judicature Act, **1873** - moves down to 12 forms
    - Came into force in **1875**
    - Fusion of law of equity
    - Amalgamation of all courts into the King's Court
    - Created system of civil procedure by removing forms of action to create body of rules dealing with procedure
- **2008** – 5 causes of action:
    - Statement of Claim
    - Originating Notice
    - Petition
    - Special application
    - Small Claims
- **2010**, we have moved from 72 forms of action to 3 causes of action + special application + small claims
    - Court of QB has plenary or nearly universal jurisdiction and only a few ways of beginning a claim → major one is Statement of Claim (procedural all-terrain vehicle)
    - Instead of rigorous tests and automatic results there is body of law to be applied
    - Arguably, substance now prevails over form
    - **Once new rules pass** (Fall 2010), move to only 2 causes of action
        - SOC, originating notice
        - 3 if you count civil claim in small claims court
        - Procedure in small claims court governed by Small Claims Act
        - More streamlined procedure – not Rules of Court
    - If you have jurisdictional choice, 95% of time you will be correct if you choose ABQB

### A. Why are There Rules of Court?

- Without rules ppl in court would not treat each other properly
- Rules secure fundamental premise that parties in litigation must treat their opponents fairly

### B. The New Rules

Level of changes:

1. Housekeeping – organizational changes
2. New wording – will require reinterpretation against backdrop of old cases
3. Enhanced methods to narrow and define issues, to manage litigation and to resolve disputes outside of trial → intended to make litigation more cooperative and collaborative

## Chapter 2: Jurisdiction

- *Primus actus judicii est judicis approbatorius* –first step in trial is the acceptance of the J of the court
- J raises 3 issues:
    - Topic
    - Territory
    - Forum conveniens
- Starting point for superior court in province is plenary J within a territory, s/t to what gets taken away by the exclusive original J of tribunals such as the *Federal Court* and speciality tribunals

## A. Court of Queen's Bench

***Board*, PC 1919:** Does superior court of AB have power and J to hear divorce cases? Yes, QB can hear federally regulated matters such as divorce. Court has right to hear divorce cases even though *English Divorce Act* of 1957 preceded the *Supreme Court Act* of Alberta (1907) which set up the court. **Jurisdiction should be presumed unless it is excluded**. Superior court has plenary J.

***Judicature Act***

- s. 1 – Court means QB and CA
- s. 2 – court has plenary jurisdiction (all-terrain vehicle)
    - (1) as was in Supreme Court of NWFT
    - (2) as was in old surrogate court of AB
- s. 3 – jurisdiction of CA
- s. 4 - powers of Judges – everything as before July 15, 1870
    - 2-4: set out jurisdiction of the court in generic terms
    - 4: powers of the judges of the courts
- s. 5 - additional Powers of CoQB - jurisdiction from Court of Chancery
- s. 8 - general Jurisdiction
    - any remedy with regard to every claim
        - every matter completely determined, multiplicity avoided
    - Court and judges give all remedies that you're entitled to; has the power to determine and grant remedy to anything properly brought forward by them
    - Reproduced on pg 12 of Materials
    - Positive obligations on court to give all remedies to available where appropriate
    - Rule 558, 559, = non compliance does render proceeding void but it may be set aside, or rendered void (Substance argument engrained in both *Judicature Act* and in the Rules themselves)
- s. 9 – province-wide J: each judge has J throughout AB, and in all cases, other than those of the CA, has and shall exercise powers of the court

Could take historical approach - knowing jurisdiction of courts from 1869 (Can make jurisdictional choice by determining that facts fit within certain court), OR just know that the effect of *Judicature Act* is to give ABQB plenary jurisdiction (all-terrain vehicle) – it has everything

- Assume ABQB has jurisdiction unless specifically taken away by something
- Some things must be in other venues:
    - Federal Court, examples listed in *Federal Court Act*
    - Specialized tribunals, WCB
- 19th century – form over substance prevailed
    - Intent of above developments is that substance will now prevail over form

***Federal Courts Act***

- Federal court created by Trudeau
- May be overlapping J w QB or exclusive J (then, if you do not pick federal you are out of luck)
- **"concurrent original J"** → pick federal court or QB (default QB)
- **"exclusive original J"** → only federal court has J
    - Non-exhaustive list: citizenship, navigation and shipping
    - Most common subject is issues re First Nations (treaties, election appeals)
- Plenary J of QB is taken away by those items enumerated in federal court act: provincial court, federal court, specialized tribunals

## B. Provincial Court

***Provincial Court Act***

- There is overlap b/w provincial court and QB. If overlap and less than $25K → J choice
- s. 9.6(1) – jurisdiction
    - (a) – for matters re debt up to $25K, damages up to $25K (specified in regs), return of personal property, specific performance or rescission, grant equitable remedy (likely unconstitutional for provincial court to have equitable J)
    - (b) – anything provided for under any enactment
- S. 9.6(2) – does not have J to hear claim in which title to land in question, validity of devise is disputed, malicious prosecution, false imprisonment, defamation, etc, claim against judge for anything done while that person was executing office, by local authority or school board for recovery of taxes

***Parris v. Reber*, AB Prov Ct, 1994**

**F:** π claimed relief of $4,000 against Δ. Then varied notice to claim relief to an amount of $4,000 for damages and $2,100 for debt, plus interest. Interpreted old s. 36(1) which is now s. 9.6(1) but does not exceed $4,000.
**D:** application to vary claim granted. Π can claim $4,000 for damages and $2,100 for debt plus interest.
**R:** Therefore, sometimes relief claimed may be as high as $8,000.
**A:** Π argued jurisdictional amount of court is $8,000 b/c section allows claim of $4,000 for debt and same amount for damages.
NOTE: Today, can read s. 9.6 together effectively increasing the limit to 25K for debt + 25K for damages. Some argument that wording will take you to 50K limit.

**Other Notes:**

- Idea of provincial court is that ordinary litigants can go there w/o lawyers.
- Faster procedure than QB b/c fewer steps. In provincial court:
- File civil claim, def/respondent responds with dispute note, action may be selected for mediation which could lead to settlement, pre-trial conference, trial.
- In fairly short time, you will have issue dealt with either informally by judge or in court.
- Cost = $200 to file civil claim payable to clerk. If no means, lower fee. Don't have this option in QB.
- Judgment of provincial court can be turned into judgment from QB by filing it, so have all QB remedies available to you in provincial court

Eg. Claim of $26K, what jurisdictional choices do you have? Could waive 1K over limit, proceed in small claims and gain those advantages, OR proceed for full $26K at QB and opt for longer procedure of getting full amount.

## C. Specialized Tribunals and Judicial Review

- Also takes away J from QB
- Eg. *Workers Compensation Act*, s. 23 – grants J to specialized tribunal which has exclusive J to deal w compensation of employees b/c scheme is intended to be comprehensive
- Other specialized tribunals: Surface Rights Board, Land Compensation Board
- Often includes a final review to the court (either QB or CA) – this is only a technical right b/c reviewing court will give deference to WCB's expertise

## D. Rules

- Rules are affected by practice notes issued from the bench
- *Court of Queen's Bench Act*, s. 20
    - Rules Committee empowered to make rules
        - Rules are passed by regulation; they are not like ordinary regulation
        - They do not go through readings like in the legislature; although that slight different background,
    - Consists of a representative sample of rule-makers.
    - They can extinguish claims leading to substantive results.

- Power to make and alter rules (R. 964 and Jud Act: inherent jurisdiction of the court and power of judges to alter the rules).
    - Limited to things specifically already covered in the rules
- *Judicature Act*, s. 63
    - Section 63: the rules are valid even though they affect substantive rights. They can do that by providing means of bringing actions to an end. Since you cannot sue, you have effectively given no remedy.
    - The court by virtue of the Judicature Act and the courts inherent jurisdiction from all these other courts, and by **RULE 964**, has the power to make and alter rules. Another source of the rules is the power of the court and the inherent jurisdiction of the court.
    - **RULE 964** says that the judges of QB and Court of Appeal may alter and amend any rules of court.

## E. Where Should I Sit?

- Prosecuting and Plaintiff's counsel sit on the judge's right (left side of the Court when facing the Bench)

## F. Styles of Address

- "Mr. Justice," "Madam Justice", or "Justice" should be used when addressing members of the Bench in a courtroom
- They may also continue to address a member of the Bench as "My Lord" or "My Lady", if they so wish

## G. Judging the Judges

- on a point of Law, the remedy is to appeal → Court of Appeal
- on a bias → Canadian Judicial Council (drunkenness on bench, Biased comments, etc)

**SUMMARY: When client comes in:**

1. Is there a cause of action?
2. What is the jurisdiction? (do I have effective remedy?)
    a. Likely QB, but above circumstances take away plenary jurisdiction
3. Is there overlapping J? Consider merits of proceeding in either J.
4. Will the economics permit an action?
5. Can I recover?
6. Are there bars to commencing action?
    a. Superior court in province *prima facie* limited to things that happen within province
    b. If party that is outside of J, under current, must make application to court to sue that person to bring them into process
    c. If you choose ABQB over BC, you have judgment in AB, this is not automatically enforceable everywhere else
7. Is there extra-judicial remedy available? (mediation, arbitration)
8. Conventional dispute resolution – can be slow and expensive, often unpredictable – must keep this in mind

*Judicature Act,* s. 8 – once you have chosen QB, that court shall give all remedies available to them that will resolve dispute between parties (must apply all those remedies to matters properly before it – defined by pleadings, evidence)

# Chapter 3: The Practice

- Nature: Rhetoric is defined as faculty of observing in any given case the available means of persuasion
- Civility: Report of the Civility Initiative Meeting, Law Society
    - Problem that brought this group together – Practice Advisor's office has had increase in calls related to incivility between lawyers
    - Possible sources of the problem – changes in civility parallel other changes in the profession and in society, could be driven by demographics, today's bar is much larger and more diverse, traditional mentoring system has broken down, AB Code of Conduct has moved from broadly worded "should" to more narrow "musts" – deals w civility in specific way, lawyers identify too closely with clients' causes and lose objectivity, judges wary of showing bias or embarrassing lawyer in court so they don't discipline

## Chapter 4: Commencement of Action

After select J, decide limitations: TELLS US WHEN TO FILE COMMENCEMENT OF ACTION

***Limitations Act* -** intent - standardized limitations for all things not covered by Ø

- s. 3(1(a)) – LP = 2 years after date on which claimant (π has burden of proving)
  - first knew, or ought to have known, injury occurred
  - Injury attributable to conduct of Δ, AND
  - Injury warrants bring proceeding (may not be warranted until other options exhausted)
- s. 3(1)(b) – OR 10 years after claim arose (Δ has burden of proving non compliance)
  - 10 year cap begins on date of event
  - Therefore possible for LP to pass w/o knowing about event
- s. 3(3) – items which start clock for 10 year cap
  - a number of breaches of duty, when conduct terminates, last act or omission occurs
  - a breach of duty, when conduct, act or omission occurs
  - demand obligation, when default in performance occurs after demand for performance made
  - *FAA*, when conduct that causes the death occurs
  - Claim for contribution, when claimant for contribution is 1) made Δ in respect of, or 2) incurs liability through settlement of, claim seeking to impose a liability on which the claim for contribution can be based, whichever occurs first
- Exceptions:
  - Minors – LP suspended until 18. Normal for someone to commence action on behalf of minor if significant
  - Disability – LP suspended during any period of time claimant is person under disability
  - First nations land claims – as if *Limitations of Actions Act* had not been repealed and this act not in force
- s. 7 – LP can be extended by agreement
- s. 8 – LP can be extended by conduct (person liable acknowledges claim/makes part payment before expiry of LP, LP begins again at time of acknowledgment)
  - waiver, estoppel or implied standstill agreements are not precluded by these sections
- s. 9 – particulars of agreement and acknowledgement
- s. 10 – LP can be estopped by court granting Δ immunity under doctrine of acquiescence of laches

***Limitation of Actions Act*, s. 40 -** subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of breach of trust, shall be held to be barred by this Act.

**3.2(1)** – action may only be started by SoC or OA

**A. Statement of Claim** (Old Rules 6-8, 261, 560; New Rules Part 3, Divisions 1 and 3)

- Most common doc used to have civil matter determined (if you pick, right 95% of time)
- File sworn docs, examine other side under oath before court reporter, trial
- New Rule 3.25 – contents of SoC - prescribed form, material facts on which claim based, relief sought, gives warnings to person suing
- New Rule 3.26 – time for service of SoC: must be served on Δ w/i 1 year after date SoC filed unless court, on application filed before 1 year expires, grants extension for time for service (cannot exceed 3 months)
- New Rule 3.27 – extension of time for service: court may grant in following circumstances...
- New Rule 3.28 – if SoC not served on Δ w/i time or extended time for service a) no further proceedings may be taken in the action against a Δ who is not served in time, b) SoC served on Δ in time is unaffected

**B. Petition** (Old Rules 6(3), 261(3), 560; eliminated)

- Pleading includes who claim against, material facts, relief claimed
- Old Rules: Used to be used for divorce; Use limited now:

- Rule 6(3)(b) – declaration of death (no person against whom relief is sought, person seeking relief against unknown/unascertained) and no issues of fact
- *Land Titles Act,* s. 174 – application to QB for review of decision/omission of Registrar

- Originating notice used in most instances previously reserved for petition

**C. Originating Notice** (Old Rules 6(2), 261(3), 404-410, 560; New Rules Part 3, Division 2, Subdivision 1)

- **Old Rule 410**
  - Pleading includes who claim against, material facts, relief claimed (New Rule 3.8)
  - No material facts in dispute
  - Written, documentary evidence, eg. Affidavit
  - Doesn't contemplate oral evidence from living witnesses on stand
- Old Rule 405 – prescribed form (New Rule 3.8)
- Old Rule 406 – must be at least 10 days between filing and hearing (New Rule 3.9 – same)
- File it + material based on w court, pick date for hearing
- Says at beginning when application is going to be heard
- Other side files written response and furnishes affidavit/evidence in response
- Old Rule 409 – court can covert procedure, give directions about disposition, require other ppl to receive notice, require witness (New Rule 3.12 – same)
- **New Rules → Originating Application** (precedent, p. 16)
  - Fill in the blanks exercise
  - New form says "go to end of doc to determine what you can do/when you must do it"
  - Names of parties on originating notice = applicant and respondent
  - New Rule 3.2(2) – SoC must be used to start action unless...then OA
  - New Rule 3.2(3)
    - if application made in course of action for which commencement doc has been filed, application must be made under Part 6
    - if application is not made in course of action for which commencement doc has been filed, an originating application must be used
  - Other rules 3.9-3.16

***Re Ulster Petroleums*, ABCA 1975**

**F:** Ulster brought application by way of originating notice, no material facts in dispute

**A:** dispute between parties cannot be determined in a summary way, but will have to be decided in light of all relevant facts established through normal course of litigation.

***Alberta Energy Co. V. Canadian Western Natural Gas Co.*, ABCA 1992**

**F:** court asked to interpret written doc in context of 410(e) application (no material facts in dispute – like *Ulster*).

**A:** Unlike *Ulster*, this appeal can be decided by reference only to words of contract, therefore no need to look at extrinsic evidence of absurdity or commercial reality.

**NOTE: Demonstrates shift in mentality– more receptive to originating notice. Happy to hear on written docs only.**

**D. Special Applications** (Old Rules 394, 395; eliminated)

- Statute provides relief but no mechanism to get it → special application
- Old Rule 394: (a) statute/regulation gives judge authority to issue certificate or order other than any action, and (b) no procedure for action is provided
- Old Rule 395: (a) court can hear the matter, or (b) direct that notice be given to certain people or a certain procedure followed. No commencing doc, just show up in chambers with evidence of some sort, to seek remedy the statute allows, court can give direction to obtain remedy
- Recall 5th category: **Civil claim at provincial court**

## Chapter 5: Parties

**To sue or be sued must be legal entity:**

- Natural person → sue using full name, aliases (aka), no titles, no initials (full age, over 18, capacity)
- Artificial person → sue using complete corporate name (Ltd. or Inc.)

### A. Deceased Persons (Old Rules 43, 50; New Rules Part 2, Division 2, Rule 10.44)

- Deceased person/estate NOT legal entity
- **BUT, consider: Does the COA survive death?**
- Under old CL, personal actions extinguished by death → NOW, *Survival of Actions Act*, *Fatal Proceedings Act*

***Survival of Actions Act*** → does COA survive?

- **s.2:** COA vested in person who dies after January 1, 1979 **survives for benefit of person's estate**
- **s.3:** COA existing against person who dies after January 1, 1979 **survives against person's estate**
- **s.4:** If COA for damages suffered by reason of act/omission would have existed against person if they had not died before damage suffered, COA **deemed to have existed against person before person's death**
- **s. 5(1):** if COA survives under s. 2, only damages recoverable are those that resulted in **actual financial loss** to deceased/deceased's estate are recoverable
    - **(2)** BUT following, **NOT recoverable**
        - Punitive/exemplary damages
        - Damages re loss of expectation of life, pain and suffering, physical disfigurement, loss of amenities
        - Damages re **future earnings** (incl. loss of earning capacity, ability to earn, chance of future earnings)
            - Change from old law which considered loss of future earnings to be actual financial loss
            - Eg. *Duncan v. Baddeley*: determined what dead child's future income would be
            - NOW, s. 5(2)(c) → bars claim for future earnings.
- **s. 6:** if death of person was caused by act/omission which gives rise to COA, damages calculated cannot account for any loss/gain to person's estate as a result of death, BUT **reasonable expenses** of the funeral, disposal of body, may be included in damages awarded, if expenses were incurred by estate
- **s. 7:** COA that survives and judgment on it is asset or liability of estate to which COA relates
- **s. 8:** if COA survives under Act, and **there is no personal rep of the deceased against whom the action may be brought**, QB can appoint **administrator ad litem** of estate of deceased and action may be brought against them and defended by them

***Fatal Accidents Act*** → what damages is deceased/estate entitled to?

- **s. 2:** when death has been caused by **wrongful act** that would, if death had not ensued, have entitled injured party to maintain cause of action and get damages, person who would have been liable is still liable
- **s. 3(1):** Action is for benefit of **spouse, adult interdependent partner, parent, child, brother, sister** of person whose died, and shall **brought in name of executor/administrator** of person deceased, court may give to persons for whose benefit the action has been brought damages appropriate to the injury resulting from the death
- **s. 3(2):** if no executor/admin, or if they do not bring action w/i 1 year after death, **action may be brought in name of all/any of beneficiaries**
- **s. 7:** if action brought under Act, and **any of following expenses** incurred by persons by whom action brought, expenses **may be included** in damages award:
    - care and well-being expenses b/w time of injury and death
    - travel and accommodation expenses b/w time of injury and death
    - funeral expenses, disposal of body
    - grief counselling expenses
- **s. 8:** w/o reference to other damages or evidence of damage, court **shall award damages for grief and loss of the guidance, care and companionship** of deceased (NOT EXHAUSTIVE)
    - $75,000 – spouse/adult interdependent partner
    - $75,000 – parent or parents if deceased minor/not minor but unmarried and no AIP, divided equally
    - $45,000 – each child who at death is minor, or not minor but unmarried and no AIP

***Ferraiuolo Estate v. Olson*, ABCA 2004:** Permitted claim of 57 year old married person. s. 8 of *FAA* is unconstitutional (s. 15) b/c only allows certain children to sue for bereavement. Therefore, s. 8 is no longer exhaustive.

**Style of Cause Rules:**

- Old Rule 43/50: trustee/executor may sue on behalf of estate; if deceased has no personal rep, Court may appoint administrator
- ALL entities must be listed in Style of Cause (beyond harm to state, consider other potential B's of estate)
    - Eg. π → X, executor/trustee/administrator *ad litem* of the Estate of Y, deceased π
    - Eg. Δ → X, administrator of litem of Estate of Y, deceased Δ
    - *Stout Estate*: commencing an action as "Estate of X" not incurable (as caselaw previously stated)

**New Rules – just changes how administrator listed**

- **New Rule 2.1 –** action may be brought by/against personal rep/trustee without naming any of the persons beneficially interested in estate or trust
- **New Rule 2.11 –** following persons **must have lit rep** to bring/defend action: minors, missing person, adult unable to make reasonable judgment, dependent adult under *Dependent Adults Act* (now gone), estate for which no personal rep is named (eg. in will)
- **New Rule 2.12(1) –** 3 types of lit rep:
    - Automatic – person is lit rep if person has authority to commence, compromise, settle, defend claim on behalf of individual under enactment, instrument/order under enactment, grant/order under *Surrogate Rules*, an instrument other than will made by person incl power of attorney/trust (New Rule 2.13)
    - Self-appointed – if party who must have lit rep, does not have one, interested person may file affidavit in prescribed form containing info… (see 2.14(2)) – like "next friend"
    - Court-appointed – if party who must have lit rep, does not have one, an interested person may, or if no interested person, party adverse in interest must, apply to court for directions about appointment of lit rep (New Rule 2.15)
- **New Rule 2.12(2)** – if lit rep service of doc required on individual must be effected on lit rep, service on individual is ineffective
- **New Rule 2.16** – court-appointed lit rep in limited cases → catch all for residual circumstances
- **ALL just referred to as litigation representative**
    - Ex. X, litigation representative, of Y, deceased
    - Ex. X, litigation rep of minor Y
- **New Rule 10.45 –** lit rep for π liable to pay costs award against π; lit rep for Δ not liable unless engaged in serious misconduct, and court so orders.

**SUMMARY: to write style of case for deceased**

- List all potential B and potential COA
- Does COA survive death?
    - *SOAA*, s. 2-4: COA survives for estate/against estate/deeming rule if damages occur after person's death
- What is amount recoverable?
    - Filter through *SOAA*, s. 5 – only damages resulting in actual financial loss recoverable
- Add reasonable expenses from *SOAA*, s. 6
- Add damages for care and well-being, etc. (*FAA*, ss. 7) and bereavement (*FAA*, s. 8)
- Someone must represent estate/deceased
- Should certain ppl be named in their own right?
    - Eg. *FAA*, ss. 7, 8; *SoAA*, s. 6
- What is length of time since accident?
    - If within 1 year → administrator listed as π
    - If after 1 year → *FAA,* s. 3 says action may be brought in name of all/any of beneficiaries

Typically: if deceased person is potential claimant, style of cause will have Estate and individuals listed (95% of cases)

**B. Trust and Estate Proceedings** (Old Rules 43, 51; New Rules Part 2, Division 2, R. 2.1, R. 10.44)

- **Old Rule 43:** Trustees, executors or administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees, or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing those persons → New Rule 2.1
- **Old Rule 51:** Court may appoint someone to oversee estate → New Rule 2.16

**C. Infants** (Old Rules 38(4), 58-59, 62-65; New Rules Part 2, Division 2, R. 2.1 and R. 10.44)

- No capacity
- Infants sue by their "next friend"
- Old Rule 62: next friend must sign consent, this acknowledges their liability to pay costs
- Next friend must appoint lawyer (*Salamon*: can't be parent), get approval from Trustee to settle for a minor
- **New Rule 2.14** – next friends are now **self-appointed lit rep**
    - Same thing for dependant adults and guardianship orders

**D. Persons of Unsound Mind** (Old Rules 60, 61; New Rules Part 2, Div 2 and R. 10.44)

- No capacity
- Old Rule 60: adult person of unsound mind if no trustee/guardian under *Dependent Adults Act* can sue by next friend/defend by guardian ad litem appointed by court
- Old Rule 61: adult person of unsound min who has trustee/guardian appointed under *Dependent Adults Act* can commence action by this person/defend by guardian ad litem appointed by court
- **New Rule 2.13** – guardian/trustee would be **automatic lit rep**

**E. Corporations → Ltd. or Inc.** n/a to firms, trade names or proprietorships

- *ABCA* – corp can sue/be sued (it is a legal entity)
    - Corp as π → must be registered in AB to sue (s. 295)
    - Corp as Δ → AB court can take J by *forum conveniens* (but consider if you will be able to enforce in AB)
- Lawsuit must be in proper company name – do corporate search

**What if corporation has been dissolved?**

- *ABCA*, s. 208/210 – can apply within 5 years of date of dissolution for corp to be revived
    - Use where discovery of COA is outside 2 year scope OR dissolved corp needs status to commence action
- *ABCA*, s. 227 – n/w dissolution action can be brought against corp w/li2 years of dissolution as if not dissolved
    - s. 227(4) – SHs to whom the property has been distributed are liable
    - consider action against SHs if corp dissolved and assets distributed
- **Therefore, list corp AND SHs as Δ in style of cause**
- Other considerations: are there assets? Insurance policy likely survives dissolution, but in AB π not permitted to know if Δ has insurance

SEE REPRESENTATION BEFORE COURT → Section J

**F. Firms** (Old Rules 80, 82, 83; New Rules Part 2, Rule 2.5)

**Partnerships:** Old Rule 80: partnerships can sue/be sued in partnership name, firm name, all names of partners

- New Rule 2.2: action by/against partners may be brought using name of partnership/partners can defend individually
- NOTE: may not actually be partnership, maybe just association → then rules n/a

**Proprietorships/Trade Names** - names with NO Inc. or Ltd. at the end (backed by individuals or # corp)

- Old Rules: entity operating under proprietorship/trade name has to sue under name behind it
    - Eg. Bob Smith, owner/operator of Bob's Welding
    - But can sue Δ simply as Bob's Welding b/c may not be able to find out who is behind them
- New Rule 2.5: entity operating as proprietorship/trade name can sue or be sued using TN

- WS: this is suggested by rule but will likely be changed back to old rule

**G. Owners and Drivers**

- Sue driver AND owner (b/c they are responsible for vehicle's insurance – mandatory in AB)
- *Traffic Safety Act*, s. 187 – owner of vehicle is vicariously liable for actions of driver
- Only limited circumstances get owner off hook, liable even for deliberate criminal acts

**H. Representative Actions** (Old Rules 42, New Rules 2.6)

- Group of ppl linked by 1 set of facts (shot-gun approach)
- Advantageous b/c levels playing field of consumers v. manufacturers
- Applies to both π and Δs
- Old Rule 42: where numerous persons have common interest, one or more may sue/be sued or authorized by Court to defend on behalf of/for the benefit of all
  - Style of Cause: X and Y on behalf of themselves and all others having this claim
  - Rule makes it possible to have representative Δ → can't do this under *Class Proceedings Act*
  - Must put in all ppl individually b/c all circumstances and claims would be different
- Old Rule now **overtaken by legislation** → *Class Proceedings Act* (preferred method over Old Rule 42)
  - s. 5: for proceeding to be certified as class proceeding Court must be satisfied…(see s. 5 conditions)
  - s. 15: judge who makes certification order hears all applications before common issues trial (case management)
- Eg. Native actions often brought as rep actions, eg. Chief X on behalf of Band Y, or unincorporated associations
- New Rules 2.6-2.10 – same as old, if certification order obtained under *Class Proceedings Act,* action from 2.6 can be continued under that Act.

**I. The Crown**

- **Crown liability** → *Interpretation Act (Alberta)*, s. 14 – no enactment binding on her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless enactment expressly states that it binds Her Majesty
- **Provincial Crown** → *Proceedings Against the Crown Act (Alberta)*, s. 12 – in proceedings under this Act, Crown shall be designated "Her Majesty the Queen in right of Alberta"
  - Can specify by including specific ministry
- **Federal Crown** → *Crown Liability and Proceedings Act*, s. 23(1) – proceedings against Crown may be taken in name of AG of Canada or, in case of an agency of Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of agency, in name of agency (eg. RCMP)
  - *CLPA* makes Crown subject to provincial rules of examination for discovery in limited circumstances.
- Crown may also avoid **ordinary rules of evidence**. Eg. May be immune to discovery, production of docs, public interest immunity (is harm of disclosure > benefit of production)
- ***Canada Deposit Insurance Co. v. Prisco*, ABCA 1997**: Fed crown immune from examination. Right can only be removed by federal statute. **Province cannot legislate to affect the rights of Crown in the Right of Canada**. Crown agent cannot be compelled, in absence of statutory authority strictly construed, to submit to discovery.

CAUTION: Some entities which may seem like Crown are NOT.

- Eg. The Public Trustee – created by *Public Trustee Act*
- To sue city –"City of Edmonton"
- To sue police, need to list Chief of Police in style of case, "Mike Boyd, Chief of the Edmonton Police Service"

Native Bands → Describe like unincorporated association + representative

- Eg. Chief X on his own behalf and on behalf of Band Y, also known as Y Nation
- Native bands likely fall into federal jurisdiction

**J. Representation before the Court** (Old Rules 5.2-5.4; New Rules 2.21-2.23)

- Corps cannot speak for themselves

- *Legal Professions Act*, s. 103 Old Rules 5.2-5.4 → lawyers MUST represent corps (monopoly over representation)
    - Old Rule 5.2 – person shall only be rep before Court by solicitor
    - Old Rule 5.3 – person may rep himself
    - Old Rule 5.4 – with permission, person may be rep before court by agent other than solicitor
- New Rule 2.23 (broader): court **may** permit person to **assist** party before court in any manner and on any terms/conditions court considers appropriate
    - Assistance includes things like note-taking (very broad)
    - **Therefore, legal representation no longer mandatory for corporations**
    - However, will likely still be common place to get leave

***Rangelander Holdings Ltd. v. Calgary*, ABCA 1997:** Applicant argued court has inherent discretion to ignore *Legal Professions Act,* s. 103. Old Rule 5.4 permits agent other than a solicitor with leave. HELD: **Must consider policy reasons for restricting right of audience to lawyers.** Here, person wishing to be agent clearly does not understand law. Corp would suffer. WSS: Appears to be "competence test" re prospective agents.

## Chapter 6: Pleadings – General Rules

A. **Content of Pleadings** (Old Rules 104-115, 199; New Rules Part 12, Divisions 3 and 4)

- New written in plain language, fewer rules, longer content, no significant legal change
- Purpose of pleadings is to describe matters at issue b/w parties (what are they fighting about?)
- To certain extent, pleadings tell **story**
- Pleadings must identify:
    - Parties (who is suing whom) and matters in issue (issues that link parties together)
        - Not every π must have same claim against Δ as long as their claims are linked
    - Material facts – disclose material facts that give rise to cause of action
        - Content
        - Active, direct voice, be concise, use plain language, avoid legalize
        - Bare bones of story
        - Observe formalities
    - Relief – who is seeking what against whom

NOTE: Cases rarely won or lost over pleadings. Court looks to substance over form.

Eg. Negligence (elements of tort → see Sample SoC, para. 4)

- Plead thing that gave rise to injury (motor vehicle of Δ hit motor vehicle of π)
- Describe injury
- Indicate accident caused solely and directly by negligence of Δ, then list particulars

**Rule 104 – Summary of Facts**

- Pleadings must contain summary of facts, not law, evidence or argument
- Include unusual claims, eg. if going to claim equitable remedy, need to include to alert other side
- Include more not less
    - Consequence of too little greater than including too much (lawsuit drawn out)
    - If lack material facts and limitation passes, claim may be struck. More likely that court will fix problem (set lawsuit back to be repeated after amending pleadings)

**Rule 105 – numbered paragraphs** (doesn't have to be proper paragraphs)

**Rule 106 – Docs and conversations not to be quoted at length**

- need not be quoted verbatim, instead summarize the effect of doc

**Rule 107 – Presumption of law**

- Do not plead things that are presumed or anticipate defences
- Eg. no need to define elements of contract

**Rule 108 – Denying CP**

- Conditions precedent implied

- Before can sue insurance co, must file notice of proof of loss from insurer → CP to suing insurer
- If you want to dispute CP you must plead it.
- If you are π → don't need to plead you have done this, it is implied
- If you are Δ → and want to dispute CP, must specifically raise it in your SoD, this CP was not performed so you do not have right to sue

**Rule 109 – When specific pleading required**

- List of when a specific pleading is required
- Δ should specifically plead performance, release, payment, limitations, eg. Can't sue me for debt b/c I paid it
- Limitations – in order to avail yourself of immunity under Act, as Δ you must raise it
- Must plead obscure things, eg. *Statute of Frauds,* etc.

**Rule 110** – **Matters arising after action started**

- Can raise things which happened after suit started
- Eg. Δ pays, no longer owes – no action
- Eg. Δ makes partial payment - include this in defence

**Rule 111** – **Plead in the alternative**

- Unlike crim law don't need to select 1 defence
- Eg. Δ says, I wasn`t there, but if I was there, I didn`t do it
- But, be careful not to negate something you have already said in a preceding paragraph

**Rule 112 – Point of Law**

- Can raise any point of law (but must be raised from material facts pleaded)

**Rule 113** – **Malice or other mental state**

- Can allege malice, fraud, knowledge or other condition of the mind of any person as fact without setting out circumstances from which it is to be inferred

**Rule 114 – Alleging notice to person**

- If pleading notice can simply allege this as fact without pleading details

**Rule 115 – When particulars to be pleaded** (nasty allegations)

- In pleading misrep, fraud, breach of trust, wilful default or undue influence must be in particulars
    - If plead this but don't prove you can get a cost penalty against you
    - Therefore, if you plead this, must give more details than ordinary

**Rule 119** – **Silence is not an admission**

- Often see pleadings where Δ denies each and every allegation in SC – don't need to do this

**New rules** (includes all of above)

**12.6** – pleadings must be succinct and consecutively numbered

- Must state any of following matters which are relevant, eg. facts upon which parties rely, etc.

**12.12** - equivalent of Rule 119 (fact denied if it is not specifically admitted)

***Rodaro v. RBC*, ONCA 2002**

**F:** TJ found for π - there was a lost opportunity arising from the misuse of confidential information. Δ appealed b/c lost opportunity not pleaded.

**D:** Δ won.

**R: Lost opportunity was not pleaded, can only argue within boundaries of pleadings.**

NOTE: π will likely try to assert claim against counsel for screwing up procedural element of case.

***Duncan*, BCCA 1968**

**F:** Builders lien claim. Π assigns benefit of contract to someone else. Δ argues this π can`t sue me b/c assigned rights – so right to sue resides in assignee, but Δ did not plead assignment argument. TJ: Δ wins, characterized assignment as point of law, so does not need to be pleaded. Π appealed.

**D:** π wins. Point of law argued by Δ not supported by fact pleaded. Assignment is material fact and therefore must be pleaded to be relied upon. **Points of fact must be raised in pleadings, points of law need not be raised.**

***Allen v. New Mount Sinai Hospital*, ONCA 1981**
**F:** Don't use left arm for IV, doctor did, π sues doc and hospital. Π pleaded in negligence, but then argued tort of battery. Ontario High Court (Linden): π wins – tort of battery made out. Δ appeals
**D:** Δ wins. Sent back for re-trial.
**R:** Battery cannot be raised b/c was not pleaded. **Cannot place liability on something not pleaded.**
**A:** CA sets suit back a few steps – π given 10 days to amend pleadings, Δ then has 10 days to amend defence, then trial on issue of battery

- Someone responsible for costs of unwinding lawsuit and having to go to trial again
- Costs of first trial will be in discretion of 2nd trial judge
- If π doesn't amend pleadings, action dismissed

***Pyramid Construction (Calgary) Limited v. Fell and Fell*, AB Sup. Ct. 1957**
**F:** Rescission of conditional contract. Contract s/t unperformed CP which was raised for the first time at trial (not pleaded). Δ argued CP not performed so no claim. Recall rule: then Rule 152, now Rule 108, future Rule 12.6(3)(e).
**D:** π wins.
**R: to rely on CP, Δ must specific condition not performed and its non performance in pleadings.**
**A:** *Allen:* Court will try and fix irregularities. *Judicature Act*: still must bring matter before court (must be in pleadings).

NOTE: remains to be seen whether under new rules court will be more forgiving. B/c new rules meant to be more co-operative, new atmosphere and goals created by new rules. Court will likely give more latitude to parties.

B. **Formal Requirements** (Old Rules 5(b), 8, 87-90, 120, 606; New Rules Part 12, Division 3 and 4)

- These are technical rules which can be fatal to pleadings

**Rule 5(b)** – pleadings must contain address for service

- NOT in new rules per se, not in new definitions, but seems to be swept up in precedent and general items in pleadings

**Rule 8** – need action number on front and back of pleadings

- Given to you by clerk
- Now 12.13 and 12.14

**Rule 87** – must say in pleadings whether you think trial will be longer than 25 days

- Brings you under long trial regime (separate set of rules governing conduct of action)
- Under new rules there will be categories of cases, scheduled dependent on category

**Rule 88** – include solicitor's name and address for service

- New rule 3.25, 2.14 (self-appointed lit rep)

**Rule 90** – reciprocal requirements for defence and subsequent documents

- Eg. If SC required to have numbered paragraphs, then SD also needs numbered paragraphs
- New Rule 12.13, 12.6

**Rule ?** - entitled to serve subsequent items on address set out in pleadings whether get notice or not

- Removed by new rules - issue of service/dispensing with it is in discretion of court, Rule 11.2(a)

**Rule 120** – Relief need not be claimed

- Costs awarded by judge according to Schedule C regardless of whether claimed
- BUT everybody does claim costs in prayer for relief ("dismissal w costs")
- Should only plead costs if asking for costs on extraordinary basis – solicitor-client costs, indemnity costs, something on scale higher than rules of court, something that punishes other side for bad behaviour
- New rule 12.6

**Rule 606** – Damages must be stated

- If going to claim monetary amount for damages must say HOW MUCH
- If below $75K → streamlined rules
- If above $75K → typical rules

- New rule 12.6 – streamlined rules removed. So doesn't matter whether over/under $75K

## C. Function

***MacCabe v. Westlock Roman Catholic Separate School District No. 110*, ABCA 2001**

**F:** Minor child (female) injured in tumbling accident. In determining liability of Δ, needed to determine laws of future income. TJ: Applied male earnings tables to determine female's future loss of income. Finds inequity in male and female wage tables and will not sanction the reality of pay inequity. Therefore, award higher than would have been had female tables been used. Δ appeals.

**D:** Overturns trial.

**R:** Function of pleadings was to decide matters at issue between parties and their specific intentions. Individual approach. **Court cannot go beyond what individuals bring into proceedings.**

**A:** Δ argues this is societal problem, not my obligation to compensate her for ills of society. Δ only responsible for harm they caused, not theoretical harm.

***Judicature Act*, s. 8 –** court has power to grant and shall grant (permissive and mandatory) all remedies to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding (must be in the pleadings) so that all matters at issue can be determined and multiplicity of actions concerning those matters avoided

- Fuses law and equity

## Chapter 7: Interest

***Judgment Interest Act***

**Part 1 – Prejudgment interest**

**s. 2(1)** – court **shall** (mandatory) award interest from date cause of action arose to date of judgment

**s. 2(2)** – court shall not award interest under this Part

a) On pecuniary loss arising after day of judgment and that is identified by court
b) On interest awarded (can't get interest on interest, ie. compound interest)
c) On exemplary or punitive damages
d) On an award of costs
e) On money, or interest on that money, borrowed by a party to pay for expenses that are claimed as special damages
f) On an amount of money that is
    a. Paid into court and accepted, or (formal offer stops interest clock)
    b. Contained in an offer of judgment or an offer to settle made and accepted

   in accordance with the *Alberta Rules of Court* in satisfaction of a claim.
g) On judgment given on consent, unless agreed to by parties
h) Where agreement between parties respecting interest
i) Where payment of pre-judgment interest is otherwise provided by law

NOTE: If default judgment, clerk calculates interest, tallies it up and puts it in final amount.

**s. 2(3) –** BUT court has discretion to refuse to award interest, award interest at higher/lower rate, award interest for period other than period provided for.

- Discretion may be applied if delay on part of π, bad conduct on part of π, interest would be windfall
- Rare, need extraordinary circumstances to get court to depart from awarding as set out by Act

**s. 4(1)** – interest awarded under on **non-pecuniary (general) damages** calculated at **4%/year**

- Pain and suffering, loss of companionship, future income loss

**s. 4(2)** – interest awarded under on **pecuniary (special) damages** calculated as **prescribed by regs**

- Out-of-pocket expenses, eg. price of medication

**s. 4(3) –** Before beginning of each year, LG may, by reg, prescribe rate to be applied under (2)

**Part 2 - Post-judgment interest**
**s. 6(1) – judgment debt** means sum of money or any costs made payable by judgment
**s. 6(2)** – judgment debt bears interest from judgment date to date judgment satisfied at rate in s. 4(3)

Before *Judgment Interest Act*, claimed under *Judicature Act*. Had to plead and prove amount X and formula for interest applied.

***Judgment Interest Regulation***
- Rate for 2010= 0.825%
- Fluctuates from high of 11% (1984, 1990, 1991) to low of 2010 (0.825%)
- Intention of regulation is to parallel commercial rates, indicates rates of economy in particular year

**Circumstances which take us outside of Act**
- Contractual agreement: contractual interest based on contract NOT Act, eg. s. 2(h) – eg. lending agreement or mortgage
- Interest claimed as separate head of damages, eg. breach of contract case/situations where damages calculated on different basis (action by beneficiary against t/ee)

NOTE: Under Act, rates tend to be lower than commercial rates. So cheaper to default on loan and pay judgment interest than pay your obligation. Courts try to fix this and fully compensate π. To do this, must find reason to justify departure from Act (will use discretion in s. 2(3)).

***216927 Alberta Ltd. Fox Creek (Town)*, ABCA 1990**
**F:** Repudiation of contract.
**D (Foisy):** Court refused to award interest b/c would have been windfall.
**R: Court has discretion but circumstances must be compelling for court to depart from Act. Will be fact-specific and on case-by-case basis.**
**A:**
- π is prima facie entitled to interest under Act (this is purpose of mandatory wording in s. 2)
- BUTs. 2(3) gives discretion

***Aetna Insurance Co. V. Canadian Surety Co.***
**R:** Once TJ has made decision about interest CA will be reluctant to interfere. Significant deference given to decision on interest made by lower courts.

***Stoner v. Canadian Natural Resources Ltd.*, ABQB 1988**
**R: If want interest must plead it (claim prayer for relief).**

**Codified in new rules at Rule 12.6(2)(c)(iii)** → Put in pleadings, indicate basis for interest and provide method for calculating interest in pleadings.

**Chapter 8: Venue** (Old Rules 12, 237, 6.1; New Rules Part 3, Division 1) → Line 2 of Style of Cause
1. Place of commencement or conduct of action
- Old rule 6.1 – "Judicial District of Edmonton"
    - File in closest jurisdiction determined by highway travel, nearest business of parties
    - If no single jurisdiction can be determined, closest centre to residence of one party
    - Defaults to π's choice, if Δ doesn't like they can challenge (*forum non conveniens*)
    - Old rules contain Judicial District Map
- New rule 3.3(1)– Judicial Centre: "Edmonton"

- appropriate judicial centre is (a) closest judicial centre, by road, to the Alberta residences or Alberta places of business of all the parties, or (b) if can't determine, then closest, by road, to the Alberta residence of Alberta place of business of one of the parties, that party being selected by the party starting the action (defaults to π's choice)
- New rules don't have Judicial District Map

- Once selected, action conducted and everything filed in that jurisdiction

2. Place of trial

- Old rule237 – in last paragraph of SoC, π proposes trial location (could be different than place where action commenced), Δ then accepts or not (R 12 – transfer of proceedings)
- New rule R 3.3 – covers place of commencement AND place of trial
  - R 3.6 – action carried on in centre where commencing doc filed, but 3.6(2) – court can specify location. Often selected based on convenience to lawyers, not parties.

## Chapter 9: Joinder of Parties and Causes of Action

- RULE: Sue everybody for everything o/w risk being barred by *res judicata* or abuse of process
  - Eg. MVA. Driver sues Δ for property damage to car, later sues for personal injury → NO 2nd COA barred.
- If joint tortfeasors, judgment against 1 may release judgment against another
- Join as many parties/issues arising from 1 set of facts as is conveniently possible w/o making lawsuit unworkable

### *A. Res Judicata*

**1. Cause of Action Estoppel** (narrow, formal)

- RULE: Damages resulting from single tort must be assessed in 1 proceeding. No double jeopardy.
- To prevent 2nd claim, Δ must show:
  - Same parties
  - Attempt to re-litigate previous COA
  - Final judgment
- If yes to all, claim estopped.
- Rationale: finality, Δ knows if sued for specific tort, all claims arising are in 1 judgment

***Cahoon v. Franks*, SCC 1967**
**F:** After car crash, claim of property damage to car and personal injury brought in separate suits.
**D:** Personal injury claim barred.
**R:** Claim for damage to property and personal injury from one accident must be brought under same action.

**2. Issue Estoppel** (wider than COA estoppel)

- Issues before court AND all issues which could have reasonably be brought before court based on pleadings
- To prevent 2nd claim, Δ must show:
  - Same parties
  - Attempt to re-litigate same question*
  - Final judgment
- If yes to all, claim estopped.
- Question must not have arisen collaterally in earlier proceeding – must have been fundamental to decision
- ***Earley*, ONCA 2007:** issue estoppel **wide enough to apply to motions**

***Angle v. Minister of National Revenue*, SCC 1974**
**I:** Is the indebtedness of Angle to Transworld the same as contested in the earlier proceedings?
**D (Dickson for majority):** No, this is not same issue, claim can proceed.
**R:** Will not suffice if question arose collaterally/incidentally in earlier proceedings or is one which must be inferred by argument from judgment - must have been "**fundamental to the decision arrived at" in the earlier proceedings**.

**A:** Question in earlier proceedings was amount of A's income tax assessment. Finding of no liability to Transworld not legally indispensable to judgment. To establish plea of *res judicata* judgment relied on must have been pronounced by a Court having concurrent or exclusive J directly upon point.

**3. Abuse of Process** (discretionary, widest category of all)

- Court has inherent jurisdiction to prevent abuse of process, applies when can't fit situation into *res judicata*
- ASK: In substance, is this duplication of something that went before under another name? Maybe 2 in different Js.
- Old Rule 129: court may order to be struck out or amended any pleading in action (control its own process)
- ***Re Roenisch***: trust issued raise in 1st action. Re-litigation was abuse of process.

**B. Joinder of Claims and Parties**

**1. Generally** (Old Rules 32-36, 38, 46-49; New Rules Part 3, Divisions 2 and 6)

- Rule 32: can unite several causes of action in lawsuit
- Rule 33: cannot have claim by t/ee in bankruptcy be joined w claim in any other capacity
- Rule 34: h and w can be joined in same lawsuit (depends on situation)
- Rule 35: executors and administrators can be joined together in personal capacity
- Rule 36 (same transaction): enjoinder rule allows multiple πs/Δs (*McMynn:* claims by several ppl against corp joined)
- Rule 38: too many/too few ppl in lawsuit not fatal to action, court can fix
- Rule 46: court can order separate trials or enjoin all Δ in 1 action for 1 relief claimed
- Rule 47: do not have to claim the same relief against every Δ
- Rule 75: where 3rd party has delivered SoD considered party to action, tried at same time as principle action
- Rule 95: court may sever or exclude counterclaims
- Rule 229: court can consolidate separate actions or decide to hear them consecutively
- **New Rule 3.73 –** No claim fails solely because a) 2 or more parties join in an action that they should not have joined, b) 2 or more parties do not join an action that they could/should have joined, or c) party was incorrectly named as a party or was incorrectly omitted from being named as a party

**2. Addition or Substitution** after Expiry of Limitation Old Rule 38: court can change parties (misjoinder of parties)

- Before LP expires → leave of court, demonstrate no prejudice, party amending pays for costs
- After expiry of limitation → *Limitation Act*, s. 6 – nwst expiry, when claim added to proceeding previously commenced, through new pleading or amendment, Δ not immune from liability if s. 6(2)-(4) → SEE BELOW

**3. Parties Added on Own Motion/Intervenors**

- Old Rules made no specific provision for intervenors, closest is 38(6)
- New Rule 2.10 - on application, court may grant status to person to intervene in action s/t terms and conditions and w rights and privileges specified by court
- Party may intervene if affected by decision and input helpful to court to make proper decision. Have to take record/evidence as they find it. Often added later in proceedings (CA, SCC)

**C. Amendment of Claims** (New Rules 3.62-3.67)

Pleadings close: New Rule 3.67

- On π's reply (joins all issues raised in suit) to SoD, or
- If no reply, 10 days after service of SoC (implied joinder) → Old Rules 8 days

**1. Amendment without leave** (Old Rules 130, 130(1.1), 131)

- NOTE: once served, will likely get o/s side's consent before amending, even though not required
- Old Rule 130(1) – party may, w/o leave, amend any pleading once at any time before pleadings close, must deliver amended pleading to opposite party → 1 free amendment (don't have to pay anyone's costs)
    - 130(1.1) Pleading may be amended under (1) to add/remove/sub party
    - 130(1.2) Removal of party is s/t to payment of costs as Court may order
- Old Rule 130(2) – where amended SoC delivered, if Δ already delivered defence, may amend and deliver w/i 8 days after amended SoC delivered
- Old Rule 130(3) – where amended defence served on π by Δ. If π already delivered reply, may amend and deliver w/i
    - 8 days after amended defence delivered
- Old Rule 131 – where party amended pleading under 130, opposite party may, w/i 8 days after receiving amended pleading, apply to court to disallow amendment, and court may disallow it
- **New Rule 3.62(1):** party may amend own pleading, including amendment to add/remove/sub/correct name of party, as against the other party as follows:
    - **Before pleadings close, any number of times without leave**
    - **After pleadings close, only by agreement between parties OR, w court's prior permission**
        - For addition/removal/sub/correction of name, permission from New Rule 3.74
        - For any other amendment, permission being given from New Rule 3.65

**2. Amendment by Consent (Agreement)** (Old Rule 135)

- **Old Rule 135** – any party may amend pleadings at any time without order on filing the written consent of the opposite party of his solicitor
- **New Rule 3.62(1)(b) –** above (after pleadings close, by consent or court's permission)

**3. Amendment by Order (Consent of court)** (Old Rule 132-134)

- **Old Rule 132** – court may allow any party to amend pleadings as necessary for **purpose of determining the real question in issue between the parties**
- **New Rule 3.65** – after close, can only amend if amendment will **identify real question in issue between the parties**
- **Old Rule 133** – court may at any time, amend any defect or error in proceedings and amendments shall be made for the purpose of determining real question of issue raised by or depending on the proceedings
- **Old Rule 134** – order for amendment expires on date specified in order, or if no date w/i 14 days from date of order

***Milfive Investments Ltd.*, ABCA 1998 – but contrast to *Rago/Hodge***
**R:** We see no reason to doubt the often stated presumption that any amendment, however late or careless, should be allowed if **no prejudice which cannot be compensated in costs.**

Therefore, provided you can meet test, almost no issue of amending prior to expiry of LP.

- As long as other party doesn't suffer beyond thrown away costs.
- Π could also start new action (see below)

**AMENDMENT AFTER EXPIRY →** *Milfive* + *Limitations Act*, s. 6
*Limitation Act*, s. 6 – nwst expiry, when claim added to proceeding previously commenced, through new pleading or amendment, Δ not immune from liability if s. 6(2)-(4)

**(2)** When added claim

- Is made by Δ against claimant, or
- does not add/sub a claimant/Δ, or change capacity in which they sue/being sued

added claim must be related to conduct/transaction/events described in original pleading in proceeding.

**(3)** When added claim adds/subs claimant, or changes capacity in which claimant sues,

- added claim must be related to conduct/transaction/events described in original pleading in proceeding,

- Δ must have received, within LP applicable to added claim plus the time provided by law for the service of process, sufficient knowledge of added claim that Δ will not be prejudiced in maintaining a defence to it on the merits, and
- court must be satisfied that added claim is necessary or desirable to ensure effective enforcement of claims originally asserted or intended to be asserted in proceeding.

NOTE: Therefore, show Δ got notice of claim within 3 years of original claim. If within section, court will allow, Δ may be able to plead immunity under Act. Can't save claim that hasn't been sued in time by tacking it on to existing suit.

**(4)** When added claim adds/subs Δ, or changes the capacity in which Δ sued,

- added claim must be related to conduct/transaction/events described in original pleading in proceeding,
- Δ must have received, within LP applicable to added claim plus the time provided by law for the service of process, sufficient knowledge of added claim that Δ will not be prejudiced in maintaining a defence to it on the merits

NOTE: requirements less onerous.

**(5)** Claimant has **burden of proving**

- added claim related to conduct/transaction/events described in original pleading in proceeding, and
- requirement of subsection (3)(c), if in issue, satisfied,

Δ has burden of proving, requirement of notice, if in issue, was not satisfied

**4. Procedure for Amendment** (Old Rules 136-140)

- Old Rule 136 – method of amendment: written alterations, additions on paper
- Old Rule 137 – endorsement of amendment: amendment shall be marked by clerk, underlined in ink of a different colour than used in original
    - Possible to amend pleadings 1+. For each subsequent amendment use different colours
- Old Rule 138 – time for delivery: delivered within time allowed for amending it (14 days, Old Rule 134)
    - **New Rule 3.62(1)** – Amending a pleading: pleading must be filed and served within **10 days**
    - Don't have to underline in red
- Old Rule 139 – if party amends at trial do not need formal order
    - Only occurs where 1 side has not gone through formality of amending pleadings before and must put record in order
    - **New Rule 3.65(4)** - same
- Old Rule 140 – when court doc, other than pleading, is amended, note shall be made on original of amendment
    - **New Rule 12.18 –** other than pleadings of affidavits
- Old Rule 141 – Party making amendment bears costs
    - If lawsuit is advanced, may have to go back a few steps, party amending may have to pay other side's thrown away costs b/c lawsuit being unwounded.
    - **New rule 3.66 –** same

***Rago Millwork v. D. Woodhouse Construction*, ABQB 1981**

Funduk: Applicant to amend pleading has to set out exactly what amendments they want. Can't just say going to apply to amend to define real issues, **must actually say WHAT amendments are being proposed**.

**A:** provide draft amendment to court or attach as exhibit in supporting materials.

***Hodge v. Carey Industrial Services Ltd.*, ABQB 1997**

**Funduk:** Seeking leave to amend is discretionary remedy for court to grant/deny. Have to go further than say other side is not going to be prejudiced. **Must give some evidence to support proposed amendment.**

**A:** Orders are not granted just by the asking. Rule 132 is permissive, not mandatory. Prejudice only arises if Δ raises it.

**D. Severance of Claims** (Old Rules 37, 46, 75(2), 95; New Rules Part 3, Div 6; New Rules 3.71,3.72)

**E. Consolidation** (Old Rules 229; New Rules Part 3, Div 6, New Rule 3.72)

- Consolidation = completely and formally unifies 2 actions as if started as 1
    - Evidence for one = evidence for all
    - In contrast to consecutive actions, where evidence must be reheard in each case
- Old Rule 229: where there are 2 or more actions or proceedings that
    - Have a common question of law or fact, or
    - Arise out of the same transaction or series of transactions,
- or where for any other reason it is desirable to make an order under this Rule, the court **may** order that the actions or proceedings be consolidated or be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.
- **New Rule 3.72**: wider "...arise out of the same transaction or occurrence or series of transactions or occurrences"
- TEST: is it just and convenient, any prejudice to parties by linking actions?
- Considerations: convenience, desire to avoid multiplicity of results, judicial economy
    - Don't want 1 court to decide it one way, then another decide differently
    - Must consider whether you can have all πs in 1 action?

***Scheidl v. Southam Inc.*, ABQB 1991**

**F:** drug bust that went wrong. 2 police officers sued Δ separately in independent actions for defamation and conspiracy. Δ applies to have actions consolidated. Master ordered 2 actions be tried together.

**D:** Overturned.

**R:** Court has discretion for consolidating actions – **convenience, costs, prejudice and avoidance of inconsistency will be considerations.**

**A:** both π wanted jury trials, argued don't want actions together b/c would prejudice them. Δ argued as general rule where claims by or against different parties involve or may involve a common question of fact bearing sufficient importance to the rest of the action to render it desirable that the whole should be disposed of at same time, then should be together.

- Here, statements of claim issued by 2 π though represented by different lawyers are almost identical, both part of Calgary police, acting in drug squad, etc.
- Even though relate to same publication there is difference between position of two π
- Positions so different can't be rep by same lawyer, juries couldn't keep it separate

## Chapter Chapter 10: Service (Notice)

- Rules for commencing docs v. other docs
- When service effected, o/s has 15 (NOW 20 days) to file SoD
- New Rule 11.2 – Unless court o/w orders or these rules o/w provide: **commencement doc** must be served in AB in accordance w method of service by enactment, or this Division.
- **Docs subsequent to commencing docs can be served:**

1. By sending to address for service that other side has provided on pleading, OR
2. By fax (if number has been provided) but must confirm o/s received
    - Old Rule 16.1 – must ensure they have received (likely have to call them)
    - New Rule 11.19– allows service by electronic method (by email w attachment), must demonstrate it has been sent and received

### A. Individuals, Litigation Representatives

(Old Rules 13, 14, 15(1), 17-19, 22; New Rules 2.12(2), 11.1, 11.3, 11.5, 11.14-11.16, 11.19, 11.20)

- Old Rule 13(1) – doc required by these rules to be served need not be served personally unless service is expressly prescribed by these Rules of by order of the Court
- Old Rule 13(2) – service may be effected on any day of week
- Old Rule 14 – commencing doc must be served personally
- Old Rule 15(1) – service effected on person by leaving with them true copy

- Old Rule 22(1) – can serve by registered mail (problem is that not certain person who has signed IS person you intend to serve)

- New Rule 11.3 – Individual
    - (1) commencement doc may be served on individual not required to be served by another method by
        - Leaving commencement doc w individual
        - Sending commencement doc by recorded mail addressed to individual
    - (2) Service effected
        - If doc left w individual, on date left
        - If doc sent by recorded mail, on date confirmation of receipt is signed by addressee
- New Rule 11.4 – can serve trustees, personal reps
- New Rule 11.6 – for missing persons, serve public t/ee
- New Rule 11.16 – Self-represented litigant
    - May accept service of commencement doc in writing
    - Service effected under rule on date the self-rep accepts service of doc in writing
- New Rule 2.12 (2) – Lit Rep service of doc that would otherwise be required on the individual must be effected on lit rep, and service of doc on individual for whom lit rep appointed ineffective

**For service of natural person, 3 options:**
- Original/true copy (New Rule 11.1)
- Provide to lawyer (must undertake to defend in <u>old rules</u>)
- Registered mail

If person won't take it – drop it at their feet.

***Forbes***: can serve someone who is only passing through J, even if they normally reside somewhere else.

**B. Corporation** (Old Rules 15(2), 24(2); New Rules 11.7)

- Old Rule 15(2) – personal service is effected on corp either a) in manner provided by statute, or b) by leaving true copy of doc with mayor, reeve, president, chairman or other head officer of corp, or c) other officials of corp
    - Time starts when leave it with someone at corp
- Old Rule 24(1) – if address for service furnished, all docs not required to be served personally shall be deemed to be sufficiently served if a true copy is left at or sent by prepaid registered mail to that address
- Old Rule 24(2) – service under (1), Rule 26 or by mail is not invalid by reason only that
    - Addressee refuses to accept mail; addressee returns mail; in case of registered mail, addressee refuses to claim or take delivery of registered mail; addressee no longer resides there and has not provided postal service with current address
- New Rule 11.7(1) – commencement doc may be served on corp by leaving it w officer/individual who appears to have management or control responsibilities wrt corp, or by sending by recorded mail addressed to corporation
- New Rule 11.7(2) – service effected under rule if doc left w officer/individual on date it is left, or sent by recorded mail on date confirmation of receipt is signed

**C. On a Firm or Partnership (Old Rule 15(3), 28 - enforcement; New Rules 11.8, 11.9)**

- Old Rule 15(3) – can effect service of commencing doc on partnership by leaving it with one of the partners (if leave with one you serve all)
    - New Rules 11.8 – service on LP
    - New Rule 11.9 – service on partnership other than LPship
- Old Rule 28 – office closed or service frustrated → Canada Post Rule
    - Then service may be effected by sending doc by mail to person at office w notice being served pursuant to Old Rule 28 – service effected at time attendance made to that office
    - No New Rule

***Nova v. Grove*, ABCA 1983*:*** rules apply only to AB partnerships. Cannot serve extra-provincial partnership by existing rule 15(3) or presumably new rules.
Therefore, If partnership is outside J → need order for service *ex juris*.

**D. Substitutional (Old Rule 23; New Rules 11.26-11.28)**

- Typically occurs, when Δ evading service
- Recall: Time for service NOT open-ended → New Rule 3.26 – SoC must be served on Δ w/i 1 year after date filed
- Old Rule 23 – where personal service prescribed and appears impractical to effect prompt personal service, may make order for sub service, or dispensing w service (very hard to get)
    - Application for sub service must be supported by affidavit indicating why impractical, proposing alternative that will likely by effective
    - If no response to sub service, need leave of court to note Δ in default
- Eg. leave w adult in household, post in newspaper, leave it on door, etc.

*McGillis v. Hirtle*: F: didn't know where Δ was to serve him. Method proposed for sub service was advertising in the newspaper but π couldn't really demonstrate that D in province/city (insufficient under rules). No evidence to support publication would reach Δ – order for sub service not granted.

*MacNeil v. Hodgin*: F: π got order of sub service, relied on order – claimed he placed ad in Calgary Herald, Δ argued no properly served, 1 year had passed and Δ wanted application struck out. Purpose of service is notice – must come to attention of Δ. However, court revived SoC, granted π extension to serve Δ. → codified in New Rule 3.27

- New Rule 11.27 – same, but more explicit:
- (2) application must be supported by affidavit:
    - Setting out why service impractical
    - Proposing alternative method, and

- Stating WHY alternate method will be more effective
- (3) order for sub service must be served w doc except when sub service is by ad, in which case ad must contain reference to order
- (4) service effected on date specified in order
  - NOTE: don't need leave if no response, as clock already running
- New Rule 11.26 – validating service
  - Court may validate service of doc served inside/outside AB in manner not specified in rules if court satisfied
    - method of service used brought or was likely to have brought doc to attention of person served
    - doc would have been served on the person or would have come to attention of person had they not evaded service
  - if validated by court under this rule, service effected on date specified in order
- NOTE: purpose of service is notice, so if Δ has notice, court should have broad power to validate
- New Rule 11.28 – Dispensing w service
  - Court can dispense w service inside/outside Alberta if service of doc by method prescribed by these rules is impractical/impossible
  - (2) application must be supported by affidavit setting out reasonable efforts to serve doc exhausted, why no or little likelihood issued will be disputed, and stating no other method of serving doc is or is apparently available
  - NOTE: this will likely still be very hard to get, even if you get it how will you enforce if you can't find Δ?

**E. On Solicitor (Old Rule 16, New Rule 11.14)**

- Old Rule 16 - Lawyers can accept service and undertake to defend
  - Typically lawyers not retained in advance so this is onerous
- New Rule 11.14 – if lawyer acts for person, lawyer may accept service of commencement doc, effected on date doc accepted in writing by lawyer
  - Removed undertaking to defend

**F. On a Business Representative of Absent Party (Agent) (Old Rule 20; New Rule 11.7 – see Corp)**

**G. Contractual Stipulation (Old Rule 21; New Rule 11.21)**

**H. Defects and Curative Powers (Old Rules 558, 559; New Rules 1.5)**

- Court has curative powers
- Old Rule 558 – non-compliance w rules does not render any act or proceeding void, but act or proceeding may be set aside either wholly or in part as irregular/amended/or otherwise dealt with
- Old Rule 559 – application to set aside proceedings for irregularity shall be made within reasonable time and shall not be allowed if party applying has taken fresh step after knowledge of the irregularity

***Fontaine v. Serben*:** F: lawyer (F) sues two clients for his legal bill. Serves them by double registered mail. Δ signs receipt for both Δs (other is his father). Didn't do anything in response to claim. Went to judgment and bailiff seized a vehicle. After all this happens father applies to have action against him set aside on basis that service was ineffective. Old Rule 559 cannot cure – too much has happened and father exhibited undue delay. Service effective.

**I. Service *Ex Juris*** (Old Rules 30,31; New Rules 11.24, 11.25, 11.30, 11.31)

- Old Rule 30 - need leave of QB to serve someone outside of province and bring them w/i J of court
  - Long list of circumstances under which court might allow
  - AB is unusual in this requirement, ON does not require this
  - Typically, court will allow for longer time period for Δ to respond
- Old Rule 31 – application must be supported by affidavit, π must state reasonable cause of action

- STRICT: must fit within one of the Rule 30 requirements, apply in advance, Δ can come to J and argue *forum non conveniens*
- NOTE: No obligation in provincial court (small claims) to get leave to serve *ex juris*

***Tolofson v. Jensen*, SCC:** to get court to take J over person living outside of AB, must show Δ has real and substantial connection to AB. But may still be subject to law of place of tort/accident.

***Brill v. Korpaach Estate*, ABCA:** F: π (B) long distance truck driver in SK, car pulled out in front of him and committed suicide, π also seriously injured. Π sues in AB within 2 years, but Sk has 1 year LP, and 1 year had passed. SK govt insurance files defence, action proceeds. *Tolofson* released by SCC, Δ's lawyer applies for SJ.
- Suit struck, must be order before justice and fairness
- Law society insurer ended up paying for π's insurance

If Δ argues *forum non conveniens* – they would have to set out test in ***United Oil Seed:***
1. Test for appropriate forum is *forum conveniens*, forum which is more suitable to ends of justice
2. Where forum possess J over Δ, as of right, Δ must show another forum is clearly or distinctly more suitable
3. Where J does not exist as of right, same burden rests on party seeking to establish J (typically service *ex juris*)
4. While overall burden is as stated, party alleging a juridical advantage/disadvantage must establish it

- New Rule 11.24 - removes requirement to get leave of QB before serving outside J
    - Just need real and substantial connection
    - Can use method satisfactory within AB or method permitted in foreign J
    - Give time for response

**J. International Treaties Regarding Service of Docs**

***Wilson*, ON Supt Ct. 2002:** serve in accordance w local law, as long as Δ receives notice within time limit, service rendered

**Chapter 11: Renewal of Statement of Claim** (Old Rule 11, New Rules Part 3, Div 3, Sub 1)
- Old Rule 11 – renewal of SoC
    - (1) SoC in force for 12 months commencing on day issued, expires at end of day of first anniversary of day issued
    - (2) court may on application grant order renewing SoC for further period not exceeding 3 months
    - (3) application to renew must be brought before expiry
    - (5) can only be renewed once
- Problem: negotiating w someone, year goes by, and o/s not co-operating
- Amended to add 11(9) – gives overriding discretion
    - (9) nwst (3), if Court finds as fact
        - That, before SoC expired, Δ/anyone purporting to be Δ, or lawyer/other person purporting to negotiate on behalf of Δ caused π/π's lawyer to reasonably believe, and to rely on that belief that
            - Δ had been served
            - Liability was not/would not be contested
            - Time limits would not be relied on/waived, and
        - SoC expired
    - Court may by order renew SoC for period of time not exceeding 3 months from day of order

***Martinez,* ABCA 1998:** pre-11(9) – rejected suggestion Rule 11 was optional/discretionary, or that court can cure failure to serve under it.

***Kapki*, ABCA 1999:** In special circumstances, court can imply standstill agreement or estoppel from words/act of parties. Court will look for ongoing activity, information gathering, negotiations, etc. Effect of standstill is to tack time unto end of 12 month period. Standstill agreement ended by reasonable notice as determined by circumstance.

To fit yourself into Rule 11(9) need lawyer to swear that liability wouldn't be in dispute/time limits waive, belief must be objectively weighable (need to have reliance of some sort). If claim struck for want of service, lawyer now liable.

New Rule3.27 – extension of time for service

- (1) court may grant extension of time for service of SoC in any of the following circumstances:
    - If Δ/ anyone purporting to be Δ, or lawyer/other person purporting to negotiate on behalf of Δ, caused π/π lawyer to reasonably believe and to rely on the belief, that
        - Δ had been served
        - Liability was not/would not be contested
        - Time limits would not be relied on/waived
    - if an order for substitutional service, an order dispensing with service or an order validating service is set aside;
    - 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 → new catch-all provision, codifies *MacNeil*
- (2) if extension granted, no further extension may be granted unless different/new circumstances established

**Chapter 12: Particulars** (Old Rules 5(m), 115-118; new Rules 3.61, 3.62)

- Old Rule 115 – pleading rule: if alleging undue influence, etc. must give more particulars in pleading
    - These rules permit Δ to ask more questions about claim
    - If request not properly answered, then Δ can apply to court to require π to provide more details about claim
    - Party at whose request particulars have been received has 8 days for pleading after delivery of particulars
- NOTE: this is usually stalling technique by Δ
- New Rule 3.61 – request for particulars
    - Party on whom pleading served may serve on party serving pleading a request for particulars about anything in pleading
    - If requesting party does not receive sufficient response w/i 10 days, apply to court
    - If court order particulars must specify time within which order must be complied with
    - DOESN'T stop clock – Δ still has obligation to furnish defence w/i 15 (NOW 20 days) → CHANGE

***Riske*, ABSC TD 1943:** Δ needs particulars in order to file defence. Here defence already filed, then asked for particulars. Court sent it to EforD, if still not enough details, can come back and request. Discretionary remedy. Purpose of particulars:

1. Enable party to frame pleadings
2. Prevent surprise at trial
3. Define issues
4. Facilitate hearing

***Tomkow*, ABQB 1980:** medical malpractice claim against nurses. Δ asked π for particulars, π said couldn't given them b/c under anaesthetic at time. Δ was one on scene, has records/charts, etc. where π can apply for medical records which enable them to provide particulars, they must do that.

**Cases demonstrate the flexibility of rule and court.**

## Chapter 13: Procedure of Default

**Time for Defending** (Old Rules 84-86; New Rules 3.31, 3.34)

**Old Rules**

- **Old Rule 84:** delivering = filing and service
- **Old Rule 85(1):** after delivery of SoC, Δ has **15 days** excluding day of service to deliver SoD or Demand of Notice
    - Unless served out of J, then time as fixed by order permitting service
    - **New Rules** = 20 days
- **Old Rule 85(2):** delivery of defence to 3rd party notice is 15 days
- **Old Rule 86:** except for defence, defence to counterclaim, defence to 3rd party notice, time within which pleading is to be delivered is 8 days after service of pleading to be answered

**Notes**

- **Code of Professional Conduct, Chapter 4, Rule 4 and Commentary:** lawyer must agree to reasonable requests by another lawyer for extensions of time, waivers of procedural formalities and similar accommodations unless client's position would be materially prejudiced.
- Nothing happens automatically after 15/20 day expiry date
- Although rules say 15 days, almost universally extended by agreement to 20 days
- Only where time is of essence, would π go ahead with noting Δ in default or default judgment (rare)
- As Δ, can't write to π and assume silence is acceptance of extension
- π's acceptance must be express and explicit (LSA Errors and Omissions Bulletin #44)

**New Rule 3.30:** Δ who is served w SoC may:

- Apply to court to set aside service (Rule 11.30)
- Apply to court for order for deficiencies (Rule 3.68)
- File and serve SoD or demand for notice (within 20 days)

SoD → if Δ files SoD must be served within 20 days of SoC if service effected in AB (3.31)
Demand for Notice → if Δ files Demand for Notice must be served w/i 20 days of SoC if service effected in AB (3.34)

**New Rule 3.36(1):** If Δ does not file either, π may:
a) get default judgment if 3.38 (recover of property) or 3.39 (debt/liquidated demand) – 1-step process (OR 148/149)

- Note New Rule 3.39(2) codifies what is meant by liquidated demand

b) get clerk to note Δ in default if claim based on damages → 2-step process

**Default Judgment** (Old Rules 142-158; New Rules Part 3, Division 3, Subdivision 3)

***Standard Oil Case*, BC County Court 1964**
**F:** π went directly to default judgment. But of judgment, $638.10 damages.
**D:** Set aside default judgment b/c got more than entitled.
**R:** Be careful where portion is something other than debt/liquidated amount.

***Clareborn Case*, BC County Court:** Cannot get default judgment for damages. In event that something like this slips through cracks and π gets default judgment, **Δ entitled to open it up**.

**Noting in Default** (Old Rule 142; New Rule 3.36(1))
**New Rule 3.37**: π may, w/o notice to any other party, apply to court for judgment in respect of claim for which Δ judgment has not been entered if:

- One or more Δ's noted in default, or
- Δ's SoD is struck

**New Rule 3.40**: if judgement entered against some but not all Δ under 3.36-3.39, π may continue action in respect of any Δ against whom judgment is not entered

**Setting Aside Default Judgment**

Upon Δ receiving default judgment can attempt 1) Discretionary order, 2) Order of Irregularity

1. **Discretionary Order (Old Rule 158; New Rule 9.15)**

- Option 1: Apply to open up default and seek leave of court to file SoD
- **New Rule 9.15(4):** court may set aside default judgment on any terms court considers just

***Don Reid Upholstery Ltd*, 1995.:** sets out traditional 3 part test for opening up a default:

- Default was unintentional
- Application was brought promptly
- Good defence on the merits

**NOTE:** Remedy is discretionary, court must act judicially. Court not bound by 3 part test as if it were a statutory enactment. "...rejects rigid rules". In summary, while we can say what an applicant will usually be asked to demonstrate on a motion to aside a default judgment, the only real rule is that the court's discretion must be applied judicially.
**Bottom line – unless court satisfied that you have good defence on the merits, court will not open up the default.**

2. **For Irregularity (Rule 558; New Rule 3.68)**

- Option 2: apply to open up a default on basis of rules re irregularities (rare)
- **New Rule 3.68:** sets out court options to deal with significant deficiencies

***Rizzie*:** Δ was corp, can serve corps by mail. When is service by mail affected? Answer in *Interpretation Act* – 7 within, 14 outside. Here, took steps before service affected in accordance with time in Act – π acted too precipitously. Default judgment entered prematurely. Therefore, can open up default b/c of irregularity of service.

**Ch. 14: Pleadings Subsequent to Statement of Claim**

After SOC served, there are 7 options for Δ to respond:

**1) D does nothing at all**
**2) D files a demand of notice**
**3) D files statement of defence (SOD)**
**4) D files a defence and counterclaim**
**5) D files SOD + third party notice**
**6) SOD and Rule 77 notice (notice to co-Δ)**
**7) P files reply** (note: π option, not Δ)

**A. Defendant's Procedure**

- **First option: do nothing**
    - Warning on backer will come true: "You risk losing the lawsuit automatically… the Court may give a judgment to the Plaintiff against you."
    - If debt or liquidated action, P may get default judgment

1. **Demand of (for) Notice** (Old Rule 85; New Rule 3.34)

- D admits liability for claim, but may wish to contest the amount or possibly simply receive notice of the proceedings in lawsuit (rare)
- Precedent in proposed court forms
- Only expect to see this on a mortgage foreclosure action
- **Old rule 85:** must file w/in 15 days of SOC
- **New rule 3.34:** must file w/in 20 days of SoC

***Bell v. Grande Mountain Apartments*, ABQB 1984**
**F:** Foreclosure action. Δ had already taken a foreclosure order but wanted to w/drawn and file SoD.
**I:** Can you w/d demand a SoD?
**D:** Yes, in limited circs.
**R:** In order to w/draw your demand of notice and file a SOD you must do 3 things:
A) act promptly (no 11th hour)
B) give good reason for filing a demand of notice instead of an SOD in the 1st place
C) demonstrate there is good defence on the merits (at least potentially)

NOTE: Purpose of demand of notice is to give the D a chance to contest . Other cases say that if a D filed a demand of notice they can cross-examine and adduce evidence on damages. Thought of as a partially-defended action. Prof. Schlosser's advice: just file a SOD, gives you more options (SOD 99% of the time).

**2. Statement of Defence** (Old Rules 108-112, 119, 121, 123-128; New Rules Part 3, Division 3, Subdivision 2, R 12.12)

- Most common - Gives D greatest range of options
- Generally written as a straight denial, then response to the substance of the P's claims
- **Old Rule 108** – denying CP: if claim CP, need to specifically refer to it in your defence
    - **New Rule R. 12.6:** pleadings must be succinct, and divided into paras, etc.
- **Old Rule 119:** silence is NOT an admission
    - **New R. 12.12:** silence is the same as denial (even stronger)
- **Old Rule 121:** To raise new version of events, must set out material facts you say are different
    - **New R. 12.6:** same effect
- **Old R. 123:** Bare denial will not suffice w/ regards to breach of K
    - **New R. 12.6:** same
- **Old R. 125:** if you have a specific defence you must plead it specifically
- **Old R. 126:** If you're going to deny, don't do it evasively
    - **New R. 12.6:** same

***Richard v. Hall*, ONCA 1928**
**F:** guy carrying long poles on street, car hits from behind, jabs P's eye out w poles. Essence of defence is to cover all bases and see what develops. Δ just said "deny every allegation". TJ said need to deny story and then add on version of matter, can't just do general denial. Δ sought leave to appeal .
**D:** Overturned.
**R:** General denial is proper as long as it does not contravene rules.
NOTE: Outside circs where specific thing (listed in New Rule 12.6) must be raised, general defences can be pleaded Should always endeavour to avoid surprise.

**Law Society of Alberta: Code of Professional Conduct -** A lawyer must not take any step in the representation of a client that is clearly without merit. So general defence (kitchen sink approach) is OK, they just must have some basis in reality

**B. Counterclaim** (Old Rules 5(f), 93-98; New Rules Part 3, Division 3, Subdivision 6)

**1. Counterclaim Generally**

- D files a defence and counterclaim
- P essentially becomes Δ (and thus the same procedure would apply to them)
- Procedure:
    - Start w/ existing style of cause
    - Write defence in #ed para's
    - Once completed defence, put in NEW style of cause (re-describe roles) for counterclaim
    - Proceed with a new SOC w/ prayer for relief etc.
- P's response would be the same range of responses D had for original SOC
- Judgment enforcement considerations:

- If USC you are at back of line for all creditors
- If you counterclaim, could exercise set-off (which ups priority)
- Therefore, ability to counterclaim may have significant impact in insolvency

**2. Set-Off**

- **Old Rule 93(2):** if you are going to claim set-off, you must do it by counterclaim
  - **New Rule 3.59:** a matter which might be claimed by set-off may be claimed by counterclaim **or by pleading set-off as defence** (added)
- **Old Rule 93(4):** counterclaim shall be conjoined and pleaded w SoD
  - **New Rule 3.57**
- **Old Rule 5(f)**: defines set-off → no parallel in new rules, but nothing to suspect any different

**3 Types of set off:**
a) legal
b) equitable
c) procedural

**Legal Set-Off**

- Requirements:
  - Same parties
  - Same action
  - Mutual debt or cross claims (mutual cross obligations)
- Usually arises in a creditor/debtor situation
- Most narrow/formal requirements → restricted to few circ's

**Equitable Set-Off**

- Requirements:
  - Claims must be related (related debts, related cross-claims)
  - Do NOT need to arise from same circ's as the parties to the action
- Usually raised as defence
- Eg. You lease car, its defective. Damages flowing from deficiencies of car useful in equitable set-off. D's claim for the damages in car would act as a defence to claim by dealer against Δ for debt.

***Holt v. Telford*, SCC 1987 – types of set-off**
**F:** Land and mtgs swapped between T and Canadian Stanley. CS assigns mtg rights to H. Loans go bad, H sues T.
**I:** No longer dealing with original parties, so is equitable set-off available?
**D (Wilson):** Yes.
**A:**
**a) Legal set-off:** NOT available here

- NOT same parties w/ same right
- The assignment of CS to Holt makes legal set-off unavailable
- Also an argument under *LOPA*…

**b) Equitable set-off:** applies in these circ's**.** The mortgages in the land should be swapped → the 2 claims c/b set-off, one against another.

**Procedural Set-Off**

- Briefly mentioned [p. 183]
- Goes beyond the relatedness requirement
- Could be 2 independent claims (1 of P against D or D against P which are otherwise unrelated)

C. **D files SOD & 3rd party notice** (Old Rules 66-76, 79; New Rules Part 3, Div 3, Subdiv 5)

- Filing of SoD triggers time to file 3rd party notice
- **3rd party notice:** original Δ gives notice to 3rd parties indicating if original Δ is liable to π, 3rd parties are liable to original Δ (ie. must indemnify Δ for reasons set out in notice)
- tells existing Δ's **or** outsiders to a claim: "if I am liable to P, you are liable to me" thus the 3rd party must indemnify and sets out grounds of doing so
- At this point pleadings can multiply/fan out: the 3rd party can party a 4th party, etc… (rare)
- Precedent (p. 481) – 3rd parties listed on separate line
- **Old Rule 66(1):** when Δ claims against any person that the person may be liable to him for all/part of π's claim against him he may serve a 3rd party notice, **(2)** notice shall state nature and grounds of claim, **(4)** 6 months to file (from time Δ filed defence/demand of notice, but before noted in default/judgement entered against him); 1 month to serve after filing (3rd party has 15 days to file defence)
- **Old Rule 71(2.1):** where 3rd party disputes the liability of Δ to π, π shall be at liberty to deliver reply to 3rd party's defence within 10 days after service of defence and pleadings b/w π and 3rd shall be incl. in record
    - **New Rule 3.44:** sets out reqs and scope of circs where Δ can make someone a 3rd party
    - **New Rule 3.45:** form of 3rd party claim – **filed and served** on π and 3rd party Δ within 6 months after Δ files SoD or demand for notice (CHANGE FROM OLD) and before noted in default/judgment entered against him (3rd party has 20 days to file defence)
    - **New Rule 3.54:** π or 3rd party π may file reply to SoD filed by 3rd party Δ

**Scope of 3rd Party Notice outlined in cases:**

***Dilcon Constructors Ltd.*, ABCA 1995**

**F:** SoC, SoD, Δ by counterclaim brings in 3rd party by issuing 3rd party notice (which was based on damages).
**I:** Does 3rd party notice have to limit compensation or indemnity situation?
**D:** No – 3rd party notice is wider, there can be different causes of action.

***Suncor Inc*, ABQB 1992**

**F:** Canada Wire puts bad wiring into Suncor's installation, fire. 60 creative 3rd parties added to action by Δ (eg. 3rd partied insurance company saying they should have warned you).
**I:** Was there duty owed by third party to the π or Δ? (3P should on work if there was duty to Δ)
**D:** Yes.
**R:** Provided 3Ps among pool of parties who can be found liable from the tortfeasor's act, you can be liable.
**A:** Here, π and Δs mediated damages by agreeing on lesser amount, then met w all parties.
NOTE: This is widest possible statement (WS thinks too wide – and doesn't think this case is followed)

***Wallace*, ABCA 2001 - narrows *Dilcon*, may even overrule *Suncor***

**R:** Measure of damages in main action and damages in 3P action must be the same in order for the 3Ps to be either joint or concurrent tortfeasors.

***Leoppky*, ABCA 2001**

**F:** 2 motor vehicle accidents.
**I:** For the 1996 accidents, can the Δ's 3P the at-fault driver from the previous accident?
**D:** No b/c damages NOT same.

D. **Notice to Co-Defendant** (Old Rules 77, New Rules 3.43)

- **Old Rule 77, "Rule 77 notice":** notice to an existing co-defendant for claim by reason of *Tortfeasors Act* or *Contributor Negligence Act*, Δ may within 10 days of filing SoD or demand of notice file and serve co-Δ
    - Similar to a 3rd party notice but more limited b/c cannot bring in a NEW party
    - Only for these 2 acts
    - "I am going to claim on you as well…"

- **New Rule 3.43:** Δ has 20 days after filing SoD

***Contributory Negligence Act*, s. 2** - determination of degree of fault

***AG v. Nunavut Tunngavik Inc.*, NUCA 2009:** Can someone other than π add a Δ to an action? Theoretically possible in rules, but unlikely – π gets to choose who Δs are. Court lacks discretion to add.

**E. Limitations**

- Are there time limits on when Δ can 3rd party another person?
- *Limitations Act*, s. 6 – suggests you must fulfill the relatedness req

***Dean v. Kociniak*, ABQB 2001**

**F:** issuing 3PN outside 6 months required by rules.
**I:** If beyond 6 months required in rules, where do you draw time limit?
**R:** Same 3 reqs as if you were a π starting claim (recall *Limitations Act*):
1) know injury occurred
2) know it is fault of D
3) injury warrants the bringing of proceedings
**A:** Limitation period begins when Δ knows or ought to know that the 3rd party owed a duty to contribute
**NOTE: Old Rule:** one exception to silence is not an admission

- **New Rule 3.49:** do not HAVE to deny (permissive not mandatory - so old rule appears to have been removed)

**F. Reply and Joinder of Issue**

- Options 1-6 are things Δ's options → this is something π has option to do
- **Old Rule 110:** reply cannot be inconsistent w/ SoC and only address new stuff in SOD
- **New Rule 3.69:** allows π to get last word
- Significance of reply: when reply is filed → pleadings close (no longer get a free amendment, must seek leave)

## Chapter 15: Chambers Practice – Interlocutory Applications

- Originating Notice/Application takes you directly to Chambers
- **Chambers** is for items that come up along way of lawsuit after SoC filed but before judgment
    - Eg. getting someone to discovery, getting undertakings, steps in foreclosure application
- **Interlocutory applications** - items that come up continually along the way of the lawsuit
- **Final application** – has ability to determine action once and for all
- Difference is <u>result</u>
- Only reason to make distinction b/w interlocutory and final is that grade of evidence differs
    - If interlocutory – lower standard applied to evidence (Hearsay is ok)
    - If final – higher standard (best evidence rule)
        - Typically, need direct, first-hand evidence in support of application
- Sometimes applications heard in judge's private chambers (office). Though if self rep litigant, typically there will be clerk, recording, etc.

**Special chambers** – if going to over 15-20 min should go to Special Chambers

- scheduled in advance
    - Masters – booked in advanced by Master's secretary
    - Judge – booked by admin office
- Deal with applications that are lengthier/more complex than regular chambers
- Both A and R file briefs:
    - Masters – applicant's brief 14 days before, respondent 7 days before
    - Judges – applicant's brief by 4:30 on 3 Fridays before, respondent on 2 Friday's before

**Court of Appeal Chambers –** items that come up along way in appeal

**A. Procedure**

**1. Notice of Motion** (Old Rules 384-386, 387.1-389; New Rules 6.3)

- Get to chambers by NoM (originating notice), under new rules this is application
- Precedent p. 66
- Make decision about what evidence you will rely on (typically affidavit)
- Pick date it will be heard
    - **Old Rule:** 2 clear business days notice
        - Eg. for Friday motion, must give notice on Tuesday
    - **New Rule 6.3:** 5 clear business days notice
- Decide length of motion (special or regular chambers?)
    - Typically set for regular, than adjourn to special chambers
- File with Chambers clerk, so it is put on list
- Serve
- Other side must show up on appointed day unless adjourned by consent in advance
- After drafted NoM should try to settle w OS, see if they will consent to relief you are seeking
- Loser of application pays costs (based on amount at issue in lawsuit), automatic result, don't need to argue
- Typically gambling $1,000 on Chambers application if you lose

**Contents of NoM**

- **Old Rule 384:** must state relief sought, grounds and material or evidence intended to be relied on
    - **New Rule 6.3:** (1) application may only be filed during action or after judgment entered (2) must be in prescribed form, state grounds, identify material or evidence, etc.
- **Old Rule 385:** motions, applications, hearings other than trial disposed of in Chambers
    - **New Rule 6.10**: Court may consider filed application in person, by means of electronic hearing, based on docs only (instead of only traditional argument in Chambers)
- **Old Rule 538**:
    - New Rule 12.5: Unless court orders otherwise, parties can extend any time period specified (court can shorten 5 days notice)
- **Old Rules 545, 547, 550:** deal w counting days
    - **New Rule 12.3**: deals with this in general way – day on which event occurs not counted, so on 6th day motions is heard

NOTE: **Old Rule 11:** SoC in force for 12 months, can apply to renew, court can grant renewal for further 3 months → New Rule 3.26, 3.27 (same – don't need notice to other side)

**2. Ex Parte** (Old Rules 387; New Rule 6.04)

- Notices may not be necessary in emergency situations
- Circumstances where giving notice to other side would let cat out of bag, or nullify relief seeking b/c give other side opportunity.

**Code of Professional Conduct, Chapter 10, Rule 6-8**

- Rule 6 – when lawyer required by law to notify one or more parties of step taken or to be taken, lawyer must notify all parties to matter – never go *ex parte* s/t limited exceptions, if another side, only use *ex parte* in extraordinary circumstances
- Rule 7 – lawyer must not communicate with court respecting matter unless other parties to matter (or their counsel) are present or have had reasonable prior notice, or circumstances are exceptions and disclosed to court
- Rule 8 – if going *ex parte* role becomes similar to prosecutor – must present balanced view of evidence, explain there is OS, you haven't given them notice, and justify not giving them notice

***RBC***
**F:** RBC put receiver in on ex parte basis without all info before court, tanked company, company claimed damages against RBC. SCC awarded $100,000 against RBC for application without full and complete disclosure.

**Old Rule 387:** (1) if satisfied no notice necessary or delay caused by proceeding by NoM might cause mischief, court can make *ex parte* order (2) order made *ex parte* by judge may be varied or discharged by any judge with notice to parties (3) order made *ex parte* by master may be varied or discharged by any master/judge w notice to parties

- **New Rule 9. 15:** same
- important b/c provide means to go back to same level of court rather than forcing them up

**B. Appearance in Masters' Chambers** (should I be in Masters or Judges Chambers?)

**1. Jurisdiction**

- Judges have plenary J
- Masters are creature of statute – can only deal with items set out in *Court of Queen's Bench Act*
    - s. 9(3) - cannot deal with items listed in this section
    - no contempt
    - s. 9(1)(b) – if parties' consent, can do almost anything
- **Rule of thumb**: If rule/statute says court → master can hear it; if says judge → judge must hear it
- p. 202 – lists things master can hear

***SBI*, ABCA 1981**
**I:** Can a master grant summary judgment?
**D:** Yes.
**R:** master is not exercising federal power in granting summary judgment, only administrative function.

***South Side Woodwork*, Master Funduk**: Any legal system which has judicial appeals process inherently creates pecking order for judiciary. Masters at bottom of food chain, can appeal from Master to Judge, or from Judge to Court of Appeal. Masters bounds by decisions above them. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.

**2. Appeals**

**Old Rule 500**: requirements for appeal from Master
***Court of Queen's Bench Act*, s. 12 –** appeal lies to judge in Chambers from a decision of Master

- appeal *de novo* (not bound by record used in front of Master)
- So, if don't like result from Master can tune-up case for QB

***Armstrong*, ABCA 1992**
**F:** ability of one party to CE an affidavit.
**D (Cote):** appeal from Master to Judge is *de novo* and new evidence may be adduced by both sides.
NOTE: In most appeal settings and especially in discretionary matters, appellant court gives deference to court below. Because appeal from master to judge at moment is appeal *de novo*, masters decisions are not accorded same deference.

**BUT, New Rule 6.15** – Appeal from master to judge is appeal on the record (not *de novo*)

- WSS: This is not change for better
- New form for appeal (no longer NoM)

**C. Affidavits**

**1. Preparation and Oath** (Old Rules 261, 298-313, 314.1; New Rules 12.20-12.30, and Part 6, Div 1, Subdiv 1)

- Affidavit is most common type of evidence used for Chambers application
- **Old Rules 304-312** – list of things required to be in affidavit
- **Old Rule261** – lists other possible sources of evidence

- **New Rule 12.20** – supplants existing rules
    - List of requirements for affidavits (very comprehensive)
- **Affidavit precedent** → p. 484
    - Rules that apply to form of affidavit is generic
    - Leads w style of cause (as picked by π)
    - Drafted in 1st person
    - Preamble, "I_____ the affiant", provides occupation, indicates they are giving under oath
    - Indicates affiant has "personal knowledge of the matters hereinafter ...except where stated to be in my belief"→ direct evidence, unless indicated that it is hearsay
    - If FINAL application, affidavit must have personal, direct, first-hand evidence – **no hearsay**
    - Can attach exhibits to affidavit
    - Instance of evidence given upon information and belief: "I am advised by Δ solicitor in Calgary, and do verily believe that" → must identify source and grounds for your belief
    - Final paragraph indicates what affidavit is for (eg. support of application to set aside default judgment) – this is not necessary
    - Provides space for signature (deponent of affidavit) and space for person taking affidavit (who it is being sworn before, eg. Commissioner for Oaths)
        - If using affidavit inside province, notary is sufficient
        - If using it outside province, need Commissioner so it has a Seal
- Students and lawyers are automatically notaries, others can become notary by taking test
    - When administering, need to know religion of deponent and form of oath that will bind their conscience
    - 99% of oaths given on affirmation (don't use bible anymore)
- **To make changes**, cross out bad part, write in correction w checkmarks on either side, deponent initials in margin
- Once filed, copy remains on court file and it becomes a public document

**Exhibits**

- **Old Rule 312 –** if exhibits are lengthy/inconvenient to attach, don't attach just refer to them, but they must be provided at court application
- **New Rule 12.22** – Requirements for exhibits to an affidavit
    - Can't just refer to exhibits, if over 25 pages (aff + exhibit) must be tabbed
    - Certificate stamped on exhibit identifying what exhibit it is and signed by person commissioning the affidavit (same as new rules → but he said this was new rule, so find old rule #)
- **Old Rule 3.02 (blind/illiterate)/3.03 (interpreter)** – situations where deponent is illiterate/blind/does not speak English
    - If can't speak English, need statement from translator saying contents were read to witness, translated and they understood
    - **New Rule 12.23/12.24**

**Hearsay Evidence in Affidavit**

- Ordinarily, need witness to identify source of information, swear they believe it, indicate why they think it is reliable/why they believe it
- **Old Rule 305** – court may look at hearsay evidence in affidavit, but generally not to be used in support of final application
- **New Rule 12.19** – same

***Bartle & Gibson Co Ltd.*, BCCA 1971**

- No reason that single fact can't constitute both source of info AND grounds for belief
- Form → "I am informed by X and do verily believe that"
- If source is normally trustworthy, don't need to go further
- "To the best of my information and belief" is inadequate b/c doesn't identify source

- Here, instance of affidavit taken by lawyer

**NOTE:** Code of Professional Conduct, Chapter 10 and *Byer's Transport*, NWTTC 1972, state lawyer cannot be both witness and advocate in same case

- Chapter 10, Rule 10: Lawyer must not act as counsel in any proceeding in which it is likely that the lawyer will give evidence that will be contested.

**2. CE on Affidavit** (Old Rule 314; New Rules 6.9, 6.17-6.22, 6.8(4))

- **Old Rule 314** – examinations on affidavit
    - (1) person who has made affidavit may be CE on affidavit without order
    - (2) deponent may be required to attend in same manner as party being examined, procedure for examination of deponent same
    - (3) party conducting CE shall cause transcript of the CE to be filed
    - (4) re monies
    - (5) for purpose of requiring attendance of deponent at CE, the party filing affidavit is entitled to serve copy of the Appointment upon person to be examined and upon payment of proper conduct money person to be examined shall attend and submit to examination
    - Ie. to ensure other side shows up, provide conduct money (return bus fare)
- **New Rule 3.13- Questioning (not CE) on an affidavit and questioning witnesses**
- **New Rule 6.19** – conduct money higher (Sch. B), allowances for travel, meals, etc.

***Ray*, SKQB 1956**

- **Affidavit and transcript of CE goes before the court**
- Great opportunity for making your case worse by examining on affidavit
- Good CE is very difficult and most people tend to go too far

***Sandford*, AB Chambers**

- Securing attendance by conduct money
- Here, student loans case. Student didn't pay and being sued. Student wanted to examine loans officer on affidavit they had sworn, but officer in Quebec.
- Did student have to pay conduct money from Quebec to secure attendance in AB for examination?
- Amount of loan was $3400 so conduct money would significantly add to expense
- Judge: Not necessary to pay conduct money, affidavit could have easily been sworn in Edmonton, don't need this particular officer. Only pay conduct money for person from Edmonton office.

***Ed Miller*, ABQB 1981**

- Before case, **test**: questions must be restricted to 4 corners of affidavit
- Here, found test must be wider than above (not limited to affidavit)
- Person can ask question so long as **a) it relates to matter sworn in Affidavit, b) relates to things at issue in motion**
- The nature of the application is relevant to the scope of permissible questions
- Eg. If summary judgment application, all issues in lawsuit will be in issue, scope is wide

Court reporter forms transcript of CE, person asking questions gets transcript and files it in court. CE occurs in lawyers' boardrooms

***Evans* - Scope of examination of non-party affiant is significantly narrower than scope of examination of party**

- CJ Wakowich: person swearing affidavit is not party to action, they are outsider (here, volunteer)
- Does the broad test set out in *Miller* apply when the affiant is an outsider to the lawsuit? NO. Scope of examination limited to things within personal knowledge of person being examined. Normally, shouldn't be asked to give undertakings to look into things/answer questions unless it wouldn't involve too much effort or expense.

**D. Examination of Witnesses** (Old Rule 266; New Rule 6.9)

- **Old Rule 266** – allows examining witness for purpose of motion, can compel to attend
- **New Rule 6.9 –** same
- Wide rule
- Applies even if person has not sworn affidavit
- Examination of witness in support of motion like examination on affidavit b/c <u>whole thing goes in</u>

***Deschant v. LSA***

- Evidence becomes evidence of party conducting examination – they are stuck with all of it
- Therefore, must be careful when examining someone who is adverse in interest, b/c unlikely their evidence will be helpful to you, and you will likely make your case worse

**E. Appearances in Chambers**

- Master Hyndman → still applicable to Chambers
- *Court of Queens Bench Act* – sets out J of Masters, Masters in Chambers has same J as QB judge sitting in chambers w following exceptions: statutory, case law, administrative, other
- Justice Agrios → still applicable to Judges' Chambers

NOTE: Used to be impetus by clerk to put all things in Masters' Chambers that were s/t Masters' jurisdiction. Therefore, if you put something in Judge's chambers that would normally be in Masters, clerk would move it to Masters when you filed it.

- NOW, they don't do this → applicant has choice
- Since judge has all powers of Masters, if you pick judges' chambers unlikely that you will be moved to another venue
- BUT, much easier to appeal from Masters to Judges, then Judges to CA (more complex, expensive)
- SO, if unsure about application, try it before Master, if lose, try again
- Level of deference given to Master not as great as that given to Gudge
- HOWEVER, If very sure about decision, and don't want O/S to easily appeal →Judges Chambers

**F. Adjournments**

- Applications can be adjourned by consent
- In past, call clerk, then follow w faxed letter confirming adjournment
- Deadline = 9am of morning of application (except Special Chambers)
- If no consent or missed deadline, then must show up in Chambers and deal w adjournment on spot
- NOW, chambers applications can be made online at AB Courts website
- In all other situations, appearance is necessary

**G. Orders** (Old Rules 315-318, 321-323, 390; New Rules Part 9, Div 1, Div 3)

- Order = formal doc reflecting result of Chambers appearance
- Form of order
    - **Old Rule 315** – numbered paragraphs which summarize direction of court
    - **Old Rule 317** – show date granted, name of M/J, date entered
    - Other: style of cause, venue, preamble indicating who appeared
- **Old Rule 322** – order takes effect from date granted unless otherwise ordered
- **Old Rule 321** – order may be signed by J/M/clerk of court
    - If form correct, judge will sign on spot
    - If order *ex parte* or by consent is otherwise predictable, can be prepared prior to appearance
- **Old Rule 323** - Order can be prepared after appearance and signed by Clerk, but if not granted *ex parte* it must be signed by opposing counsel "approved as to form" by opposite counsel or you must give notice to the other side
    - Winning party drafts

- Once approved, submitted to clerk
- If it corresponds to clerk`s notes, they can sign order
- If doubt, clerk will send it to M or J who will decide whether appropriate
- If significant disagreement b/w sides, can appear again before court to settle terms of order
- Once approved, signed and filed, served.

- **Service starts clock for appeal**
- **New Rule 9.5** – cannot enter order more than 3 months after pronounced
- Typically, once order entered and served, if don't like it then must appeal
- Few exceptions where you can go back to judge to get order fixed:
  - New Rule 9.12 – correcting mistakes or errors
  - New Rule 9.13 – re-opening a case
  - New Rule 9.14 – further or other order after judgment or order entered
- If going to apply to have it set aside based on 9.12-9.14 you have 20 days (**New Rule 9.15**)
- Old Rules much stricter on circumstances where you can return to same level of court
  - Indicate you can't go before judge again unless exceptional circumstances
- New rules give power to court, doesn't have to be same master or judge that heard it

## Chapter 16: Alternative Routes to Judgment

- Rules contemplate SoC, SoD, then production of documents, then CE under oath, trial
- Under new rules, timetable based on flexibility of case
- Here, circumstances where you can short-circuit process and get judgment along the way

Options:
- Striking out pleadings – will occur right away
- Summary judgment – made by π against Δ OR vv
  - entitled to judgment w/o trial b/c o/s's case has no merit
- Summary trial – hybrid procedure b/w regular trial and summary procedure
  - Open enough to have some oral/affidavit evidence
  - Very flexible procedure
- Determination of a point of law
  - Determination of main issue would resolve many/most of other issues in case
  - Currently, streamlined procedure (removed by new rules) for claimants under $75K
  - May have effect of determining action
- Settlement – can settle action at any time
  - If settle must file discontinuance with court and a release

NOTE: Currently, strict division in types of application to summarily deal with claims.

### A. Striking Out Pleadings (Old Rule 129; New Rule 3.68)

- **Old Rule 129** – can apply to court to strike out pleadings on ground that
  - (a) discloses no cause of action or defence, or
    - Under this clause, no evidence is admissible (look at pleadings only)
    - Eg. *Donoghue v. Stevenson* – Δ applied to strike action on basis that pleadings did not disclose a COA – manufacturer does not owe duty to consumer directly for non-dangerous good
  - (b) scandalous, frivolous or vexatious, or
  - (c) it may prejudice, embarrass or delay the fair trial of the action, or
  - (d) it is o/w an abuse of process of the court
- For (b)-(d) can use evidence (affidavit w non-hearsay evidence)
- **Old Rule 159** – court can give summary judgment
- **New Rule 3. 68** – court options to deal with deficiencies in pleadings

**Cases discuss threshold in order to obtain judgment in summary way:**

***Jolly*, Ontario Judgment 1999**

- `Mr. Jolly`s claims in these 2 actions...all center on his firm assertion that he is not a human being, but a Martian"
- Δ moving to strike b/c frivolous. Motion granted.
- What proof do you have which supports this claim? Jolly had well-prepared argument re evidence of falsification of evidence...only reason he was not now able to satisfy court that he was Martian was due to falsification of report by Americans.

***Hunt*, SCC 1990**

- Latent injury asbestos case
- SCC considers provincial courts to be masters of own procedural issues, so rare to have case at SCC
- Deals with AB Rule 129(1)(a) – striking out because no COA
- IN order to succeed on summary judgment application (and win) application must show it is **plain and obvious or beyond a reasonable doubt** that should not proceed (higher than BOP standard)
- Approaching criminal standard
- When applying to strike out for failure to disclose COA, look at pleadings, either assume they can be proved or are true, then ask: is it plain and obvious or beyond doubt that it does not disclose COA?

Background: at this point it was only possible for a P to apply for summary judgment.

***German v. Major*, ABCA 1985**

- Δ is Major (judge of SCC) sued for malicious prosecution
- Δ can obtain summary judgment in circumstances where π case is **demonstrably hopeless**
- NOW, Δ can apply for summary judgment

**B. Summary Judgment** (Old Rules 159-164; New Rules Part 7, Div 2)

- **Old Rule 159** – when summary judgment is available (reqs for evidence)
    - (a) in action where defence filed, **π** may apply to court for judgment on affidavit made by him or other person who can swear positively to the facts, verifying the claim or part of claim and stating in deponent's belief there is no genuine issue to be tried or only genuine issue is to the amount
    - (b) **Δ** may, after delivering SoD apply to court for judgment on affidavit sworn by him or some other person who can swear positively to facts, stating no merit to whole or part of claim or only genuine issue is as to amount and deponent knows of no facts that would substantiate claim or any part
    - If court satisfied, may give summary judgment against π or Δ
- **New Rule 7.3 –** Application and Decision
    - Requires someone to swear there is a) no defence, b) no merit, c) only real issue is amount to be awarded
    - If only real issue is amount → liability determined against Δ (goes to quantum of damages)
    - Applicant must satisfy plain and obvious test to get summary judgment against π
    - CHANGE from OLD: no distinction b/w π and Δ
- **Old Rule 162 –** Admissions of fact/documentary evidence
    - At any stage of proceedings court may give judgment/order to which applicant may be entitled when a) admissions of fact have been made on the pleadings or otherwise, or b) only evidence consists of docs and such affidavits as are sufficient to prove their execution or identity
- **New Rule 7.2** – same

NOTE: BRD threshold to get summary judgment. Best way to respond is by showing there is tryable issue b/c:

- Credibility issues → court will not grant summary b/c want to assess this themselves, therefore fatal
- Disputed facts → also tend to be fatal, unless possibility is novel/unusual point of law

***Leeds v. Alberta (Minister of the Environment)*, ABCA 1989 – cannot strike out where novel question**

**F:** Land rezoned as restricted development area. Landowners argue zoning changed land to point of expropriation. C applied for summary judgment.
**D:** SJ denied. Court felt there was a interesting/novel legal argument that was not beyond doubt.

***Pioneer Exploration Inc v. Euro-Am Pacific Enterprises,* ABCA 2003 – who proves what in SJ application**
**R:** 1) π bears evidentiary burden of proving action on BOP, 2) once π proves, burden shifts to Δ who can avoid SJ by proving there is genuine issue for trial (credibility, disputed facts) 3) if Δ proves, π fails to make out ultimate burden, so ultimate burden falls on π to satisfy court there is no genuine issue for trial.

***Espey v. Chapters Inc.,* ABQB 1998 – courts becoming more receptive to granting SJ.**
**F:** E was e/ee of Chapters and claimed WD. Π applied for SJ, Δ refused.
**D:** π got SJ against Δ.
**R:** initial reluctance to grant is going away, court recognizes disadvantages of trial: money, length

- **Old R. 160:**
  - **New R. 7.4:** same
- **Old R. 163:** court can direct any application to become application for SJ → this would be your worst nightmare
  - NO parallel in New rules, but they are so broadly drafted court still has ability to do this
- **Old R. 164:** SJ rules apply to counterclaims
  - **New R. 3.6:** same

**C. Summary Trial** (New Rules Part 7, Division 3)
- Summary trials occur between special chambers and trial
- New Rules 158.1-.7
- **New Rule 158.1**: summary trial is a complex SJ application w more flexibility regarding evidence
  - Apply by filing NoM to judge, not Master, stating you think it's appropriate for a summary trial
  - If yes, court gives directions (witnesses, how long, etc)
- **New Rule 158.2**: must be 21 days between motion for summary trial and hearing itself
- Very flexible procedure to give you an accelerated trial process

D. **Determination of Points of Law** (Old Rules 220-224, 232; New Rules Part 6, Rule 7.1)
- **Old Rule 220**: where pleadings raise point of law, you can set it down for determination w leave of court
  - **New Rule 232** (similar, but more flexible): gives parties ability to bring legal issue before court (on agreed facts) to decide issue that may have effect of determining most/all of lawsuit
    - Eg: application on point of law re: LP → if parties can agree on facts, court might be willing to deal w/ LP issue
  - Be aware that this req's agreement by other side

***Canadian Cancer Society v. BMO*, ABCA 1966**
**R:** judicial reluctance to hear cases in piecemeal fashion.
NOW: attitude changed, court willing to deal w cases summarily

***Bailey v. Guaranty Trust Co. of Canada*, ABCA 1987**
**F:** foreclosure case.
**R:** Decision on point of law is final (*res judicata*). Once issue is decided it is not up to parties to abuse evidence or argue it further at trial. Once reached decision on point of law, not open to TJ to reach different conclusion on same point in final judgment at trial.

**E. Streamlined Procedures** (Old Rules 659-673; eliminated)
- If damages less than $75K → follow streamlined procedure

- New rules eliminate b/c only see something caught by streamlined rules by accident, lawyers claim more damages than suit it worth to evade streamlined in favour of traditional

**F. Discontinuance of Action** (Old Rules 225-227; New Rule 4.36, 4.37)

- If action is discontinued, file discontinuance: eg. settlement, voluntary, etc.
    - Old Rule 225: π may discontinue action with leave of court (3) or by consent of parties (5)
    - If π discontinues, *prima facie* Δ entitled to costs of action
    - If settlement, cost will be taken into consideration of the settlement
        - Discontinuance will state which costs attributed to which parties
    - Release – not filed w/ court; a K bt/wn parties "P ends the claim in consideration for X"
- **New Rule 436:** a discontinuance needs to be in prescribed form
- **New Rule 437:** allows Δ to discontinue their defence

**NOTE:** New rules have expediency effect. If novel points, interesting legal issues, likely won't get above alternate routes

## Chapter 17: Case Management

### A. Reform Issues

***Article: The German Advantage in Civil Procedure*:** In Germany judges are appointed by peers, train as judges
Issue: w/ current greater involvement by courts in Canada, are we approaching the German system?

### B. Pre-Trial Conferences and Case Management (Litigation Plans) (Old Rules 219-219.1; New Rules Part 4, Div 1-3)

- Action is almost ready for trial, but appearance before judge req'd to ensure agreement on exhibits, etc.

**Pre-trial conference –** intended to be 1-time thing

- **Old Practice Note #3:** 3 situations where a pre-trial conference is mandatory
    - Mandatory if trial will be 3+ days
    - Mandatory in long trial scenario (25+ days)
    - Mandatory in matrimonial scenarios
- **Certificate of readiness –** after trial ready to go, doc sent to trial coordinator, sets it down for trial if they can be satisfied a pre-trial conference completed
    - Procedure: Depends on judge

**Case management –** judge assigned to watch over case, keeps ball rolling

- Procedure:
    - Make an application to the Chief Justice
    - Provided CJ agrees it is a suitable case for case mgmt → assigns a judge to file
    - Sometimes occur in private chambers (judge's office) or could occur in courtroom/conference mro
    - Minutes of case mgmt forwarded to both sides, these form directions of the court → essentially an ORDER
- Useful to keep everyone in line so that a large trial actually proceeds forward

**Rules**

- **Old R. 219 + Old Practice Note #3**
- **New Rule:** preserves these possibilities
    - **New Rule 4.10-4.11:** do not have the same req'ments to set matter down for trial
    - **New Rule 8.4:** must satisfy these requirements for clerk to set trial date
        - NO mandatory pre-trial conference like old rules
    - **New R. 4.12:** deals w/ case management (same as existing procedure)

NOTE: willingness of court to do pre-trial conferences/case mgmt is shift in responsibility of court, used to just hear the cases once they were prepared by parties

***Tremco Inc. v. Gienow Building Products Ltd.***

**I:** are decisions of case management judges and pre-trial conference judges binding on parties?
**D:** CA should be reluctant to interfere w decision of case management judge UNLESS it is shown to be palpably wrong; BUT TJ not bound by case management decision
**R:** 3 options:

- A) appeal to CA but you're SOL unless you can demonstrate a palpable error (risky)
- B) wait until trial to ask (risky)
- C) try to get the other side to agree to procedure in a new manner of direction before the case mgmt judge

***Article: Mini-trials in Alberta***

- Non-trial, informal dispute resolution → 90% success rate
- Bring parties together in presence of judge (retired judge, mediator), provide briefs, counsel puts forward views, obtain non-binding opinion as to what judge believes will happen at trial
- Promotes settlement discussions, save costs of trial

**JDRs**

- Court-sanctioned JDR: binding (if both parties consent) or non-binding
- Often run by case mgmt judge or pretrial judge who agrees to do the JDR
- Procedure:
    - Informal, usually in a conference room w/ parties present
    - Briefs filed w/ judge, judge reviews, lawyers put best case forward
    - Judge will state: "here is what my disposition would be…"
    - Often leads to parties trying to broker a deal

## Chapter 18: Special Remedies

### A. Interlocutory Injunctions (Old Rules 440, 441; New Rules Part 6, generally, and Rule 6.27)

- **Injunction:** restrains someone from doing something
    - Interim – prevents something while lawsuit is going on
    - Final – result in part of lawsuit
- **Old Rule 440, *Judicature Act,* s. 13** – basis for injunction
- **New Rule 1.3** (not parallel, but similar) – court can grant any remedy referred to in *Judicature Act*

Species of Injunctions:

- Anton Piller order – civil search warrant: restrains person/entity from disposing records
- Mariva order – prevents disposing of assets prior to judgment

Remember:

- Sharp Article: Injunctions and Specific Performance – excellent source; excerpt in materials
- *Civil Enforcement Act* provides overlapping remedies which are often <u>easier to get than injunction</u>

**3 requirements to obtain injunction (established in British case)**

1. Is there serious issue to be tried?
2. Absent injunction, will there be irreparable harm to individual seeking injunction?
3. Balance of convenience in favour of granting injunction

**Risks:** If restraining on interim basis, may be required to post a **bond in damages**. If at end, do not make out claim to restrain competitor, they can make claim against you for damages suffered as a result of interim injunction.

***Harper v. AG*, SCC 2000**
**F:** restraining enforcement of past law re election spending.

**R:** 3 part test applied here is test from above British case.
**A:** Challenge to otherwise valid past legislation. **Therefore, heavy onus on applicant to displace status quo.**

NOTE: b/c urgent, if notice given to O/S in advance, often OK to go *ex parte* and advise court of special circumstances

**B. Replevin (rare)** (Old Rules 427-436; New Rules Part 6, Div. 8)

- To have something reconveyed to you pending outcome of lawsuit
- **Old Rule 427** – deals w replevin (specific narrow circumstances)
  - Δ reconveys chattel to π pending outcome of lawsuit
  - Like injunction, might have to post security
  - Point of remedy is interim – allows possession of item until ownership is determined
- **New Rule 6.5** – interpersonal restraining order
  - Not quite same, but only parallel in new rules

**C. Interim Custody of Property (rare)** (Old Rules 467; New Rules Part 6, Div. 3)

- Similar to replevin, but wider
- Instead π allowed to hold it until trial
- **New Rule 6.27**

**D. Interpleader** (Old Rules 442; New rules Part 6, Div. 9 – New Rule 6.56)

- Eg. 2 parties competing for something you have. Typically in d/or situation (applicant owes A). B says I am entitled to money, if you pay A I will sue you. ALSO, A will sue you if you pay B. You owe debt to someone, want to resolve.
- Bring interpleader application → allows applicant to satisfy obligation by paying money into court
- Then let A and B fight about it with you being part of lawsuit

**Chapter 19: Discovery of Records** (Old Rules 186-198; New Rules Part 5, Div. 1, Subdiv 1-2)

**A. Affidavit of Records/Solicitor's Duty**

- **Old Rule 187 –** production of records is mandatory step in QB action (sworn list of docs). Occurs 90 days from SoD.
- **New Rule 5.5 –** Changes time period: Π has 3 months from SoD, Δ has 1 month from receiving π's affidavit of records. 3rd party gets 3 months from filing their 3rd party defence.
- If action falls under streamlined rules (less than 75K) time limit is 30 days (rules removed)

FORM (Appendix, p. 58)

- Style of case, #d paras, sworn in 1st person
- **Only variation - divide records into 3 categories:**
  - **Producable**: records I have and am willing to produce (in my power and possession)
    - Records must be relevant and material to lawsuit
      - Most clients identify this w exculpatory → NO, requirement much wider
      - Test for relevance and producibility dealt w in **Old Rules 186-186.1, New Rules 5.2, 5.61**
  - **Privileged**: Records which are relevant and material but can`t be given to other side
  - **Non-producible**: Records you once had but don't have anymore
- Describing records:
  - Old Rules – describe in particularity (Record 1: Letter dated from X date) and describe privilege generically
  - New Rules – records must be numbered and described, not individually, but in bundles by category
    - **Must indicate what privilege applies to what group of records, not generic**
- **Old Rule 198** – if you list record, relevancy and admissibility is not admitted (**New Rule 5.2(2)** – same _
- **Old Rule 197** – if don't disclose can't later use it in evidence (**New Rule 5.16 –** same)

NOTE: New rules have not changed the categories of privilege. Remember not to give away privilege when you identify record. Consequences of not including record Old Rule 197 – can`t later use it in evidence; New Rule 5.16 – same effect

- False affidavit can be perjury or contempt
- If you do not furnish affidavit of records
    - **Old Rule** – no affidavit + no sufficient cause for failure to produce →auto penalty (Sch. C, Item 3.1 x 2) $1-3K
    - **New Rule 5.12** – same (but contemplates wider range of sanctions)
- Errors and Omissions Bulletin: Lawyers can be liable for costs if they do sloppy job of producing affidavit of records
- Omissions from Production of Docs by Cote J: list of commonly omitted items
- Sample Instructions for the Preparation of an Affidavit of Docs by Mr. White: essay re preparing affidavits of docs

**Other Methods to Obtain Docs**
- Old Rule 193 – Can obtain docs referred to in other court docs (New Rule 5.14)
- Old Rule 314 – examinations on affidavit, docs referred to in questioning on affidavit are obtainable (New Rule 3.13)
- Old Rule 266 – party may require attendance of witness to be examined before officer for purpose of using evidence for case, docs referred to here can be obtained as well (examining ppl in support of motion) (New Rule 3.13)
- Old Rule 200, 208, 205 – docs referred to in examining for discovery
- Old Rule 209 – production of document, can get documents from 3rd party if relevant and material (New Rule 5.13)
    - Eg. medical records held by doctor, but applies to anyone in possession of relevant records

***Dorchak v. Krupka; Roy v. Krilow*, ABCA 1997**
**I:** what is necessary in describing affidavit of records? Eg. Folder of correspondence b/w date X and Y marked in upper right hand corner as 57.
**R:** Must show unambiguously what's disclosed in affidavit of record.
**A:** This is sufficient, do not have to describe each doc separately
- Same considerations to privilege documents
- New Rules relating to manner in which docs/records are produced **likely codify this case**

**Privilege** → Basis for refusal to produce record, telling O/S, it is relevant and material, but they can't look at it
- 3 types of privilege:
    - **Legal professional privilege** (solicitor/client privilege)
        - Communications b/w lawyer and client for purposes of getting legal advice
    - **Litigation privilege**
        - Applies to lawyer/client communicating with outsider wrt subject of lawsuit or lawsuit itself
        - Eg. lawyer retains expert
    - **Without prejudice communications**
        - Arises in circumstances where object of communication is to settle lawsuit
        - Eg. I will settle for X (communication is protected), can't show it to court and argue this claim is not worth what they are asking b/c offered to settle for less 1 month ago

**B. Legal Professional Privilege**
***Strass v. Goldsach*, ABCA 1975**
**I:** LP Privilege?
**D:** No
**R:** Wigmore's 4 conditions – may be applied to **any relationship** to determine if docs protected:
1) Communications must originate in confidence that they will not be disclosed
2) Element of confidentially must be essential to the full and satisfactory maintenance of the relation between the parties
3) The relation must be one which in the opinion of the community ought to be sedulously fostered
4) They injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
**A:** If relation is in non-established category of privilege, you do test in case-by-case basis. Don't have to do this in lawyer-client category b/c privilege here is clear and well established.
NOTE: Based on 4 conditions, if docs protected, then must be described as in ***Dorchak***

If you are lawyer doing affidavit of records, and you think something should be protected, air on side of caution. Privilege belongs to client not lawyer. Sanctionable conduct for lawyer to waive privilege w/o client consent/court order.

**Procedure for taking run at privilege** 1) examine on affidavit 2) court application to compel production

- Doc given sealed to judge, they review, make ruling on privilege
- If producible, goes to o/s; If not, goes back to party claiming

**Litigation Privilege**

- Arises from **<u>circumstances and purpose</u>** of communication not relationship (like legal professional privilege)

***Spray Lakes***
**I:** Whether statement made to insurance adjuster was covered under Litigation privilege?
**D (Conrad):** No.
**A:** Statements and docs fall within protection of the litigation privilege where the **<u>dominant purpose</u>** for their creation was, at the time they were made, for use in contemplated or pending litigation. If yes, protected. If no, o/s can see.

Lit Priv commonly applies when retaining expert. Where claimed, privilege for report usually given up in accordance w rules disclosing expert evidence prior to trial. Holder of the privilege gets to decide, no obligation to give it up.

***Ernst & Young*, ABQB 1998 – lays out principles of privilege (see p. 295)**
**F:** surveillance videos.
**A:** Videos begin as privileged b/c created <u>for purpose of lit</u>. Normally, purpose of video is to test credibility of π. Can use in CE, but may not want to disclose them right away. Likely must disclose you have them/facts re when tapes made, etc.

### C. Procedure to Claim Privilege

***Syncrude*, ABCA 1992 – mere physical loss does not waive, must be overt**
**F:** privileged doc found in hands of o/s. No one knew how it got there.
**I:** B/c they have it was privileged lost?
**D:** no.
**R:** Accidental disclosure of doc does not waive privilege, ie. physical loss of control does not waive privilege.

***AM v. Ryan*, SCC 1997 – example of court imposing conditions on what can be produced**
**F:** Defence in SA case wanted psychiatrist records.
**I:** are docs arising in psychologist patient relationship protected?
**D (McLachlin):**
**R:** Applies Wigmore's 4 conditions
**A:** Fails on 4th condition (balancing) – which is more important protection of relationship or correct disposition of suit? Production was directed but conditionally (only to lawyers and expert witnesses, no copies, no disclosure to others, etc.)

### D. Without Prejudice Communications

- w/o prejudice communications = informal offers made in course of lawsuit
- may arise in context of existing or pending litigation
- **RULE:** Communications for main purpose of attempting to settle lawsuit are protected from production unless both sides consent to disclosure
    - Maker doesn't want offer disclosed in court b/c could prejudice their position
- What can be marked?
    - Insurance claims ppl mark everything as w/o P
    - Court considers substance not form, **<u>content and purpose of communication are determining factor, not that words are written somewhere on it</u>**
- In some cases, fact that communication was made is evidence in itself

- w/o prejudice communication that would o/w be protected might be disclosed
- Eg. If o/s attempting to strike out for delay, could argue there has been a lot going on during this time (settlement negotiations) – to demonstrate activity might disclose an o/w w/o prej communication

***Phillips v. Rogers*, ABQB 1988**
**F:** π sought to use 3 letters that were part of negotiation process;
**A:** all three determined to be part of settlement negotiations, assessed on substance of letter, not form or label, therefore privileged.
NOTE: Typically if something is WO prej communication cannot be disclosed w/o consent of both parties

**E. Relevance – what is relevant and material? is it protected?**
- **New Rule 5.2** - Scope of relevance

***Lazin***
**F:** Here, some entries of diary relevant, others not.
**I:** What if part of doc relevant? Part not relevant?
**A:** Copy diary and black out irrelevant part. Produce this to other side. O/s can examine on doc, if they believe something blacked out is relevant, apply to court to look at docs to determine admissibility
NOTE: This can apply to diary, telephone records, etc., eg. Pain diary.

***Duke v. Roman***
**F:** facebook entries in relation to lawsuit.
**R:** Information in profile open to public and friends only is producible. Obligation to copy and preserve for potential future use in lawsuit, list in affidavit.

**F. Possession or Power**
- AOR should also include docs you have power to obtain, eg. medical records
- Obligation to produce is greater than confidentiality
- BUT docs produced in lawsuit cannot be used for ulterior purposes. Eg. Pepsi can't sue Coke, get formula, then use it to beat Coke. Court will impose conditions/limitations on use and disclosure, eg. *Ryan*
- **Old Rule 187** – possession or power
- **New Rule 5.6** – control (likely means same thing, but there will be discussion about this)

***Western Union*, AB SCTD 1972 – blood samples under *AB Hospitals Act***
**F:** Court finds records showing blood-alcohol content producible b/c Act put them w/i their power to produce.

NOTE: In personal injury, medical history will be open book to Δ. Sometimes Δ can force π to be examined by independent doctor. Can get every medical visit from past years, and want doctor's note from each visit. Normal day-to-day things are producible. Doctor's records do not apply to doctor's obtained for purpose of lawsuit (privileged).

***McKerney,* SCC 1992 – medical files, unless reasonable grounds for not doing so**
**F:** Doctor office keeps records, these charts belong to patient.
**R:** Office obliged to copy and provide to you. If doc refuses to comply, patient has power to obtain via Old Rule 209.

NOTE: Normally, get AB Health Care Statement of Benefits paid for past 7 years, get medical release forms signed by client. Doc copies file, sends it to you. If doc does not produce, π can bring application for production. If π rebuffed, Δ can also use this as application to get medical record.

***Hunter v. Eck, Doe, Brown, Poss and City of Edmonton* –** police docs in power or possession of City for purposes of Old Rule 186(1) and Old Rule 191. Therefore, scope of power or possession can have consequences.

**G. Documents in Possession of Someone Not a Party to the Action** (Old Rules 209, New Rules 5.13)

- Old Rule 209 – production of document, can order stranger to action to provide docs
    - Eg. med records describing π's pre-accident condition
    - BUT, need to know specifically what docs trying to obtain from outsider – no fishing expedition
    - Cant be used as examination of outsider to suit
    - Docs don't need to be admissible at trial
- New Rule 5.13

***AG v. TT Investments*** – Crown immunity prevails over Old Rule 209, can't compel 3rd party Crown

- C can raise objection to application for production of docs by virtue of s. 17, *Interpretation Act*

**H. Freedom of Information Legislation and Discovery of Docs – see article p. 308**

**I. Streamlined Procedure**

- **Old Rule 661** requires an AOR within 30 days of defence
- Scope of Affidavit somewhat narrower than regular action
- However, unlike Affidavit in regular action it requires list of witnesses

**J. Small Claims**

- Production of docs can be ordered under *Provincial Court Act*, o/w no requirement for AOR

**K. Penalty** (New Rules 5.12)

- If fail to produce AOR, must have excuse - ***Wagner v. Petryga Estate*****, ABQB 2001,** 1) beyond control of party upon whom obligation falls, 2) arises from complexity and difficulty associated w reqs of case.
- If fail to provide and no sufficient cause, **can't rely on it in evidence**.
- **Penalty** = 2 x Item 3 (Schedule of Rules dealing with Costs); Depends on value of suit, $1,000-$3,000

## Chapter 20: Examination for Discovery (the "Questioning" under the New Rules)

- ED - Each side has right, but doesn't have to occur
- Occurs 99% of time b/c want to see: documentary evidence, oral evidence, what kind of witness they are going to be
- Record under oath (then difficult for them to depart from)
- After ED you have complete picture of case you will have to meet
- Ability to ambush is limited by examination procedure
- After ED is best time to try and settle

**4 Reasons for Discovery**

1. Define Facts
2. Fix Facts
3. To see the Other Side and Assess ability as Witness
4. Encourage Settlement

**Procedure**

- Use to follow court orders, but with privatization can do it whenever suitable to reporter and witness
- Reporter attends at firm, set-up, get style of cause, Δ's lawyer will begin asking π questions after π has been sworn as witness (usually)
- Must identify witness on record – Are you named this π in Court of QB action #...?
    - If corporate party, are you X here to speak on behalf of corporate entity in Court of QB action #...?
    - If don't, transcript is useless
    - If multi-party, agreement that all sides adverse in interest can use transcript as if they asked the questions, so every party doesn't have to cover same ground
- Once questioning begins, lawyer on o/s has limited ability to interfere
    - Like CE, can only step-in if question being asked is improper

    - Typically, lawyer will say – don't answer
- Not proper to help witness
    - Can't at break remind them they forgot to say this...
    - Totally hands off unless o/s expressly agrees you can do this
- Witness suppose to bring all producible docs and answer all questions
    - Often, witness will not have looked at doc in advance, and have to give **undertaking** to find document
    - Undertaking noted on record, listed at end of transcript
- Questioning lawyer concludes s/t any disputed questions, undertakings
    - Don't get two chances, ask all relevant questions in first instance
- Then π's lawyer asks Δ questions

Creates written record of evidence
- Non-verbal responses are not recorded
- Witness must be instructed to say yes or no
- Be explicit about WHAT on record you are referring/pointing to
- Objections: If can't think of proper objection, but don't like question take question under advisory

ED consists of statements given under oath, transcript can be used for:

**1. Cross-Examination**
- If witness departs from story, can use prior inconsistent statement as credibility issue

**2. Can be Read-In**
- No guarantee witness will come and testify, π hedges bet by putting admissions on records
- In unusual circumstances, Δ can read-in, but since all witnesses will be called, very unusual for Δ to read-in

**Evidence is evidence of person performing questioning. They pick what parts go in (distinct from CE). Evidence can only be used against person testifying and can't be used in their favour.**

**A. Who Can Examine Whom** (Old Rules 200-202; New Rules Part 5, Div 1, Subdiv 3, especially 5.17, 5.18)
- **Rules set out framework, scope/purpose**
- Old Rule 200(1) – who can examine whom, if other side wants to examine more than 1 e/ee, they must pay for it (3)
    - New Rule 5.17
- OId Rule 200(1.2) – person required to answer only relevant and material questions
    - New Rule 5.25 – more detailed, gives categories of objections
        - Significantly expands existing rule
    - New Rule 5.19 - Court can limit number of persons s/t questioning, cancelling appointment for questioning it considers unnecessary, improper or vexatious
- Old Rule 200(4) – can examine persons connected w corporate entity, eg. Auditor
    - New Rule 5. 17 – same
- Old Rule 200(5) – can examine outside province by way of commission
    - New Rule 6.24 – same
- Old Rule 202 – can examine assignors
    - Assignee will normally be party to lawsuit, so need to get right for assignor
    - New Rule 5.17 - same
- Old Rule 203 – when you can examine, π can examine after Δ has defended or after time for defence has expired
    - New Rule 5.20 – same, BUT combines effect of other rules in 180s, now need AOR before you can have ED, can examine despite no affidavit or defence if court gives leave/agreement
    - Typically right to examine occurs after time period for defence expired and affidavit of records has been filed by both sides
- Old Rule 204 – can give appointment to witness you want to examine, with conduct money, serve notice upon solicitor
    - Currently in 95% of cases notice set out by agreement, likely to continue this way

    - New Rule 5.21 – how to secure attendance of person you want to examine, requires 20 days notice
- Old Rule 206 – may mark exhibits, mark it or refer to it
    - New Rule 5.26 – change, exhibits must be part of transcript
- Old Rule 207 – allows for re-examination
    - Lawyer examines their own client after other side completed cross to clear things up; or
    - If evidence given by witness that not covered in chief (unusual but possible)
    - New Rule 5.26 – same
- If someone asks question and other lawyer objects, court reporter will rule on objection, can get direction from court if don't like reporter's ruling – NO ONE does this right now
    - o/s just puts objection on record, when transcript comes out, go to court for direction by court on questions
    - if proper, witness must answer and pay costs
- Old Rule 214 - officer can speak on behalf of corporate entity
    - New Rule 5.26 – sort of the parallel – allows officer to attend as witness and be questioned
- Old Rule 216.1 – bad behaviour at examination, talks about courts power
    - New Rule 5.3 – generic, gives power to restrict/modify ability of one side to examine another

**Currently can only examine ordinary witnesses (e/ees, assignors, ex-e/ees)**

- Expert evidence → Rules 2.18.1 – one side must give notice to other of expert qualifications and substance of opinion of expert they intend to call at trial
- New Rules – permit one side to examine other side's expert
- New Rule 5.22 – will allow for use of interrogatories, written questions/answers given under oath

***Proceedings Against the Crown Act*** – treat C like corp, except it has immunity wrt public interest dealing.

**1. Parties Adverse in Interest**

***Turta v. CPR,* AB SCTD 1951 –** T sued CPR and Imperial Oil. CPR 3rd partied Montreal Trust. T can examine IO, CP. IO and CP cannot examine eachother b/c they are co-Δs, not adverse in interest. CP and MT can examine each other b/c there is 3rd party notice b/w them. If MT denies liability to T, they are adverse in interest to T and then T and MT can examine eachother. MT cannot examine IO.
RULE: co-Δs cannot examine eachother. Parties w 3rd party notice b/w them can examine each other.

**2. Employees and Officers**

- In many cases, one party will be corp – who can you examine?

***Cana Corp,* ABCA 1986 -** can unpaid volunteers of charitable organization be examined? Yes. If they have info relevant and material Scope of questioning re WHO is quite wide.

**3. Infants, Persons of Unsound Mind**

***Strehlke v. Camenzind Letorneau And Janor Contracting* (3rd Party), ABQB 1980**
**F:** Examining cause of firing. Evidence NOT given under oath.
**I:** Can evidence be used at trial?
**D:** No.
**A:** Can't read in unsworn evidence of witnesses at trial. Could use it by questioning minor on whether they have obligation to tell truth, circumstantial guarantee they are going to tell truth – something short of them taking oath.

***Cisar v. Alberta*, ABQB 1996**

- Where you have minor litigant brought by next friend very difficult to get evidence
- No provision under old rules to examine next friend

**NOTE: new rule 5.17(1)(c) allow for examination of lit rep (next friend)**

**4. Person for Whose Benefit the Action is Brought (LP)** – limited partner can be examined though not listed in Rule 200
**5. Even if No Defence – O**ld Rule 203; New Rule 5.20

**B. Attendance and Conduct** (Old Rules 203-204, 206-208, 211-212)

- At questioning, witness has obligation to bring records and answer all relevant questions.
- Witness will be asked question they don't know answer to, they give undertaking to make inquiries to determine answer

***Psychologist Assn*, ABCA 1991 – getting out of an undertaking**
If undertaking made, stick w it unless: 1) given inadvertently, 2) should not have been given, 3) o/s will suffer no prejudice if undertaking w/d or prejudiced can be cured with something like costs award.
***Code of Professional Conduct* – Rule 25**

- Lawyer involved in proceedings a) must not, during a CE, obstruct the CE in any manner; and b) must not during brek in CE, discuss w witness the evidence witness has given or is about to give
- Only exceptions if examination adjourned for period longer than 7 days or when answer to undertaking is required

***Landes*, ABQB 1997 -** lawyer cant say i don't understand question and object. Up to witness to say I don't understand. HOWEVER, typically it is lawyers who will say they don't understand and object.

**C. Scope and Purpose** (New Rule 5.1)
***Mitchell*, ABCA 1977 -** Widest latitude given to questioning. Answer all relevant and material questions. Here, can ask not only what happened, but what doctor knew and where they heard it.
***Quality*, ABCA 1985 –** If witness happens to be expert, can you get free expert opinion through back door? NO. Witness qualified as expert in a particular field cannot be compelled to answer questions on discovery which call for his expert opinion. Unless witness is personally party to action directly related to this professional or technical advice and witness' competence is in question.

***Wright***: expands on *Mitchell* – answering questions

- Person giving evidence may answer questions about what others said; may respond to pure hearsay inquiries
- Relevance of evidence is determined at trial
- Witness is obliged to ask questions or make inquiries of persons over whom they have control, ie. bosses must ask e/ees; do not have control over spouses and cannot make inquiries of them for discovery questions
    - If it is beyond your control, you should make reasonable efforts
- If you fail to make objection to evidence given at discovery, doesn't mean it is automatically inadmissible at trial

***Can-Air*:** cannot ask for selection of facts, ie. "on what do you rely on for pleading?"

**D. Examination of a Corporate Officer (Rep)** (Old Rule 214; New Rules 5.17(1)(b), Appendix "Corp rep")
**Selection of Corporate Officer**

- Typically, company will produce corporate officer to speak on its behalf
- *Damiani v. Anderson,* ABCA 1977: cannot select someone who has no info or unable to make inquiries
    - Should examine ordinary witnesses first (personal, direct knowledge of events), then examine officer last.
    - Usually O will not have first-hand knowledge of events leading to lawsuit, but they have power to get information and power to tells us whether evidence given by e/ee is information of company
    - Court wont interfere who they pick if done in good faith

**Duty of Officer and Use of Examination** (Old Rule 214; New Rules 5.23, 5.29, 5.31)
***Esso v. Stearns Catalytic Ltd.*, AB 1993**
**F:** use of corporate evidence. Here, 6 or 8 inches of carbon steel instead of chrome steel put into plant. Pipe burst, fire started, 2 year lawsuit.
**I:** Status of e/ee's evidence and role of officer in relation to that
**A:** Distinction b/w evidence given by e/ee v. O; evidence given by e/ee = info of the company; officer does not have to admit whether its true or false; evidence can be affirmed or rebutted at trial, or read-in, but status of evidence is non-

binding on company; e/ee's evidence has lesser value than officer's, but examining e/ee will give you first-hand info, can be read-in, although co. can always rebut or adduce inconsistent evidence

Corporate party wont call officer to give evidence at trial because it is hearsay. Typically employees with knowledge are the ones who should be giving evidence. Question those ppl first, then issue is : can you use it at trial because employees cant bind company.
**New Rule 5.29** codifies cases re procedure of questioning corporate employees and officers.

**Objections** (Old Rule 210, 213)**/ Discovery Abuse** (Old Rule 216.1)

**E. Use of Discovery**

**1. Procedure to Read-In** (Old Rule 214(4))

***Guarantee*, ABQB 1992 – use of discovery transcript:** Δ's use of transcript. Used for testing credibility, but prior inconsistent statements to witness. Before close case, do read-ins, begin with ID of witness, read-in parts of evidence you select (Q&A).

**2. Binding Effect**

***McDonald*** – Be careful about use of discovery items in read-in or CE. Because once it is in you are stuck with it.

**3. After Death – Use by the Party Examined**

***Paquin v. Gainers,* ABQB 1989 – discovery transcript:** witness died before trial, Δ wanted to use transcript that had deceased's CE. Lawyer for party cannot put that party's transcript from ED at trial if party dies before trial. Could be different if 1) evidence commissioned, 2) o/s consented**.** Person giving evidence cant use it in their favour.

**4. Improper or Collateral Purpose**

***Ochitwa v. Bombino*, ABQB 1997 – no collateral or ulterior purpose**: implied undertaking that applies to all evidence given that it can only be used for purpose to which it was given. Cant use it for competitive advantage, etc. Here, child abuse, one party said evidence couldn't be disclosed to AG because concerned about charges being laid. Case centered on motion to prohibit use on examination evidence.

**Chapter 21: Admissions** (Old Rule 230; New Rule 6.39)

- Purpose of ED is to get admissions against interest from other side
- Can try to get admissions outside of ED by serving **notice to admit facts**
- **Old Rule 230** – notice to admit facts
    - no specific form, but style of cause and title
    - "Take notice that Party X requires Party Y to admit the following facts:"
    - 30 days to respond
    - If don't respond deemed to have admitted facts set out therein
- **New Rule 6.39** – SAME, BUT only 20 days to respond
- If don't admit, person trying to get admission must prove at trial, if proven, person who did not admit has cost penalty. Of little consequence b/c if π wins they get costs anyway.
- RECALL: Under new rules, greater obligation on person who is requested to give admission to cooperate in process.
- Important to remember this is admissions of fact CANT admit matters of law, opinions.
- Saying something is a matter of law/opinion is sufficient grounds for not admitting a so called fact.
- Currently, other side will usually not cooperate or admit anything. Nice idea, but doesn't really happen.

***Davies v. Edmonton*, ABQB 1991**
**F:** Inadvertent failure to respond to notice to admit
**I:** If you fail to respond, can you get out of deeming to have admitted fact?
**D:** Yes. But difficult
**R:** Must demonstrate there is triable issue that ought to be tried in interests of justice wrt issue that was inadvertently admitted. Then can get out of admission.
**A:** Almost as difficult to get out of implied admission for failure to respond as it is to get out of undertaking at discovery.

***Dwyer v. Fox*, ABCA 1996 – upholds *Davies***

**R:** To get out of explicit or deemed admission: judge should permit withdrawal in any case where the person who made admission has demonstrated to satisfaction of judge that evidence available about the fact in question is such that a determination of the truth at trial is the only satisfactory means to settle the issue.Within discretion of court, they can amend or withdraw admissions if in the interests of justice.

***Canada Southern v. Amoco Canada Petroleum*, Atla L.R. 1984**
**R:** Court cannot compel other side to properly address admissions you are seeking, often will get back a straight denial. The only penalty is costs.
NOTE: Since new rules require more cooperation, may be wider range of penalties available.

## Chapter 22: Delay, Leave to Take the Next, Dismissal for Want of Prosecution

- Very messy area of procedure – allows one side to strike action for delay

**Background: Many changes in rules**

- **Old old rules –** required step be taken in action <u>every year</u> or Δ could apply for dismissal for want of prosecution
    - Decision indicated what qualifies as "step"
    - If didn't take step had to seek leave of court to move action forward
    - O/s could have matter struck for want of prosecution
    - TEST: *Allen v. Sir Alfred McAlpine and Sons* (Eng. CA): Δ must demonstrate delay was 1) inordinate, 2) inexcusable, 3) gave rise to extreme prejudice (prejudice not compensable w cost?)
- **Then reformed rules:**
    - **Old Rule 244 –** delay between 0-5 years
        - **TEST: *Allen* test**
        - Inordinate delay means within 3-4 years time span
        - Depends in part on attitude of parties, eg. participation in delay, acquiescence of o/s
        - No obligation on Δ to move matter forward
        - Party opposing dismissal would try to show delay excusable, o/s acquiesced, no prejudice
        - NOTE: activity for purposes under Rule 244, not necessarily something that "materially advances suit" under Rule 244.1
    - **Old Rule 244.1 –** five or more years of delay (**drop dead rule**)
        - **TEST: Δ must demonstrate there has been no thing which materially advances action**
        - Rule is mandatory - debate focuses on whether there was 5 year gap, what constitutes materially advancing action, etc.
        - Five or more years have expired since last thing was done in action that materially advances action
        - <u>Things are wider than "steps"</u> (from old rules)
- **Parties can agree on pace of action out of the 5 year time limit**
    - Must be express and in correspondence b/w parties
    - Circumstances, eg. child w potential brain injury, can't test child until they grow up a bit
- Even though applications to strike are in FINAL form, **hearsay IS allowable**
    - Therefore, can make applications based on belief of deponent

**New Rules**

- **New Rule 4.31** (parallel to Old Rule 244) – delay between 0-2 years
    - Requirements will likely be same as old rule even though not specifically stated in new rule
    - If delay significant, court will likely find delay is inordinate and inexcusable (pretty much a given)
    - Once first 2 established, rebuttable presumption of serious prejudice
    - Then, burden shifts to π to raise reasonable doubt about prejudice
        - Prejudice must arise <u>during period of delay</u>
        - If prejudice arises as result of nothing π did wrong, difficult for Δ to strike action
    - If π can rebut presumption of serious prejudice, court can impose terms to move matter forward or get rid of any other prejudices that might have come up along way

    - Therefore, rule will either be fatal to action OR court will come up w terms to keep case moving forward
- **New Rule 4.33** (parallel to Old Rule 244.1) – two or more years of delay
    - **NOW,** need thing that significantly advances action
    - Rule is mandatory

**Code of Professional Conduct**: ethical obligation to use reasonable efforts to expedite litigation process.
Balanced against other factors: obligation to give o/s reasonable time extensions, delay can be a strategy (cases die b/c π loses zeal)

***Young (Next Friend of) v. A. Dei-Baning Professional Corp*, ABCA 1996:** Old Rule 244. As per *Lethbridge Motors* (case which imports *Allen*), onus on party seeking to dismiss to prove serious prejudice. Here, fading memories not enough, need missing witnesses, lost records, etc.

***Apple Yard v. Reed,* ABQB 1997:** Old Rule 244.1. Ponzi scheme case. Applied to strike for delay. Here, exchange of expert reports in advance of requirements under rules is thing which "materially advances" action.

- If approaching timeline, very difficult to do something unilaterally that will materially advance action
- But exchange of report is something done unilaterally which will materially advance action

***Volk v. 331323 Alberta Ltd,* ABCA 1998:** Old Rule 244.1. Question of prejudice to the applying party from the delay is irrelevant. Time is the only thing that matters. No requirement to prove prejudice.

***Bishop v. Grotrian*, ABCA 1998**: Old Rule 244.1. Consent order is "thing" which materially advances action.

***Alberta v. Morash*, ABCA 2000:** Old Rule 244.1

- Rule is mandatory, not discretionary (like Old Rule 244/New Rule 4.31)
- Procedural step required by rules is always something that materially advances action, eg. filing AOR
- Procedural steps contemplated by rules, but not required, may in and of themselves materially advance action
- Action may be materially advanced by other things, even though they are not procedural steps
- **To assess, court applies functional analysis – has action been moved closer to trial in meaningful way?**

***Trout Lake v. CIBC*, ABCA 2003 (most important case) – interpretation of Old Rule 244.1**
Appropriate approach on a 244.1 application to dismiss is:

- Proceedings examined as at date of application (not hearing) to dismiss for want of prosecution
- If at any time in action there has been gap of 5 years or more where no "thing" materially advanced action, judge shall examine what has occurred since 5 year gap
- If delaying party has not done a thing to materially advance action since 5 year gap → action dismissed absent agreement to delay
- If delaying party has done a thing to materially advance action after 5 year gap:
    - and other party objected and applied for dismissal → action dismissed absent agreement to delay
    - and applicant has participated in that thing, continued to participate in action, or otherwise acquiesced in delay → action shall continue, application refused

**In most cases, Δ applicant will apply in alternative**

- Apply under Old Rule 244.1, if not entitled to auto remedy, then say in alternative I would like action struck for delay under Old Rule 244
- Recall different tests between 2 rules (as indicated above)
    - NOTE: New rules differently worded, but almost exactly parallel
- Typically, someone will apply under 4.33 and in alternative under 4.31
- Materials in support will have to demonstrate for 4.31 that delay was inordinate, inexcusable and point out prejudice not curable by costs, etc.

**Materials in support of drop dead (New Rule 4.33)**

- Hearsay allowable
- Legal assistant can say I have procedure card from clerk indicates: SoC filed by Firm X on date, SoD filed by Firm Y on date, etc.
- Pull copy of card and see nothing on card between last entry and date of motion
- Since things which may not be entered on card may materially advance action, need to include another part in affidavit about things which may have happened in lawsuit since last entry on card

**Material in support of simply delay app (New Rule 4.31)**

- Need some evidence of what happened: inordinate, inexcusable, identify nature of prejudice
- To hedge bets, look at 4.31 and 4.33 and say no acquiescence in any of the things spelled out by the rules

NOTE: Infants/minors are in privileged positions re strike for delay. Most cases since running of LP under *Limitations Act* doesn't commence until minor becomes adult. Court reluctant to strike out action by minor for delay.

**Summary:**

- Time period shortened from 5 years to 2 years.
- Δ has no obligation to move action forward, but since philosophy of new rules make things less adversarial, more co-operative, argument that Δ has obligation to move matter forward or at least not foster delay. Acquiescence will be important
    - Few cases which talk about Δs being estopped from relying on rules
    - This will likely translate into interpretation of new rules
- Results of successful application - Δ awarded costs of application and costs of action. Therefore lawyer who has delayed will be on for costs of application ($1500), costs of action (determined by Sch. C), value of underlying action (what value was as lost to client)
- Difficult to demonstrate that client participated in delay and is somehow contributory neg from lawyer's perspective

## Chapter 23: Costs and Fees

**A. Costs Between Parties**(Old Rules 599.1, 600-612; New Rules Part 10, Div. 2)

- **Costs** = Amounts payable by loser to winner pursuant to Sch. C of Rules of Court (p. 338)
- **Two Principles:** 1) Winner gets costs (Old Rule 607), 2) Always in discretion of court
    - Overall winner of lawsuit or motion
    - In other jurisdictions you can see instances of costs being awarded on issue by issue basis
    - AB - all or none
- Technically, costs belong to client not lawyer
- If π wins →entitled to costs based on amount they actually won, not what they claimed
- If Δ wins → entitled to costs, treated as having won suit w face value of SoC
- Winner of motion → entitled to costs based on face value of SoC, b/c costs in suit wont have been determined
- **Process:** Determine which column in Sch. C you fall under, then follow down list of steps
- In some case, court can award multiples of a column. In extra-ordinary circs court can award costs on higher scale (solicitor, indemnity)
- If move from small to large:
    - Sch. C – most modest
    - solicitor-client costs (what reasonable solicitor would charge)
    - indemnity costs (whatever they are out of pocket for costs, reasonable or not) → *Mitran*
- To get more, need positive misconduct on part of losing party. Court wants to punish them for this behaviour.

<u>What is included in cost award?</u>

- Schedule C, "Tariff of Recoverable Fees"(not costs)

- Costs award = fee according to Sch. C + allowance for disbursements/out-of-pocket expenses
    - Eg. SoC filing fee = disbursement

What does lawyer charge client?
- Fees + contingency agreement
- Lawyer's fees based on hourly rate
- Contingency means lawyer recovers portion of what client gets in lawsuit
- Costs awarded against one party and lawyer's compensation are reviewable by court offices
- New Rules → Assessment and Review Officers

Rules and Cases
- **Old Rule 600** – specifies what is included in costs
    - no exact counterpart in new rules
    - New rules include this info in definitions section at end
- **Old Rule 601** – costs awarded by court, typically Sch. C, but court can award gross sum instead
- **Old Rule 599.1/602** – circs where lawyer may be required to pay costs personally
    - **New Rules 10.29-32, 10.48** – cover same basis

***Pollock v. Liberty Technical*, ABQB 1997 – costs as result of non-compliance (against solicitor)**
**F:** lawyer failed to follow practice note re timing of filing of materials for Chambers Application. No reasonable excuse offered. Failure to follow interfered w thing going ahead.
**D:** Costs payable jointly by lawyer and client.

***Young v. Young*, SCC 1993 – costs awarded against lawyer**
**F:** CA overturned costs award against lawyer.
**D:** Upheld CA. McLachlin says court should be reluctant b/c if too eager to gives costs against lawyer danger lawyer will not zealously argue difficult cases and take risks necessary to properly defend. Jurisdiction should be exercised sparingly.

- **Old Rule 603** - Next friends give undertaking to pay costs if lawsuit unsuccessful
    - New Rules – next friends eclipsed by lit rep
    - **New Rule 10.45** – makes lit reps generally liable for costs in appropriate circumstances
- **Old Rule 607** –costs of motion are automatic (if the loser of motion doesn't raise cost issue, winner auto gets them) to figure out what they are look at face value of lawsuit
- Eg. losing contested app will range from 1-2K depending on amount at issue in lawsuit

***Caswell v. Pakulat*, ABQB 2002 – interlocutory applications**
**D:** Laycock. Only go to winner by default if not raised and always in discretion of person hearing motion.
**R:**
- Onus on unsuccessful party to raise costs o/w goes against them. Eg. novel point, mixed success, etc.
- Ex parte orders – since o/s is not present, the appropriate procedure is to have order say that costs will be in the cause (determined at end of day depending on success/failure of lawsuit)
- Old Rule 206 does not apply to *ex parte* application

NOTE: If settle, action discontinued, π has *prima facie* right to have costs determined. Prepare bill of costs, reviewed by clerk.

***Laube v. Juchli*, ABCA 1988 – (exaggerated claim) → demonstrates court's discretion**
**F:** π paraplegic, confined to wheelchair. Appellant hired pvt investigators. No wheelchair ramp, filmed her. On one occasion she had limp, then walked perfectly normally. Π admitted evidence true. TJ awarded $36K in damages (modest figure). Π paralyzed only for short period in hospital. Δ believed π should be punished for deception.
**I:** Is award correct?

**D:** Costs extinguished everything π would have been entitled to under damages.
**R:**
**A:** Court said could not interfere w damage award, but b/c discretion re costs, decided to make costs award payable to Δ equal to damages π got. "Therefore, we simply fix all costs payable to appellant def from date of the offer as being equal to the total of all sums otherwise payable to the π. In net result, no one will recover anything.

***Mitran v. Guarantee RV Centre Inc.*, ABQB 1999 – indemnity costs**
**I:** How to get more costs? What constitutes rare and exceptional circumstances?
**R:** In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis as opposed to party-party basis, the Court must conclude that they case fits within the parameters of a rare and exceptional or unusual case:

- Blameworthiness in conduct of litigation by party
- Justice can only be done by complete indemnification for costs
- Π did something to confuse litigation, no serious issue of fact/law, positively misconducting party was "contemptuous" of the aggrieved party in forcing the aggrieved party to exhaust legal proceedings to obtain that which was obviously his
- Attempt to deceive court, delay/defeat justice
- Δ guilty of positive misconduct
- Δs found to be acting fraudulently and in breach of trust
- Fraudulent conduct
- Attempt to delay proceedings

<u>Bullock and Sanderson Orders</u>

- Applies where π must sue 2+ Δs
- Π always obliged to pay costs to successful Δ, but court can make unsuccessful Δ pay costs of successful Δ
- Criteria: 1) reasonable for π to have joined successful Δ, 2) no cause for depriving successful Δ his costs, 3) as b/w co-Δs, the unsuccessful one is wholly responsible (*Wenden v. Trikha*, ABQB 1992 – MVA where π sues at fault driver and doctor arguing Δ should not be driving)
- Bullock order: unsuccessful Δ pay TWO sets of costs to π (costs indemnified), π pay successful Δ
- Sanderson order: unsuccessful Δ pays π and successful Δ
- As successful Δ, you prefer Bullock order in case unsuccessful Δ is unreliable

<u>GST</u>

- Can get GST on costs, but must ask for it (*Amalgamated Transit v. Independent Canada Transit Union,* ABQB 1998)

**B. Solicitor's Fees** (New Rules Part 10, Div. 1)

1. **Fees** (Old Rules 613-614, 624-626)

**2. Contingency Fees** (Old Rules 615-620; New Rules Part 10, Div. 3)

- Method for lawyer to charge client
- Typically on sliding scale depending on stage of lawsuit – see sample (p. 387)
    - In many cases, it will be 25% (and settled before examinations), 30% (if after), 35% (if it goes to trial)
    - Many charge contingency on flat 35% - lawyer gets 1/3 of what's recovered at end of day
- Lawyer may recover equivalent sum to costs client may o/w be entitled to
- Most files on contingency agreement have nothing contingent about them - only a question of how much and when
- In most cases, contingency agreement is kind of a misnomer
- Allows ppl who can't pay along way to hire lawyer who reserves payment til end of day (at a price)
- **New Rule 10.7** – spells out detailed requirements for contingency

***Rusk (Next Friend of) v. Medicine Hat (City)*, ABQB 2001**
**F:** personal injury claim had contingency rate of 35%, amounted to almost $1M.

**D:** Court reduced amount in its discretion from 1M to 472K.
**R:** Contingency fee should be adjusted - good settlement, but not really contingent.

**C. Taxation –** Old Rule 627-658; New Rules Part 10, Div 4.5
- see GST above

**D. Security for Costs** (Old Rules 593-599; New Rules Part 4, Div. 4)
- Where π claim is weak (π lives outside of J, π is corp entity of uncertain solvency) Δ can apply for **security for costs**
- Requires π to either pay amount into court pending outcome of case or do letter of credit, etc.
- Strategic move b/c Δ can kill suit w successful app by setting obstacle so high that π can't get over it
- **Old Rule 593/New Rule 4.22** – court may order party to pay security for costs if court considers it just and reasonable to do so (within their discretion)

***Sprung Enviroponics v. Calgary and Imperial Oil*, ABCA 1990 – security a fraction of anticipated total cost**
**I:** How much should security be?
**D:** Usually fraction of anticipated amount. Sent to QB to determine amount.
**QB:** Can rely on double hearsay evidence to make an award (weak evidence). Court will award on weak evidence.

***Crothers v. Simpson Sears Ltd*, ABCA 1988 – non-residents may post**
**R:** Requiring security for costs for out of province π is not unconstitutional. Court will award b/c if π loses lawsuit, Δ may have difficulty recovering judgment for costs even though π is in Canada.

***Keller (next friend of) v. Penkoski*, ABQB 1994 – illustrates extent of court's discretion**
**F:** Medical malpractice suit, single mother on welfare. Doctor applies for security for costs in hope it will end lawsuit.
**D (Funduk):** will not allow b/c π entitled to day in court.
**R:** Court has discretion to deny. Here, scales of justice weigh in favour of action going to trial which it will not if order for security for costs is granted.

## Chapter 24: Compromise (Settlement) Using the Court Process (Old Rules 165-174; New Rules Part 4, Div 5)

**A. Nature of Offer**
1. Introduces element of gambling
2. Recall: Costs = winner gets costs (fees + disbursements)
3. **Compromise** = can double up fees portion of bill of costs depending on outcome of lawsuit and terms of formal offer
4. If someone makes offer and other side rejects, penalty in fees portion of Bill of Costs (often has doubling effect)

**3 Possibilities**
- Δ can pay money into court to settle claim
- Δ can make offer of judgment to π (**formal offer**)
- Π can make offer of compromise to Δ (**formal offer**)

Formal offers caught by **Old Rules 166-170**
- If one of 3 possibilities occurs, then go to trial, decision rendered
- Consequence of failure to match/equate formal offer set out in **Old Rule 174**
- If π makes offer of compromise to Δ, Δ rejects, action goes to trial:
    - if π equals/betters offer → π gets double costs of fees for every step taken after service of offer
        - Offers served on o/s but not filed w court
        - Court can know about existence of formal offer until after determination of action
        - Confidential until after result
    - π doesn't do better than Δ offer, but still wins → π gets no costs for any steps taken in lawsuit after service of Δ's offer, Δ gets costs of fees for every step taken after service of offer
        - Although π wins suit, they are deprived of costs after service of offer b/c of compromise rules

        - Δ is rewarded w his costs
    - π loses suit → usually, Δ entitled to costs, BUT here, b/c Δ made formal offer, Δ gets <u>double costs for every step taken after service of offer</u>
        - Δ gets regular Sch. C up to service of offer + double costs for every step taken after offer

<u>Payment into court</u>
- Same effect
- Downside – must actually come up w money and give it to clerk

***Jones v. Trans America Life*, ABCA 1996 – marginal element of compromise**
**F:** π offered to settle full amount of claim
**I:** is this a valid offer of compromise?
**D:** Yes.
**A:** Court can take into account formal offer by π for full amount of claim.

***Allen (Next Friend of) v. University Hospitals Board*, ABCA 2006 – qualifies Jones**
**R:** Court can evaluate offer and look at quality of offer.
**A:** Offer of the full amount is not genuine b/c it lacks element of compromise. Offer must reflect merits of case <u>at time of offer</u>. Must be realistic in order to be genuine. Even element of compromise on one side or other may not be sufficient to give it reality or genuine quality which is required.

NOTE: Old Rules – costs consequences are **mandatory** (COURT SHALL except for special reasons – *Allen* is special reason).

**B. Time to Offer**
***Larouche v. Shaw*, ABCA 1981:** Formal offer can be made on eve of trial. Rationale: immediately before trial everyone's minds are focused and parties know their case well. They are in good position to evaluate formal offer.

- Old rules require offer to be open for 45 days or until formally withdrawn, offer still open ends at trial.
- Rather than worrying about formally withdrawing, say in offer it will automatically be withdrawn 45 days after service or by start of trial unless extended in writing.

**C. Time for Acceptance**
***Collins v. National Life Assurance*, AB L.R. 1995 –** Counter offer doesn't automatically reject an offer. Offer by π and Δ must remain open for acceptance in accordance w rules. If π makes offer, then Δ makes offer, possible to have both open for acceptance at same time. Ordinary rules of contract do not apply.

**D. Content of the Offer**
***Whittle v. Davies*, ABCA 1988 –** Offer was very specific. Risk in particularizing the offer. In circumstances were π does better than some but worse than others, difficult for court to determine whether π has matched/bettered original offer. By particularizing you are just given yourself risk of offer not having full effect at end of day if there is mixed result.
- Best thing to do is to put lump sum in your offer inclusive of all damages and express it to be lump sum + costs + interest.

**E. Form**
***Province of AB Treasury Branches v. Floral Holdings Ltd.*, ABQB 1990 –** Offer is effective only if it refers to the Rules. Formal offer process does not apply to interlocutory proceedings.

**F. On Appeal**
***Davis v. Caproco Corrosion Prevention Ltd.*, ABCA 1996 –** Can make formal offer in appeal once process commences, but underlying offer before trial is not automatically extended if matter appealed.

**New Rules -** codify existing rules and interpretation of cases above

- **New Rule 4.24** - Can no longer make formal offer on eve of trial – must be at least 10 days ahead
    - Contrast to *Larouche*
- **New Rule 4.24(2)** – formal offer must be in prescribed form
    - Contents spelled out in (2)
    - Codifies/expands *Treasury Branch*
- **New Rule 4.24(3)** – formal offers must be open for 2 months
    - Trial or summary trial has effect of terminating (same)
- **New Rule 4.29** - Cost consequences same
    - Old rules indicate cost consequences MANDATORY unless special reasons
    - NOW, entitlement by party to certain costs – introduces wider element of discretion
- **New Rule 4.28** – offers are confidential
    - Served on o/s but not filed
    - Court does not know about them until decision rendered
- Acceptances are filed
    - This terminates lawsuit
- Currently, existing rules are all or none proposition (settling action)
    - New rules discuss settling action or claim in action
    - May be able to make formal offer on an issue by issue basis (not all or none proposition)
- Need Statement of Claim – can't make formal offer in advance of action
    - New Rules speak about SoC, not originating applications
    - So remains to be seen whether compromise rules applicable to originating application → EXAM
    - Maybe they can be adapted

**Chapter 25: Contempt Power** (Old Rules 701-704; New Rules Part 10, Div. 4, Subdiv 2)

- **Old Rule 702** – court may, on its own motion or on application, declare someone in contempt
- **Old Rule 703** – circumstances generally when court can give contempt remedy
    - Eg. failing to appear for court order, failing to attend discoveries after appointment, etc.
- **Old Rule 704** – punishment for being in contempt
    - Eg. striking proceedings, fining ppl to imprisonment
- **New Rule 10.50, 10.51** – parallel 703/704

***Zelazo v. Masson*, ABQB 1992**

**F:** Accountants battling over files. 1 accountant ordered not to take the files, ignored court order, took files. This is contempt application brought by other accountant.

**D (Cote sitting as QB while on CA):**

**R:** Don't want litigants to disobey court order, then buy their way out w fine.

**A:** This case is not minor. Will not impose minor fine or impose no penalty except for costs. But in view of the fact that the items taken had moderate worth, it should not be too heavy a penalty. It may be objected that imprisonment for contempt is uncommon in Alberta, but that is not correct. It is common to sentence the offender to time spent in custody, which is commonly several days. In most cases of contempt the offender sincerely apologizes and repents.

***Michel v. Lafrentz* – considerations relevant to what remedy/punishment should be imposed**

**F:** One got judgment against another. Old Rules allow for questionnaire to be sent to judgment d/or. Less than perfect response to questionnaire, application to cite them in contempt. Person seeking to be placed in contempt was questioned/CE'd by applicant.

**D (Cote):** Fine of $5,000.

**R:** Some considerations relevant for deciding 1) lack of intent, 2) negligence, 3) attempt to purge the contempt → EXAM
Here, they lacked a sense of urgency, and the fuse was burning perilously close to the bomb.

## Chapter 26: Professional Responsibilities

**A. Change of Solicitors or Withdrawal** (Old Rule 554, 555; New Rules Part 2, Div. 5)

- **New Rule 2.29** – same as old: if you want to w/d must serve notice of withdrawal on o/s and your client
    - Removes you from formal record 10 days after service of notice
    - Therefore, o/s cant serve you things, they must now serve client directly at last known address
- Need leave of court to withdraw after trial date has been set.
- However, recent case (legal aid), determined client had ability to pay. Legal aid tried to withdraw and SCC said no you can't. Court may require you to stay on.
- In order asks for costs of application and action

**B. Undertakings**

- Code of Professional Conduct, Ch. 4, Rule 10
- Lawyer must honour all undertakings given by lawyer regardless of their form or the manner in which they have been communicated

***Witten, Vogel, Binder & Lyons v. Leung*, ABQB 1983** – must honour undertakings: cannot violate trust conditions. Cannot unilaterally change trust conditions. If you have trust condition imposed upon you, must get other sides agreement to waive and their consent in writing. Judge disagreed w advice of practising advisor of LSA.

## Chapter 27: Experts

**A. Appointment of Experts** (Old Rules 217-218; New Rules Part 5, Div. 3)

- **Old Rule 217** – **Independent Medical Examinations** (IME) - procedure by which Δ can call upon π to make π s/t medical examination by independent medical practitioner of Δ's choice
    - Arises where π puts medical condition into issue, eg. personal injury lawsuit
    - IME examines π and provides report to Δ
    - Δ provides copy of report to π
    - trigger's π's obligation to give Δ any reports about this time period → <u>extinguishes privilege for all of π's expert reports</u>
    - Δ would ask for AB Health Care statement of benefits paid (incl. charts and notes)
    - Permits Δ to assess the pre-accident condition of π and see if injuries are reflected in post-accident report
    - These are non-privileged producible items
    - Must be listed in Affidavit of Records
- "duly qualified medical practitioners" (wording in 217)
    - Interpreted narrowly – doctors
- Idea of IME is to level playing field, permits Δ to get Δ-friendly expert to examine π

***Grayson v. Demers,* ABCA 1975** - example of π trying to get IME of Δ

- Δ put medical condition into issue by saying accident happened by factors/circumstances beyond their control
- Strictly this is not appropriate use for Old Rule 217
- <u>But court has discretion under Old Rule 218</u>
- Therefore, π can obtain an IME of Δ if Δ puts their medical condition into issue

**New Rules 5.41-5.43 -** wider than old

- Speaks of **persons**, not π, Δ, or parties
    - Therefore, wider array of individuals may be s/t IME
- **5.44** – health care professional can be called on to perform any test recognized by medical science
    - "health care professionals" not "duly qualified medical practitioners" - defined later , much wider
    - "any test recognized" - very wide
- **5.42-5.44** – discusses procedure
    - Make provision for video-taping examination

- <u>BUT, consequences of New Rules are the same</u>
    - Following IME, requesting person gets copy of report, sends to person examined, person examined must hand over any like reports
    - Nature of damages are not objectively quantifiable

***Petersen v. Shepard*, ABQB 1985**
**I:** whether Master erred in holding Δ's not entitled to copies of π's medical reports unless π first request from the Δ a copy of the IME? Yes. Δs, after receiving IME report of π, are entitled to receive medical reports previously or hereafter prepared by docs of π, nwst that π has not first requested a copy of the Δ's IME.

***Tat v. Ellis*, ABCA 1994 – vocational psychologist s/t discretion**
**I:** whether π could be made s/t examination by qualified vocational psychologist?
**R:** s/t to discretion of court.
**A:** The rule requires a judicial consideration of the merits of the request; it is not enough that the doctor makes the request. They judge should weigh all the many factors that are relevant to a fair decision...they will include in most cases: degree of competence of the proposed tester, weight of evidence of the reliability and usefulness of the test, importance of test to diagnosis, degree of relevance to the suit of that aspect of the diagnosis, degree of intrusion into privacy of π, any health risks involved in the test, reasonableness in terms of time and effort, balancing of potential expense against good achieved.
NOTE: Even though rule expanded, *Tat* forms basis for overriding use of discretion if 1 side is blocking the request.

**B. Notice of Expert Evidence** (Old Rules 218.1; New Rules 5.34)
- For purposes of lawsuit, may retain someone to give opinion
    - Eg. whether π will recover in future, extent of prognosis for π – will there be permanent impairment, quantify loss of income, etc.
- Expert communications and opinions → **privileged**
- Expert report → **litigation privilege**
- To make use of report in lawsuit or at trial, privilege must be waived b/c o/s must be made aware of opinion
- **Old Rule 218.1** – notice to adduce expert evidence
    - Party intending to adduce expert at trial must serve notice of this on o/s 120 days before
    - this amounts to waiver of privilege
    - Providing report to o/s means incl. substance of report, qualifications of expert, report itself
    - If fail to give proper notice could be s/t costs.
- O/s can 1) admit report, 2) agree to have report available at trial and ask that expert be available for CE, 3) retain own expert to provide rebuttal report (Δ has 60 days from service of report for rebuttal)
    - Presently rules do not contemplate examination of expert witness in same manner as examination of ordinary witness prior to trial
    - Could not question expert under oath prior to trial, like others in **Old Rule 200**
- Expert will be called at trial
    - Put in their evidence
    - Propose to court the expert's qualification
    - O/s may not agree to scope of qualifications you are looking for
    - Once made proposal, if o/s doesn't agree, they can CE expert on qualifications
    - Court makes ruling on qualifications
- Put facts you can prove to expert in hypothetical
    - Expert finds based on A, B, C, my opinion is...
    - O/s CE's expert
- Court makes decision: 1) Court will/will not accept opinion, 2) Court will find opinion defective b/c underlying facts have not been proved

***Commonwealth v. Syncrude*, ABQB 1985 – include facts relied upon**

**R:** Experts' opinions must include opinion and facts expert relies on the come to this opinion.
NOTE: Normally, expert won't set facts out in report, but will mention everything they have reviewed.

***Wilson v. Walton*, ABQB 1987**
**F:** if get deficient substance of opinion, served late or failure to comply with Old Rule 218, can object.
**D:** Expert evidence disallowed b/c doesn't substantially conform to Old Rule 218.1
**NOTE:** unusual result – disallowing expert evidence is rare. More likely *Wade.*

***Wade v. Baxter*, ABQB 2001**
**R:** Test: Four considerations about whether court can receive expert evidence which is late/doesn't comply.
1. Facts should analyzed to see if delay/non-compliance is so egregious and inexcusable that it undermines the workability of the system
2. Assuming non-compliance does not amount to abuse of process, and evidence is relevant and material, there should be presumption in favour of having all evidence before trier of fact (is there prejudice to other party that cannot be neutralized by costs, adjournment, calling of rebuttal evidence)
3. Once decision made to admit evidence, other party should be given opportunity to seek adjournment
4. Whether adjournment granted or not, costs and disbursements related to late evidence may be granted or denied depending on particular circumstances

Result will probably be adjournment rather than forcing parties to proceed to trial w/o the expert evidence.

**New Rules 5.34**
- NOW, not as rigid → no timeline, **BUT** cant set something down for trial w/o expert reports having been circulated
    - Precondition to trial
- Determined by who has primary onus of proof
- Person w primary onus is obliged to serve their expert report on o/s
- o/s can then provide rebuttal report
- Once served, then triggers right of person who served original report to provide sur-rebuttal report
- ALSO, new rules suggest can examine expert before trial

**C. Experts in Very Long Trial Actions** (Old Rules 218.2-218.91)

**D. Preservation and Inspection of Property** (Old Rules 468; New Rules Part 6, Div. 2.3)
***354995 Alberta Ltd. v. Morin*** - order to subject Elk to tuberculosis tests under Old Rule 468. Court said no. Rule does not allow for destructive testing unless both sides agree.
NOTE: New Rules 6.27/6.28 wider and maybe more effective at allowing them to do what is contemplated under *Morin*

**E. Referees** (Old Rules 403, 418-426; New Rules Part 6, Div 6)
- Old Rule 403 – masters are automatically referees
    - QB judge refers something to Master for determination by Master. Upon conclusion, sent back up.
    - Masters are auto referees, indemnity clerks can be made referees.
    - References are very unusual
- Possibility and circumstances set out in Report on Referees at 438.

## Chapter 28: Other Evidence

**A.** Affidavit Evidence at Trial (Old Rules 261(2); New Rules 8.17, 8.18)
- Typical method for entry of evidence at trial is witnesses on stand
    - Permits trier of fact to determine credibility, weight
- Can you use affidavit evidence? Yes **Old Rule 261/New Rule 8.17**
    - BUT permitted only for uncontroversial matters (no CE desired or needed) and only where there is a sufficient reason for non-attendance of witness (expense, inconvenience)

- Generally, it matter truly uncontroversial should be able to achieve same result by admissions

***Heritage-*** Reviews circumstances where affidavit permitted.
**R:** Discretionary. Here, evidence reasonably necessary and circumstances suggest evidence is reasonably reliable. Therefore, admissible in affidavit form. Witness doesn't need to be called. Weight placed on evidence determined by TJ.

**Recall: *Quinn*** – attempt to use affidavit evidence in place of dead witness, and court said NO. Requires extraordinary circumstances to depart from typical rule.

As a result of summary trials, etc. will likely see more court procedures involving partly oral and partly documentary evidence. Trend away from purely oral evidence.

**B. Examination *De Bene Esse*/C. Commission Evidence**

- Can put evidence before court without witnesses there
- DBE – they are in J, but in bad health and may not live to trial
- CE – taken from someone outside J

**Old Rule 270/New Rule 6.23, 6.24**

- Normally have video service and person whose evidence witness will give will examine in chief, other will CE, objections made on the video and if not sorted out then, TJ will make ruling on admissibility of evidence or objection

**Chapter 29: Entry for Trial and Trial** (Old Rules 236-240; New Rules Part 8, Div. 1)

**A. Entry** (Old Rules 236-240; New Rules Part 8, Div. 1)

**Practice Note #4 – requires certificate of readiness**

- After all steps taken (pleadings, affidavit, AOR, examinations) and no settlement, then trial is set
- Get certificate of readiness, says estimated length of trial, # of witnesses (expert and ordinary), how long you expect to argue, whether facts can be agreed upon, etc.
- Send to o/s, they sign and return, triggers whether you get trial date
- Completed certificate + others items in practice note #4 will determine whether you get trial date

*Curlett v. Steele*, ABCA 1984 – if o/s won't sign can apply to judge for declaration that thing is ready for trial using certificate in support

**Preparation for Trial Checklist (p. 447)**

**Rules**

- **Old Rule 236 –** when everything completed may enter action by trial by completing certificate of readiness
- **Old Rule 239 -** also need to file a record of pleadings in their current state
- **New Rules 8.4** (non-jury trial) – request to court clerk to schedule trial date
    - Must be in prescribed form
    - Appendix, p. 101
    - Like certificate of readiness, but includes things certificate doesn't include, eg. confirmation you have engaged in DR process, or this has been waived by court
    - Must certify that expert reports have been exchanged (this is new requirement)
    - Require confirmation IMEs have been completed
- Old Rule – certificate of readiness requires parties to indicate time at which they will be ready for trial
    - New Rule – same
- **New Rule 8.5** – request to court to schedule trial date
    - Codifies *Curlett*
- Old, certificate filed, estimates number of days required, then trial co-ordinator gives you date, if you are caught by mandatory pre-trial confierence, trial co-ordinator requires pre-trial conference to have been held

- **New Rule 8.6** – when clerk/court schedules date, notice given to parties by trial co-ordinator
- **New Rule 8.7** – parties must confirm 3 months in advance that they are ready to go to trial
- Old – if you want trial, you can get dates very soon
    - New Rules will work well for trial over 5 days
- Old – if you want date for over 5 days looking at late fall/winter
    - Over 25 – you get on long trial wait list – 1 ½ away from trial date
- **New Rules 8.10 –** procedure at trial
    - Order of presentation
    - Order of calling witnesses
    - Opening statement
- **New Rule 8.20 –** allows Δ to make application for non-suit

**B. Jury Trial (**Old Rules 234; New Rules Part 8, Div. 2) - **civil jury trials are RARE**

- *Jury Act* – discusses jury trials as if it were a right
- Practice Note #2 and New Rule 8.2 – reverses onus, requires applicant for jury trial to demonstrate that it isn't too complicated, lengthy or technical for jury
- Both contemplate application for jury trial
- App made to CJ

***Esmail v. Hanna*, ABQB 1999 –** criteria to get jury trial from CJ: will trial involve scientific or long investigation which cannot conveniently be made by jury?

Jurors get $50/day for first 5 days, then $75/day after that. Fees set out in Schedule to existing rules and new rules.

- Jurors who show up but don't get picked get $15
- 6 jurors, 3 challenges as of right and other ones for cause
- Civil juries don't award large amounts of money – cant put case showing range of damages to jury in AB

**C. Attendance of Witnesses** (Old Rules 292-296; New Rules Part 8, Div. 3)

- **Old Rule 292** – party who desires to call as witness at trial an opposite party may give him at least 5 days notice + conduct money, if opposite party does not attend, judgment may be pronounced against him or postponed
    - never use this rule b/c certain they will show up
- **Old Rule 293** – party who desires to call any person as witness may serve him with notice, but notice not effective unless at the time of service or prior thereto or within reasonably time prior to time at which he is required to attend, he is paid conduct money
    - ordinary witnesses that are non-parties, just reasonable notice and conduct money
- **New Rule 8.8** – give 20 days notice to attend for anyone, incl. party, + allowance determined by Sch. B
- **Old Rule 294** – warrants for those who don't show up
    - **New Rule 8.9** – same
- *Interprovincial Subpoena Act* – applies when witnesses out of province who need to attend
- *Ed Miller* – CL subpoenas/notice to attend can be quashed if it is an irrelevant, oppressive, abusive process. Court has this discretion.

**Chapter 30: Judgment** – result of trial

NOTE: judgment is NOT reasons for judgment. Judge can change mind anytime before the formal judgment is filed. At this point, judge becomes *functus officio* and s/t Rule 339 or 330, next step is CA. Changes only made on app w notice.

**A. Approval** (Old Rules 315-319)

- If Chambers application is final application it may also be judgment
- Judgment out what day, relief, signed by Judge/Master/Clerk
- After trial, judge may issue reasons explaining result and giving result
- Form/process of judgment are same as Orders (covered under Chamber Practice)

- Judgments signed by clerk (old rule 321(2)) after having been approved by other side (assuming other side has attended at trial) (old rule 323)
- Disputes about contents resolved by clerk wrt clerk's notes or by judge who heard case (Old Rule 318(2), (3))
- Judgments may be filed w/i 1 year from pronouncement, or later w leave of court obtained on notice (Old Rule 327)
- Filing and service of judgment starts appeal clock – 20 days from this point
- Interlocutory judgment can be varied per Old Rule 390
- Final orders/judgments cannot be varied, only remedy is to appeal unless it is something like clerical error

### B. Satisfaction of Judgment

- Once terms of judgment have been satisfied in full, file memo
- **Old Rule 333** – memo of satisfaction can (and should) be filed. Prevents subsequent execution in error.
    - **New Rule 9.22** – contemplates application and court order that judgment has been satisfied

### C. Renewal of Judgment

- Judgments good for 10 years, if not satisfied by then, must renew it.
- **Old Rule 331** – could renew before expiry (conflicts w *Limitations Act*)
    - New Rule 9.21 - Tension eliminated – refers to *Limitations Act*, s.11
- Options 1) renew existing, 2) sue on unsatisfied judgment
- If don't renew, enforcement and everything goes by wayside

### Chapter 31: Appeals – for the most part, it will not be on the exam. NO NEW RULES

- **Old Rule 506** – Time: 20 days after judgment has been signed, tendered, served
- **Old Rule 508** – Appeal does not act as stay of execution
- **Old Rule 509 –** Have 10 days to cross-appeal
- $600 to file notice of appeal
- Procedure – contemplates agreement of contents of appeal books
- There are interlocutory chambers dealing with items arising during course of appeal
- Most provide written memorandum in these chambers about what you are fighting about (in all cases)
- If judgment from final matter → 1 set of rules applies
- If appeal from an interlocutory decision → different rules – very short time period
    - Draconian cost consequences