452 Civ Pro CAN

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Civil Litigation System

Myth of the Adversarial System

- Civil litigation is based on the adversarial process in CA, rather than the investigative process
- Party-led litigation where P has burden of proof in their case & Court is removed from proceedings
- Courts take reactive positions in the adversarial process (do what parties ask; don't assist)
- **Party prosecution:** parties organize and pursue their own cases, based on belief that they are in the best position to do so (b/c of access to information) and b/c they are motivated to do so as those most affected by the outcome (Infrequency of case management (contrast w/ the US))
- **Party autonomy**: parties free to choose extent to which they will advance or defend claims
- Adversarial system culminates in a **continuous, oral trial.** Adversarial system **requires** a response.
  - **BUT** trial is actually VERY rare
  - ***Hryniak v Mauldin***: **the myth of trial should no longer govern civil procedure**.
  - ***Windsor*, 2014 ABCA 108**: It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial".
  - ***Hryniak v Mauldin***: Focus on A2J through culture shift in litigation toward **simplifying pre-trial procedures** and moving the emphasis away from the conventional trial in favour of **proportional procedures** tailored to the needs of the particular case.
  - ***Nafie v Badawy***: "Quicker access to justice must not mean accepting less stringent practises which diminish the quality of a judicial process such that fair and proper adjudication is, or is seen to be, compromised"

Process

At any point in the above steps, a claim can resolve, therefore ending the process.

Rules of Court: Purpose

R 1.2 (1) provide a **means by which claims** can be **fairly** and **justly resolved** in or by a court process in a **timely** and **cost-effective** way (Tension – balancing fairness with efficiency)

R 1.2(2) rules intended to be used (a) to **identify the real issues** in dispute, (b) facilitate the **quickest means** of resolving a claim at the **least expense**, (c) encourage the parties to **resolve the claim w/o a court**; (d) oblige the parties to **communicate honestly**, **openly** and in a **timely** way, and (e) to provide an **effective**, **efficient** and **credible system** of remedies and sanctions to **enforce** these rules and orders and judgments.

R 1.2(3)(d) Efficient use of judicial resources

***C(L) v Alberta:* Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues** b/c Rule 1.2 is the lens through which other rules must be interpreted.

- Competing interests in R 1.2 (fair & just result ≠ timely & cost-effective result)
- **Ds CANNOT maintain unreasonable/frivolous defences**/can't deny all allegations & put the P to strict proof standard.
- ROC calls for greater **cooperation between counsel** in moving an action towards **dispute resolution** and then trial if necessary. BUT the new rules DO NOT contemplate that parties must agree to jump over processes to achieve and timely cost effective result.

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ROC: Legal Basis

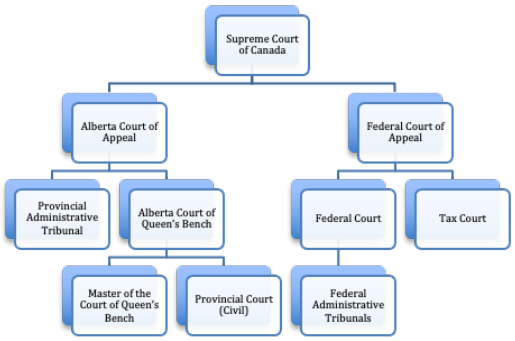
1. **Statute**: *Judicature Act*, RSA 2000, c J02, ss 28.1-28.3, 29 (what rules can be made for what, what the Rules of Court Committee can do, consistency amendments to regulations, ministerial regulations, and special jurisdiction)
2. **Regulation**: *Alta Reg 124/2010*
3. **Inherent Power:** Court has an **Inherent Power to control its own processes** (i.e., if you can't find a rule, you can call on their inherent power to control its own processes)

TIME TO DISPOSITION: Typical time to trial for civil lawsuit in ABKB = >5 years

- ***Jordan*** impacted this b/c it shifted priorities by capping amount of time crim trial can take therefore making crim trials priority #1 → impacted civil trials.
- ***Allen v Alberta***: The reasonable expectation of the bench, the bar, and the public is that **procedural deadlines are imposed to further the administration of justice**, not to thwart it.

SOURCES OF ROC:
"Rules of Court" are only one source of "civil procedure." Other sources include: Notices to the Profession; Practice Notes; Manuals (like the Costs Manual); Court policies; Unwritten rules

Jurisdiction



Jurisdiction relates to:	**Corresponding questions to determine jurisdiction:**
1. The topic or subject matter of a claim (monetary, type of claim)	Is the subject matter of the litigation within the scope of the decision maker's authority? Is the amount of damages or remedy sought within the monetary limits or scope of the decision maker's authority?
2. The territory where the claim is brought	Does the decision maker have territorial jurisdiction or jurisdiction over the person appearing before it?
3. ***Forum conveniens*** (i.e., most convenient forum or venue)	What venue is the most convenient?

Concurrent jurisdiction: two or more court/tribunals have jurisdiction over a claim

Exclusive jurisdiction: only one court/tribunal has jurisdiction over a claim

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	KB: Justices	KB: AJS	PROV CT	FED CT	ADMIN TRIBUNALS	COA	SCC
ENABLING STATUTE	*Judicature Act*, ss 2, 4-9; *CA* S 96 (fed appt)	*Court of King's Bench Act*, ss 8-16 (prov appt)	Statutory Court: Provincial Court Act (PCA) (prov appt) BUT ***Reference re Code of Civil Procedure*** set out the constitutional limits on inferior court powers	Statutory Court: *Federal Courts Act*, s 17-26.	Varies.	Statutory court	Statutory Court: *Supreme Court Act*
JURISDIC	**Plenary** (i.e., complete juris) **Inherent** (i.e., can deal w/ any issue unless taken away by statute)	**Hears:** Interlocutory, procedural matters, Matters by consent (s 9(1)(b)) BUT NOT: Trials, Contempt proceedings, or Apps for injunctions	**Statutory.** **Hears:** Debt, damages, unjust enrichment, title to personal property, specific performance, recision BUT NOT title of land, wills, defamation, malicious prosecution (PCA, s 9.6(2)) or anything against police officers **Threshold amount is $50,000** (PCA, s 9.6)	Statutory. **Hears**: Against the federal crown, intellectual property matters, maritime law, citizenship & immigration, judicial review of federal administrative bodies and intergovernmental disputes (see Judicature Act s 27) Lots of **concurrent juris** w/ superior courts (FCA s 18)	ALL ASPECTS VARY DEPENDING ON THE STATUTE ENABLING, but all tribunals are **statutory, court-like bodies** (can be prov or fed). E.g., Workers' Compensation Board, Workers Compensation Act, s 17, 23 (exclusive jurisdiction) → Right of appeal to Workers Compensation Appeal Commission → further right of appeal to KB, WCA s13.1–13.4 E.g., Residential Tenancy Dispute Resolution Services, Residential Tenancies Act, s 48 (concurrent jurisdiction; can go to the Board, PC, or KB) → Right of appeal to KB (RTDRSR, s 23)	Hears: KB matters w/o leave (R 14.4(1) w/ some exceptions in R14.4(2-5); Refs from the AB Gov't (Judicature Act, s 26) BUT NOT: AJ matters (goes to KB Justice first), appeals of civil matters originating in PC.	Hears: Civil appeals & some crim matters w/ leave (SCA s 40), some appeals "of right" on criminal matters (CC s 691), Refs from Fed Gov't (SCA s 53–54)
FILING FEES			< $7,500 for claim = $100 for App > $7,500 for claim = $200 for App (Provincial Court Fees and Costs Regulation, s 1) **Monetary limit of $50K** (applies to each action, *Parris*) (Provincial Court Civil Div Regs, s 2)	$150/claim (Fed Ct Rules, Tariff "A")		$600 to file appeal (ARC Schedule "B", Division 6)	$75, see Rules of the SCC, Schedule A
PROCESS	ROC Agents NOT permitted	ROC Agents NOT permitted.	Provincial Court Civil Procedure Regulation & PCA Part IV. Agents permitted. Mostly SRLs	*Federal Courts Rules*		ARC R 1.1–Part 14	Rules of the SCC
APPEALS		**KB Justice** (R6.14) via **appeal de novo** (i.e., complete do-over) **NO** direct appeals to COA (R 14.4)	**KB** (PCA, s 46) **NO** appeals to COA (KB appeal = final) → ***Sharma***: AB COA has no jurisdiction to hear appeals from KB when it originated in Prov Ct Civ Div. **Implied right** to appeal **to SCC**	Federal Court of Appeal, FCA, s 27		Varies depending on governing legislation.	since 1949 there is no further appeal.
OTHER	***Rai Trucking***: Cannot order matters down to ABPC w/o consent of parties		Matters can be **transferred up** to ABKB IF it's outside PC jurisdiction (PCA s56) Matters can be **transferred down** from KB on consent of parties.	Federal court has a officer that is akin to an Applications Judge called a "prothonotary"	Generally not subject to ROC.		

ROC Enforcement: By KB Justices, KB AJs, or Court Officers (AKA **Case Management Counsel**: Cannot issue Court Orders or otherwise adjudicate on matters of civil law or civil process but they provide assistance in managing civil cases as requested by the Chief Justice or as provided for in the Rules of Court)

CONTEMPT OF COURT:

<table>
<tr><td colspan="3">Contempt of Court: When you're ordered to do something and you don't do it.

Jurisdiction is statutory in KB (R 10.51-10.53, 10.55) & Prov Ct (PCA, s 9.61)

2 TYPES = civil, criminal</td></tr>
<tr><td colspan="2">CIVIL
(purpose: coerce someone to do something, not punitive)</td><td rowspan="2">CRIMINAL
(purpose: punitive, attempts to deter conduct)</td></tr>
<tr><td>Contempt in facie (i.e., contempt in the court – like you curse or refuse to wear a mask)</td><td>Contempt ex facie (i.e., contempt outside of the court, of the court's order, or directions or processes). Contempt ex facie requires one to bring an application to enforce the order.</td></tr>
</table>

EXAMPLES OF CONDUCT THAT CONSTITUTE CONTEMPT:

- Failure to comply with an order (excludes order to pay money)
- Engages in conduct before the Court that warrants a contempt order
- Failure to attend for questioning or to answer questions person is ordered by Court to answer
- A witness who refuses to be sworn or to answer proper questions
- Does not perform or observe an undertaking given to the Court

Carey v Laiken **– test for civil contempt + contumacious intent**

R: Three elements to establish civil contempt (BARD):

1. **Clarity** → order alleged to have been breached "must state clearly and unequivocally what should and should not be done" → If it's not clear/unequivocal, you won't be able to get a contempt order.
2. **Knowledge of order** → party alleged to have breached the order must have had actual knowledge of it
   a. Wilful blindness is **not** sufficient.
3. **Intention** → all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice

HOWEVER, even if you meet all 3 requirements, the court still has a discretionary power to decide not to hold someone in contempt.

I: To be found in contempt of court, must a party have shown "contumacious" intent when disobeying the order?

H: **Contumacious intent** (i.e., whether they were contemptful) is an aggravating factor to be considered at the penalty phase, not liability phase.

Additional info:

- It could also allow an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding—this would undermine the power of a court order

SENTENCING FOR CONTEMPT: Options: fines, imprisonment, failure to access the court to participate in litigation (striking an action or entering judgment). NOTE – Imprisonment is **not** for owing money, it is for addressing contemptuous intent.

336239 Alberta Ltd. v Mella - sentencing factors

R: Judges have **discretion** in ordering sanctions for contempt, which must be proportionate and reflect the gravity of the offence and the personal culpability of the contemnor

R: factors relevant to the **determination of an appropriate sentence** for civil contempt:

1. **proportionality** of the sentence to the wrongdoing;
2. the presence of **mitigating factors**;
3. the absence of **aggravating factors**;
4. **deterrence** and denunciation;
5. **similarity of sentences in like circumstances**; and
6. **reasonableness** of the fine or incarceration

R: "[t]he decision to find a party in contempt is discretionary, as is the sanction for contempt, and both are reviewable on a standard of reasonableness. A reviewing court may not substitute its own discretion unless the chambers judge failed to give sufficient weight to relevant considerations, proceeded on wrong principles, or there is likely to be a failure of justice

***Envacon Inc v 829693 Alberta Ltd* – due diligence is a defence against contempt, burden of proof, & standard of proof**

R: burden of proof both as to persuasion and the need for evidence is entirely **on the party alleging contempt**, and the standard is proof **BARD**

R: due diligence is a defence against contempt → if you take every reasonable step not to comply with an order but you still fail to comply, you didn't have the MR so you can't be held in contempt (contrast to a situation where you intentionally do the act your not supposed to do).

"**contumacious**" intent: a desire to willfully disobey the court or to interfere with the administration of justice

Contumacious intent is not an essential element of contempt. It is not the intent to disobey the order, it is the disobedience itself.

Serving Contempt Application: *Tornquist v Shenner*, 2022 ABCA 133 - service of contempt need not be in person

R: Rule 10.52 provides that, for allegations of contempt other than those in the face of the court, notice of an application for contempt "must be served on the person in the same manner as a commencement document" → **the finding in this case displaces the long-held understanding that service of contempt should be in person. Can serve in other methods if: agreed in a contract (R 11.3); service on lawyer (11.16) so long as they notify indiv ASAP (R 10.52(2)); leaving copy w/ lawyer of record (R 11.17)**

Limitation Periods

Limitation period: **deadline** for bringing an action if you are going to. If you miss the limitation, you cannot bring the action. Limitation period ends when a party **files** (not when they serve). Limitation periods **must** be pled in SOD (or not pled at all).

PURPOSE: To **provide "repose"** (***Boyd v Cook***) ⇒ **document retention** (what if you had to keep your documents forever instead of just 10 years); **psychological relief** (Learned Hand, litigation neurosis); **insurance costs** may be high if you're potentially under litigation (you always "might" be sued); **saleability of business** → if the answer to "are there any outstanding causes of action?" and the answer is "maybe", it would be really hard to sell; **loss of evidence** – fading memories (trial system based on oral evidence), people die, documents disappearing; **changing standards** – proving industry practices or standard from decades ago may be impossible (could you just wait until something becomes negligent?); **promote diligent pursuit of claims**, **limit causes of action even if they're good** (***Bowes v Edmonton***)

ANALYSIS:

1. Is there a statute that alters the limitation period? If so, use that period & NOT the following steps (***Boyd v Cook***)
2. Is there an exception that changes the limitations period? If so, use that!
    a. Fraudulent concealment, minor Ps, disabled Ps, sex assault/battery, other sexual conduct exceptions, Indg claims for breach of fiduciary duty, Indg apps for declaratory relief, judgment renewal
3. Determine discoverability period.
4. Determine ultimate period.
5. Whichever period ends **first** = effective limitation period
6. Is D shielded from liability? I.e., did the period end BEFORE P filed their claim?

TWO LIMITATION PERIODS (***Limitations Act,* s 3(1)**)

(a) **Discoverability period**

- (i) **STARTS: when** person learns the **important facts** and **seriousness** of the matter (i.e., satisfies the subjective test)
- (ii) **LENGTH**: runs for 2 years
- (iii) **REASONABLE PERSON/modified objective TEST (*Boyd v Cook*): based on when claimant knew or ought to have known a claim arises,** i.e., (1) injury had occurred, (2) injury was attributable to the conduct of the D, **&** (3) injury warrants bringing a proceeding)

(b) **Ultimate period**

- (i) **STARTS**: happening of the event
- (ii) **LENGTH**: ten years from date of the event
- (iii) **OBJECTIVE TEST**: Period runs independent of knowledge of ignorance, based on one of the situations in ***Limitations Act*, s 3(3)**:
    - (a) If series of something → starts when last act/omission occurs
    - (b) If breach of duty → starts when conduct, act, or omission occurs
    - (c) If demand → starts when a default in performance occurs AFTER a demand for performance is made.
    - (d) If proceeding under *Fatal Accidents Act* → starts when conduct that causes the death occurs
    - (e) If contribution/two parties are at fault → starts when claimant for contribution is made a D OR incurs liability through settlement, whichever occurs first.
    - (f) If remedial order for recovery of possession of real prop → starts when claimant is dispossed of the real prop.

Use whichever period expires first to determine whether the D immune from liability.

STATUTE CAN ALTER LIM PERIODS LA 2(4)(b) Limitation period in LA **does not apply** if there is a **specific limitation in another statute**.

- **R 3.15 6 months** to file a **judicial review application (CANNOT be extended** by court)
- ***Employment Standards Code*, s 82(2) 6 months** for filing a **complaint (CAN be extended** in "extenuating circumstances")
- ***Canada Student Financial Assistance Act,* s 16.1 6 year** limitation period for suing on **student loan**
- Various limitation periods in ***Insurance Act*** for various types of Insurance Claims.

*If you see multiple limitations and it's unclear which applies, **assume the stricter one applies**.

LIMITATION PERIODS APPLY TO THE PROVINCIAL (LA S 2(5)) & FEDERAL CROWNS (*CROWN LIABILITY & PROCEEDINGS ACT*, S 32).

Exceptions

LA 4(1) FRAUDULENT CONCEALMENT: **ultimate limitation period suspended** during **any period of time that the defendant fraudulently conceals** the fact that **the injury** for which a remedial order is sought has occurred

LA 5.1(2) MINOR PLAINTIFFS: limitation periods **suspended** while claimant is a **minor**. Starts to run when they turn 18.

- **Minor** = "person under the age of 18" (*Interpretation Act,* s 28(1)(ii))
- **LA 5.1(3–9) EXCEPTION TO MINOR P EXCEPTION:** A **potential D can start a limitation period against the minor IF** the potential defendant**:**
    - Delivers notice to the **public trustee** and the **minor's guardian** → then the limitation period can start to run
    - **CANNOT** start a limitation period against the minor where:
        - The potential defendant **is the minor's guardian** (if there is one)
        - The claim is based on "**conduct of a sexual nature**, including, without limitation, sexual assault"

LA 5(1) DISABLED Ps: limitation periods **suspended** while claimant is a person **under disability.**

- "**Person under disability**" means (*LA* s 1(1)(h))
    - A **represented adult** under the *Adult Guardian and Trusteeship Act*, or if they have a **certificate of incapacity** under the *Public Trustee Act* OR
    - An adult who is **unable to make reasonable judgment in respect of matters relating to the claim**
- **Substance abuse MAY count as a disability** (***Munroe v Levin***)

LA 3.1 SEXUAL ASSAULT/BATTERY: No limitation periods

LA 3.1 OTHER SEXUAL ASSAULT/CONDUCT: No limitation periods IF:

- P= **minor** at the time of the conduct; OR
- P= **dependent** on the assaulter; OR
- P= in an **intimate partner relationship** with the assaulter; OR
- P= had **disability**

LA 13 INIDGENOUS CLAIMS FOR BREACH OF FIDUCIARY DUTY: No limitations period for actions brought on or after March 1, 1999 against Crown for breach of fiduciary duty

***Manitoba Metis Federation v. Canada*, 2013 SCC 1 INIDGENOUS APPS FOR DECLARATORY RELIEF**: **NO LIMITATIONS PERIOD**

LA 11 JUDGMENT LENGTH & RENEWAL Judgments for creditors last for 10 years but can be renewed on App if they haven't been paid.

LA 7 CONSENT TO EXTENSION Parties can agree to extend limitation period (but NOT shorten)

LA 8–9 EXTENSION BY COURT Once limitation period is over, can't be restarted. BUT can be extended if:

1. It's a **debt claim**; AND
2. the D makes **partial payment** on the debt OR signs a **written acknowledgment** of the debt. At this point in time, the limitation period starts over again.

Commencement Documents

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

R 3.2(2) A statement of claim must be used to start an action **unless** **R 3.2(2)** criteria are met (***Dash Distributors***). **In these cases, you can use an Originating Application**:

(a) there is **no substantial factual dispute**,
(b) there is **no person to serve as defendant**, *(no one available to sue)*
(c) a **decision, act or omission of a person or body is to be the subject of judicial review**,
(d) When an act says you can bring an app, originating app, or originating notice
(e) when an Act says you can bring an action, but doesn't state how to bring the action
(f) An Act says you can bring an appeal or a reference but does **NOT provide the procedure to be used**,
   - E.g., Application to force compliance with corporate documents, Business Corporations Act (Alberta) s 248
   - E.g. to discharge a builders Lien (s. 48 BLA)

R 3.2(6) Court can convert from one to the other

Form 10 → most forms start with this form, the "Statement of Claim" (P/D).
Elements: Style of cause; Court; Judicial District; Court File Number (we don't have this when we first file SOC, but the Court will file it & return it to you with the number. Use this number for all future pleadings in the action); Document Type; Address for Service Particulars (necessary facts. I.e., "Statement of facts to be relied upon"); "Remedies sought"

COURT FILE NUMBER *(assigned by court)*

COURT OF KING'S BENCH OF ALBERTA — This is our style of cause & will remain the same throughout all the forms

JUDICIAL CENTRE

PLAINTIFF(S)

DEFENDANT(S)

DOCUMENT **STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT — *Your name/address as lawyer of record*

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

....

Form 7 → Originating Application (Applicant/Respondent)

- You are given a court date here and so there is space to put a date. Tends to be quicker than SOC
- With an originating application, you have to file an Affidavit that is sworn by someone with firsthand knowledge because you are asking for a specific remedy.

Parties

Party: "Anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defence, or appeal from an adverse judgment"; "One by or against whom a lawsuit is brought"

Plaintiff: party who starts an action through SOC (ABKB) or Civil Claim (ABPC). The person suing.

Defendant: party against whom an action is started (again by way of SOC or Civil Claim). The person being sued.

Plaintiff-by-counterclaim/defendant-by-counterclaim: if there's a counterclaim, then the D becomes P by CC and the P becomes D by CC

Third Party: someone who was not initially included as a party in the original lawsuit but is somehow implicated in it and brought in by the Defendant. Also a verb: "to third party"

Applicant/Respondent: the parties (P/D) in actions started by Originating Application or a SOC commenced action when filing on procedural orders. Also refers to status in interlocutory applications.

Appellant/Respondent: for appeals. The fact that the responding party to an application and an appeal are called the same thing in Canada is confusing.

Litigation Representative

Litigation representative (LR/Lit Rep): Someone **appointed** (automatically or by application) to represent in a lawsuit a party who is a minor, dead, or does not have capacity

R 2.15-16 LRs can be **modified** by **Court Order**
R 2.21 Court can **replace, terminate, or place conditions** on LR
R 2.11 Court can **dispense with** the need for an **LR**

LRs **MUST** be appointed in 5 circumstances ***unless*** the court orders otherwise:

1. **Estate:** if no personal rep/executor/administrator → someone has to be appointed by Application
2. **Minors**: all minors need LRs
   - **parent is the automatic LR** (**R 2.13, *FLA* s 21**), but LR does not have to be a parent (***LC v Alberta***)
     - **BUT parent** should **not** act as **LR if potential for conflict b/w** parent & child's **interests**
   - If there is a ***guardian appointed*** *AND they* ***can deal with lawsuit*** → **Guardian becomes LR**. If don't have capacity → different LR appointed.
   - Public Trustee must be given at least **10 days notice of an application re: minor's property in an estate**, ***Minors' Property Act (MPA)*, s 15**)
   - Settlement of minor's claims require court approval, ***MPA***, s 4
3. **Deceased** people: sues & defends by personal rep or LR
   - ***Survival of Actions Act*, s 3** [WHEN D] Causes of action **against** dead people **survive**
   - ***SAA*, ss 2, 5** [WHEN P] Causes of action **by** dead people survive w/ some limitations

        - Only damages for *actual* financial losses are recoverable → no claims for future income (unless in NWT), pain & suffering, trespass or defamation without evidence of actual loss
    - **R 4.34** If they die in the middle of litigation, the death will automatically stay the proceeding, and LR will have to apply to lift the stay
4. People who **lack capacity** ("unsound mind")
    - If the Appointing Order specifies the trustee or guardian is **authorized to pursue/defend** litigation, they are **automatically appointed**, but if not, then someone will have to apply to be LR
    - LR required in two situations:
        - (1) **Represented Adult**: Guardianship &/or trusteeship order in place, but does not give power to pursue/defend litigation to anyone → need to apply to be LR
        - (2) Person **lacking capacity**: no trustee appointed
            - **Capacity: ability to understand** the **information relevant** to the decision and to **appreciate the reasonably foreseeable consequences** of (i) a **decision**, and (ii) a **failure to make a decision**" (***Adult Guardian and Trusteeship Act***)
            - Likely need a doctor to say that someone lacks capacity
5. **Missing person**

AUTO APPOINTMENT OF LR WHEN R 2.12:

1. someone has a power of attorney that appoints someone to settle claims on their behalf
2. when there is someone appointed under *AGTA* w/ power to settle claims on behalf of the adult
3. or an executor of an estate
4. Or you are a child (*FLA* s21(6)(j) – parent is presumed LR)

SELF APPOINTMENT OF LR BY APPLICATION WHEN (*LC v Alberta*) following **R 2.14** requirements (***RBC v Godbout***), i.e., **file affidavit** (Form 1) **containing** the following information:

1. interested person's **agreement in writing** to be the LR
2. **reason** for the self-appointment
3. **relationship** between the LR and the individual/estate/corporation
4. Statement that **LR has no interest in the action adverse in interest to the represented party**
5. Statement about being *in* Alberta:
    a. If LR is a person: **Statement that LR resides in Alberta**
    b. If LR is a corporation: its **business/activity** of the corporation is **in Alberta**
6. **Acknowledgement of the potential liability for costs** to be paid by the LR
7. ***If LR of an estate*** → LR must **serve notice** on the **beneficiaries**

LR DUTIES

1. **Instruct counsel**: LRs **MUST** hire a lawyer (**unless** the litigation representative is a lawyer themselves – ***Champagne v Sidorsky***; however, there was a recent rule change that leaves it unclear whether LRs actually have to hire counsel)
    - **General rule, hire counsel if you are appointed as an LR** – while Court can exercise discretion under R 2.23 to allow agent to talk for a party so long as it doesn't encroach on providing representation under the *Legal Profession Act*, it's still dicey.
2. **Pay costs** if they are unsuccessful (**R 10.47**)
3. If the matter **discontinues, is abandoned, or settles**, the LR will require **Court approval** (**R 2.19**)

ESTATES AND TRUSTS MAY BE BROUGHT BY PR OF TRUSTEE, R 2.1 Action may be brought by or against a personal representative or trustee without naming any of persons beneficially interested in the Estate or Trust.

Suing Business Entities

Do a **corporate registry search** to determine if it is:

1. **Corporation**:
    a. Who is liable? *(ENSURE named CORRECTLY)*
    b. Is the business current or dissolved?
        i. If it's been dissolved, you can sue within 2 years of its dissolution (***Business Corporations Act*, s 227**)
        ii. You can revive a dissolved corporation for 10 years after dissolution (***BCA***)
    c. If an extra-provincial corporation wants to sue in Alberta, it has to **register in AB** (***BCA***)
2. **Partnership**: can sue personally (in partners' name) or business name (**R 2.3-2.4**)
    a. Provide notice if suing partner in personal capacity
3. **Sole proprietorship**: can sue personally (in proprietor's name) *or* in business name (**R 2.5**)
4. "**Carrying on business as**" (also for trade names; e.g., "1234 Inc carrying on business as Lacy's Cleaning Service")

If acting for a partnership or sole proprietorship in **bringing an action, make sure that any **declarations required** under the ***Partnership Act,* s 113 have been filed** or **action may be stayed**.

Suing The Crown

Crown: executive level/branch of government

Crown is **vicariously liable** for the torts of its employees in the course of their employment

- *Anglin v Resler:* **Legislature is Independent of Crown** Control, so ask ***is this an act of the Crown or of the Legislature?***
    - Action was brought against the Crown due to actions of Chief Electoral Officer.
    - Legislature is **not** the Crown → Legislature is independent of Crown control
    - Chief Electoral Officer is an employee of the legislature therefore not the Crown.

Prov Crown: "His Majesty the King in Right of Alberta" (***Proceedings Against the Crown Act*, s 12**)
Fed Crown: "Attorney General of Canada" (***Crown Liability and Proceedings Act*, s 23**)

Crown Immunity = Default

- ***Interpretation Act, s 14*** Crown only bound if the Act says so
    - Subject to the same procedural rules as other litigants, including costs (***PACA*, ss 8, 9, 16; *CLPA*, ss 27–28**)
    - SO Crown immunity = default UNLESS statute says otherwise
- **Cannot enforce discovery against the Crown where the Crown is not a party** (***Canada v Thouin***)
- If contesting constitutionality of Crown legislation → provide 14-days' notice (***Judicature Act*, s 24**)
- Can**NOT** undertake enforcement proceedings against the Crown (*PACA* s 25; *CPLA* s 29)

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Interveners

R 2.10 On application, a Court can grant intervenor status in an action *(interveners can be subject to terms, conditions, rights, and privileges specified by the court).* This is **uncommon**: interveners are not common unless Gov't of Canada is a party. Also not common at trial level, but usually at appellate. Uncommon b/c an intervenor tends to delay proceedings which is seen as a prejudice to the parties.

CROWN'S STATUTORY RIGHT OF INTERVENTION: Crown can be intervener w/o app in 2 situations

1. **Judicial review**, as per **R 3.17**
2. **Constitutionality of legislation**, as per ***Judicature Act* s 24** & ***Administrative Procedures and Jurisdiction Act,* s 14**.

TEST FOR INTERVENER APPS (***UofA v Alberta***)

1. Determine the **subject matter** of the proceedings
2. Determine the **proposed intervenor's interest** in the subject matter
    - **Factors** (***Auer v Auer,*** 2018 ABQB 510):
        1. Is the intervenor **specifically affected by the decision** facing the Court *OR* do they bring some **special expertise or insight to issue** before the Court?
        2. Will the intervenor **represent an interest** in the proceedings that **would not otherwise be fully argued or protected** by existing parties?
        3. Intervener **cannot add issues or evidence** to **prejudice** of **existing parties** (take the case as they find it).

Class Actions

LEGISLATION: *Class Proceedings Act,* SA 2003, c C-16.5

GOALS of Class Actions

1. **Judicial Economy**
    - The monetary amount for individuals is not significant enough for an individual to bring a claim → so combining them into one can allow for some $ for people.
2. **Access to Justice**
3. **Behaviour Modification**

PROCESS

1. Issue **SOC** by representative P (one P or a small group of Ps)
2. Have matter **certified** as a class action
3. Once certification achieved, next step is to **prepare for trial**, *but most matters* ***settle***
4. **Court** must **approve** any **settlement** at a "settlement conference"

Representation Before the Court

ONLY Barristers & Solicitors can appear before court OR ppl who fall under the **exceptions** in ***Legal Professions Act,* s 106**, including:

- **SRLs** (**R 2.22**) → note that until recently corporations couldn't self-represent b/c corporations are persons themselves in KB (but in PC, corporate officials could represent their corporations)
- **Persons providing assistance to a party** (including to provide "quiet suggestions", take notes, provide support, or address the particular needs of the party) so long as the court ensures that

proportionality is protected. Here, ppl may be able to argue someone other than a lawyer can assist (like the head of a corporation) (**R 2.23**)
- **SLS**
- **Students-At-Law**
- **Foreign** lawyers with **authorization** to practice
- **Agents** in ABPC (not KB)

People who CANNOT appear before a Court (i.e., people **NOT** exempt from ***LPA*, s 106**)
- Representative plaintiffs (**cannot represent an entire class in a class action** → you can't self rep b/c you are representing a number of people)
- People acting for free

"Granting Audience"
- The Court can grant audience **to an agent** as part of its inherent jurisdiction to control own process.
- **To grant audience to an agent, Court will consider *Champagne v Sidorsky*** at paras 38-40:
  - ➢ ***Family*** relationship between agent & party
  - ➢ Is the agent ***charging*** for services? (charging → not allowing)
  - ➢ Is the party subject to ***economic hardship***, such that they cannot retain counsel?
  - ➢ Would refusing audience to agent deny the party the benefit of **any** representation?
  - ➢ BUT **"Where audience is granted, it must be for something LESS than the full gamut of a barrister and solicitor**."

Corporations can be represented by an agent (*PCA*, s 62)
- In ABPC: often self-rep through a director or officer
- In ABQB: the **Court has discretion** to **grant a non-lawyer representative** from corporations, but **presumptively corporations need lawyers** (**R 2.23(4)**, ***Vuong Van Tai v Alberta***)

Vexatious Litigants

Vexatious litigants: ppl identified by Court who abuse courts with meritless lawsuits, are often self-represented, & often have mental health issues. See OPCA Litigants below for additional details.

"**OPCA Litigants**" (i.e., Organized Pseudo-Legal Commercial Arguments): often use the following lines of argument: Distinction between straw person & real person (Trademark oneself, unusual spelling of name); Claim of right/ laws don't apply – often reference the Magna Carta; Distinction between lawful vs. legal; Admiralty court; Magna Carta; Freemen of the Land (think they can squat on land that is unoccupied); QAnon. Also referred to as **litigation terrorists**

Vexatious litigant order: (Judicature Act) prevents litigant from commencing or continuing proceedings without permission of court (this impacts access to justice)

Johnsson v Lymer [authority to impose VLOs]: Court can prohibit an individual from seeking relief from the court if the indiv is determined to be vexatious (see also ***Judicature Act*, s 23.1; *FLA*, s 91**)

Jonsson v Lymer [Determining Restrictions in Vexatious Litigant Order]: Any restrictions imposed in a vexatious litigant order must be focused on a **particular litigant, be proportional to the problematic conduct revealed by the record, and they should be incremental and adapted to the specific problem**, **be no wider than is necessary, & and must not routinely limit access to court** facilities or restrain resort to fee waivers UNLESS warranted by the facts of the particular case.

Vexatious Litigant Indicia (***Judicature Act,* s 23**): **repeatedly re-litigating** the same issues; **repeatedly** bringing claims with **no hope of success**; **multiple** instances of **not paying costs**; **repeatedly** and unsuccessfully **appealing** court order; **repeatedly** engaging in **inappropriate behaviour** in the courtroom.

Pleadings: General Rules

PURPOSES: defining the issues b/w parties & **set scope of litigation**; puts the **other party on notice**; to **build a narrative** (lay out the alleged facts in preparation for story in briefs and other docs). Ensure litigation is conducted fairly, openly, without surprise, narrow issues, guide discovery, streamline litigation (***Alberta v Altria Group Inc***); Sets out the necessary facts (NOT evidence) to show there is jurisdiction & base a claim.

GENERAL RULE: PLEAD FACTS, NOT EVIDENCE

FACTS	EVIDENCE
On January 19, 2020 Christine had a coffee at 10:43AM	On January 19, 2020, a video camera in HUB mall captured Christine having a coffee at 10:43AM On January 19, 2020, John Doe, a law student, saw Christine having a coffee at 10:43AM On January 19, 2020, the receipt provided by Java Jive indicates that Christine had a coffee at 10:43AM

GENERAL RULE: You can ONLY make arguments in the pleadings. **If you don't amend the pleading before you make the argument, you cannot make the argument (*Paniccia Estate v Toal*).**
REMEMBER THIS RULE IMPACTS ALL PARTS OF PLEADINGS (SOD, SOC, RELIEF, ETC)

TYPES: Includes SOCs, Statements of defence, counterclaims, reply, third-party claims

SERVICE OUTSIDE AB: If serving outside AB, explain why.

TECHNICAL RULES ON PARTICULARS, R 13.6–13.8:

1. **R 13.6(1)** Must be succinct & divided into numbered paragraphs (Prof recommends chronological organization)
2. **R 13.6(3)** Must **specifically plead** the following to avoid taking the other party by surprise: breach of trust; duress; estoppel; fraud; illegality or invalidity of contract; malice or ill will; misrep; payment; performance; release; undue influence; voluntary assumption of risk; waiver; wilful default; tender of payment; **a limitation defence; provision of an enactment** (here, plead *what* the legislation is).
3. **R 13.7** the following claims must also include particulars (i.e., say how it occurred): breach of trust; fraud; misrep; wilful default; undue influence; defamation.
    a. **Tort of fraud**: P must provide particulars speaking to: (1) a false representation made by D, (2) some level of knowledge of the falsehood of the representation made by D (knowledge, recklessness), (3) the false representation caused P to act, and (4) P's actions resulted in loss
4. **R 13.8** Pleadings can include **alternate claims & defenses**.

5. ***Altria***: Particulars may be provided in stages for complex matters.
6. Pratt tip: "including but not limited to…" is usually sufficient in particulars.

REQUESTS FOR PARTICULARS:

1. **R 3.61** If P's pleadings don't have sufficient particulars & D therefore can't draft an SOD, D can serve a demand on P for particulars under this rule.
    a. R 3.62 P has 10 days to comply, after which the court will order particulars.
    b. R 3.64 Request for particulars doesn't stop the clock to file an SOD, but if a Court orders particulars they can include a stopping of the clock.
    c. Code of Conduct, R 7.2-1: can ask OC for an undertaking they won't note you in default pending receipt of particulars
2. If you can't bring SOD/Application in time, bring a blanket SOD & then file to amend.

TEST FOR ORDERING PARTICULARS: Are the sufficient facts present to formulate a defence (***Re Indian Residential Schools***). Note telling a D that they "know what they did wrong" is not an appropriate response for a request for particulars (***Bazinet***). **Ultimate balance of particulars**: D's right to know the case against is weighted against P's ability to move litigation forward

Remedies

1. **Damages:** NOTE – you must put in a number you request in damages (this is important because costs are based off the damages sought)
2. **Interest and the basis for the interest**
3. **Costs** per R 13.2

GENERAL RULE: **you can plead in the alternative.** E.g., $100 in costs *OR such other remedies as this court may deem reasonable*.

Damages

Guiding question: Does the calculation of damages require an **assessment of what's reasonable?**	
If no assessment required:	**If assessment is required:**
Liquidated damages: easily calculated or fixed by a scale everyone agrees on. Judge not required to set value.	**Unliquidated damages**: require judicial opinion to determine reasonable amount of damages (e.g., damages for causing permanent impairment to P's hand; damages for wrongful dismissal for pay in lieu of notice). Common in default.
Pecuniary damages: actual past losses & out of pocket expenses. calculable losses for items such as P's loss of earnings and profits and costs of future care. Common in insurance. (e.g., accident happened, CL had to pay for physio, provides receipts)	**Non-pecuniary damages**: general damages + future losses; cannot be arithmetically calculated because they compensate P for intangible losses arising from psychological pain & suffering (e.g., haven't actually lost $ but don't think CL will be able to work the same in the future)

Special damages: a form of pecuniary damages that are generally incurred pre-trial; covers out-of-pocket expenses. Common when drafting a statement of claim	**General damages**: form of non-pecuniary damages. Tend to have a narrower scope than non-pecuniary in that they are normally just for pain & suffering

Blanket Clauses – exception to general rule about contents of pleadings

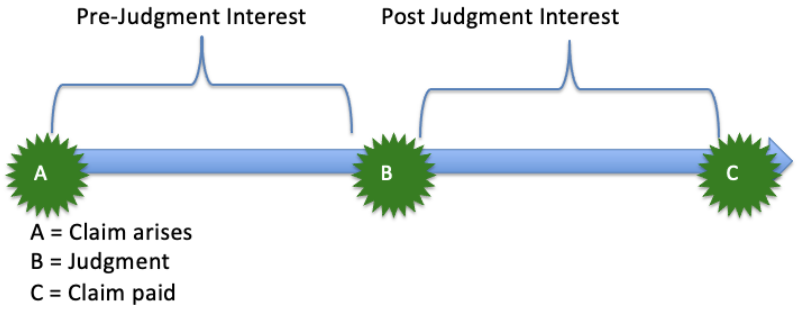
Exception to rule that arguments MUST be in the pleadings. **You may get a judge who will push your relief into a vague category, but your best bet is to try to put everything in the SOC but if you realize at some point you need something else, apply to amend it.**

Saadati v Morrhead*:* if the courts can squeeze it in to vague pleadings, and if the party doesn't object, then court may allow it to be argued – expert report – presumably notice – time to raise objection if you truly believe it is a new issue that hasn't been the subject of discovery etc. is when first raised

Tsilhqotìn Nation v BC: minor deficiencies may be overlooked in absence of clear prejudice – don't rely on it.

Lax Kw'alaams Indian Band v Canada: judge is not to go through and recharacterize the claim based upon his own review and still must be decided on the basis of the pleadings – adversarial vs. Inquisitorial approach

Interest



Damages claimed & applicable interest:

		PRE-JUDGMENT INTEREST	POST-JUDGMENT INTEREST
General principles		*must be pled (*St. Isidore Co-Op*) *interest rate: *JIA* rate in absence of another mechanism (e.g., statute, contract). BUT **Court can depart from these rules & vary rate of interest** (***JIA*, s 2(3)**) as long as they have a strong reason (e.g., intentional or egregious delay; ***Aetna Insurance Co***)	*does **not** need to be pled *interest rate: **MUST be *JIA* rate**
PECU	**Pre-judgment pecuniary damages/debt**	Rate in applicable statute or contract (LIMIT can't violate CC s 347 → criminal interest rates >60% per annum only permissible for payday lenders) OR	*JIR* rate (***JIA*, s 6(2)**)

N I A R Y		Rate in *Judgment Interest Regulation [JIR]* (*Judgment Interest Act* ***[JIA]*****, s 4(2))**	
	Post-judgment pecuniary damages (i.e., future losses)	**No** pre-judgment interest payable, ***JIA* s 2(2)(a)**	*JIR* rate (***JIA,* s 6(2)**)
N O N P E C U N	**Non-pecuniary damages (type of general)**	4% per annum (**JIA s 4(2)**) **Motor Vehicle Accidents**: Rate in *JIR* after December 9, 2020 (i.e., you don't get the 4% per annum) (***Jackson v Cooper***, 2022 ABKB 609) → Before December 9, 2020: apply 4% per annum (***JIA*****, s 4(1)**). After December 9, 2020: apply *JIR* rate	*JIR* rate (***JIA,* s 6(2)**)

Venue

JUDICIAL CENTRES: Calgary, Drumheller, Edmonton, Ft. McMurray, Grande Prairie, Lethbridge, Medicine Hat, Peace River, Red Deer, St. Paul, Wetaskiwin

ABKB VENUE RULE: File in the closest judicial centre by road to a residence/place of business of both parties (R 3.3)

If rule is not determinative, use the closest judicial centre to either party (usually P) *OR* as otherwise agreed to by the parties

If P fails to comply with R 3.3, **D can bring application to change the venue**, where onus is on P to show that their choice was reasonable (**A2J**: D has to appear in person (pre-COVID) in the district that is inconvenient for them to make the Application)

FACTORS FOR TRANSFER APP (***Odland v Odland***):

1. **number of parties or witnesses** in current vs proposed judicial centre
2. **nature of the issues** in the lawsuit
3. **relationship between the parties in respect of the issues** in the lawsuit (whether relevant interactions between the parties relating to the issues took place)
4. parties' **financial resources**
5. **stage of proceedings**
6. **convenience of location for pre-trial motions**, and
7. **location** of the **relevant assets**
   - NOTE: Lawyers only get their say on the venue by consent

TRANSFERS OF LAND RELATED CLAIMS (**R 3.4**) If proceedings start at a judicial centre that is not closest to the land in question *OR* the residence of the D → D files & serves Form 6 on P. P has 10 days to object. If P doesn't object → matter transferred VS if P objects → court hearing

ABPB VENUE RULE: D's location is the deciding factor for venue

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Joinder of Parties

After we decide who the parties are, we ask → Do we have the right parties? Is this the proper action? As a general rule, it's preferable to avoid multiple proceedings on the same issue

Joinder R 3.69–3.70

Joinder: Joining actions where parties bring **multiple actions about the same thing** (different parties against the same D on the same issue or one person against same D on same issue). 3 types:

1. P joins 2 **claims** (**R 3.69**). I.e., two claims, same defendant, one action
2. P joins 2 **Ds** (**R 3.70**). i.e., one action/issue/event, two defendants
3. **2 Ps** join claims against **1+ Ds** (**R 3.70**). I.e.,, two plaintiffs, one action/issue/event → 2 Ps making the same claim against 1+ defendants

Purpose is rooted in statute: **Use court resources wisely** (R 1.2(3)) → "the parties must, jointly and individually during an action… when using publicly funded Court resources, use them effectively"; **Unfair to parties to incur expense of multiple proceedings** (R 1.2(2)(b)) → "… these rules are intended to be used… (b) to facilitate the quickest means of resolving a claim at the least expense"; **Avoiding conflicting judgements**: R 1.2(2)(e) → "…these rules are intended to be used… (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments."

Separation/Severance & Consolidation, R 3.71–3.72

Courts can **separate** or **consolidate** multiple **claims or actions** brought **by/against multiple parties** (e.g., if the claims have nothing to do with each other)

	Separation/Severance R 3.71	**Consolidation R 3.72**
Frequency + efficiency	Less common b/c it usually **decreases efficiency** (***Egg Lake***), but typically occurs in 2 situations: 1. Party has agreed to liability & only needs damages adjudicated; OR 2. Party has agreed to damages & only needs liability adjudicated (*Note – this isn't technically splitting since second half has been resolved by settlement)*	More common b/c it **increases efficiency.** ***Auto Canada:*** Consolidation of claims creates real efficiencies and avoids duplicity of proceedings. ***Auto Canada***: Court has power to consolidate under R 1.3-1.4 through its inherent jurisdiction to control its own process. Court can rely on the facts in the pleadings alone to determine whether there are common issues of fact or law and therefore consolidate claims, i.e., Application not necessary for consolidation
When the R is used	**R 3.71(1)** If joinder of 2+ or 2+ parties takes place, Court can order separation IF the joinder may (a) unduly **complicate** or **delay** the action, or (b) cause undue **prejudice** to a party.	**R 3.71(2)** Court can order consolidation IF 2+ actions: (a) Have a common question of law or fact, or (b) Arise out of the same transaction or occurrence or series of transactions or occurrences

How the R is used	**R 3.71(2)** Possible actions under separation: (a) order separate trials, hearings, applications or other proceedings; (b) order 1 or more of the claims to be asserted in another action; (c) order a party to be compensated by a costs award for having to attend part of a trial, hearing, application or proceeding in which the party has no interest; (d) excuse a party from having to attend all or part of a trial, hearing, application or proceeding in which the party has no interest.	**R 3.72(1)** Possible orders under consol: (a) **True consolidation** (consolidate 2 or more claims & a new action number and style of cause are created. Courts don't usually do this unless it's very early, normally they'll order b or c instead) (b) 2+ claims be tried at the same time or one after the other; (they don't actually become 1 but you get shared oral testimony & document discovery) (c) 1+ claims be stayed until another claim is determined (d) a claim be asserted as a counterclaim in another action.
Factors when considering whether to split or consolidate a claim	**Factors to split or consolidate a claim** (***Egg Lake Farms, citing Mikisew***): 1. Whether there are **common claims, disputes and relationships between** the **parties** 2. Whether **consolidation will save time** and **resources** pre-trial 3. Whether **time** at **trial** will be **reduced** *(efficiency)* 4. Whether **one party** will be **seriously prejudiced** by having **two trials together** *(prejudice)* 5. Whether **one action** is at a **more advanced stage** than the other 6. Whether consolidation will **delay the trial of one action** which will cause serious prejudice to one party *(if one is finished questioning & the other is still at the pleading stage, the court will not order them to be consolidated)*	

Limits on Joinder

Limit 1: Cause of Action Estoppel

Cannot bring another claim for the same set of facts

Action estoppel: Court will **prevent** **"fragmentation of litigation** by **prohibiting** the **litigation of matters** that were **never actually addressed** in the previous litigation **but** which **properly belonged** to [the previous litigation]**"** (*864503 Alberta Inc v Genco Place Properties*) → basically, if P doesn't raise a claim that they could or should have raised during an action, they won't be allowed to bring it forward later.

- If P was successful plaintiff in their first action, then this second claim "merges" with judgment
- If P was unsuccessful in their first action, this second/new claim is barred by judgment for D

Cause of Action Estoppel TEST:

1. New claim raises "cause of action" **previously determined**
    - **Cause of action**: "a group of operative facts giving rise to one or more bases for suing, or the factual situation that entitles one person to obtain a remedy from another person… cause of action estoppel operates to prevent a party from attempting to re-litigate a case by advancing a new legal theory in support of a claim based on essentially the same facts of combination of

facts" (***Britannia Airways Ltd. v Royal Bank of Canada***). Same set of facts = same cause of action.

2. **Prior** judicial **decision was final**
3. **Prior** judicial **decision included** the **same parties (principle of mutuality)** (if the parties are different and the facts are the same, there is no cause of action estoppel because the party did not have the opportunity to argue it)
4. "The cause of action and the subsequent action **was argued or could have been argued in the prior action** if the parties had exercised reasonable diligence." (***Cahoon*** → P could've argued for personal injury in his first action in addition to prop damage since it had resulted from the MVA; i.e., **same set of facts**)
5. **BUT Court retains discretion** as to **whether to** allow the claim to **proceed** or not (***Booth v Christensen***)

Limit 2: Issue Estoppel

Issue estoppel: Court will **not** allow parties to **relitigate issues that have been finally decided in prior proceedings between the same parties** or those who stand in their place

Issue Estoppel TEST *(**Calgary Airport**)*:

1. **Same issue** has been **decided**
2. Prior judicial decision was **final** (or **not appealed**)
3. Prior judicial decision **included the same parties** (**principle of mutuality**)
   - ➢ In ***Calgary Airport***, there were different parties so the issues determined are not res judicata/issue estoppel
4. **BUT AGAIN court maintains residual discretion** not to apply estoppel

Issue Estoppel TEST IN ADMIN TRIBUNAL DECISIONS

1. **Same issue** has been **decided** *(**Calgary Airport**)*
2. Prior judicial decision was **final** (or **not appealed**) *(**Calgary Airport**)*
3. Prior judicial decision **included the same parties** (**principle of mutuality**) *(**Calgary Airport**)*
   - ➢ In ***Calgary Airport***, there were different parties so the issues determined are not res judicata/issue estoppel
4. **Court maintains residual discretion** not to apply estoppel, but **SHOULD** consider *(**Penner v Niagara**)*:
   - i. **the fairness of the initial process, and** *(compare the role of P&D in the initial process and the fairness therein)*
   - ii. **the unfairness of relying on the initial process as determinative** *(is it fair to extrapolate the results of the admin tribunal to this new process?)*

Rationale for test specific to admin tribunals: in an admin tribunal, Penner doesn't have much power – he brings the complaint, but all the adjudication is done by the tribunal. It would be unfair to the police chief to make a decision in an action that is essentially against the police chief. So, when the issue is an initial decision from an administrative tribunal, the Court needs to consider fairness of initial process & unfairness of relying on the initial process as determinative → basically, compare the role of the P & D in the initial process and determine whether it would be fair to extrapolate the results to a new process.

Prior Criminal Convictions & Issue Estoppel: Arises where there is a **civil claim** (e.g., battery) **AFTER a criminal conviction** (e.g., assault, s 266 *CC*). As per the ***Alberta Evidence Act (AEA)*, s 26(2)**, proof of the conviction is admissible as evidence that the person committed the evidence, but it's not determinative (i.e., conviction ≠ absolute evidence), so it **can be tried in civil court/no issue estoppel**.

- **EXCEPTION – DEFAMATION CLAIM**: In a defamation claim, the **conviction** of the plaintiff for the **offence** described in the allegedly defamatory act **will provide conclusive proof that the person committed the offence** (***AEA,* s 26(4)**), **but the weight given to the conviction shall be determined by the judge/jury** (***AEA,* s 26(6)**).

Prohibited Causes of Action

Abuse of Process

Court has **inherent jurisdiction** to **protect its processes from being misused** in a way that would bring the administration of justice into disrepute
Abuse of Process TEST (*R v Scott*):

1. the proceedings are **oppressive** or **vexatious**, ***AND***
2. they **violate the fundamental principles of justice** underlying the community's sense of fair place and decency

- **BUT, abuse of process doctrine is flexible**
  - Not really a step, but a consideration when going through the steps.
  - e.g, ***Bomac Construction v Stevenson***:
    - Two passengers injured in a plane crash.
    - Passenger 1 sues pilot & plane company in **negligence** →wins
    - Passenger 2 sues pilot & plane company in negligence
    - No mutuality, so no estoppel.
    - Court says it would be an **abuse of process** for D to deny negligence when they've already been found negligent.

Collateral Attack

Principle: "It has long been a fundamental rule that **a court order,** made by a court having jurisdiction to make it, **stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed**." and "may **not be attacked collaterally**" (***Wilson v the Queen****,* [1983] 2 SCR 594)

Collateral attack "may be described as **an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment**" (***Wilson***)

Alberta v Cox*:* indiv denied a permit by minister & brings a claim against minister for negligent misrep. Court says claim for negligent misrep is a collateral attack because the proper avenue is to apply for judicial review of initial decision.

Service

Service: **Notice**, by way of getting the recipient a document to alert them as to what is happening. "The only point of service is that the **D must get notice of the claim against it**. Service is not some sort of magical or formalistic ritual that has to be followed" (***Concrete Equities Inc.***). What matters is that the document was obtained by the correct party – it doesn't matter how it got there or who gave it (***Gasland Oil Inc***)

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Serving Commencement Documents in AB

Service of commencement documents **establishes the Court's jurisdiction** over the matter (***Butkovsky v Donahue***), and puts the **defendant on notice** about the claim.

General rule: commencement documents **must be served personally**

- Commencement documents are: SOCs (must be served within 1 year of being filed, **R 3.26**, originating notice (of an application or a judicial review), counterclaim, third-party claim, amended versions of any of the documents previously mentioned in this list.
- Commencement documents are NOT: notice of appeal (b/c that is a continuation of a prior claim, ***Harder v Hayter***)
- **Electronic service** is generally **NOT permitted** for commencement documents (but electronic service can be used for **interlocutory** docs in certain circumstances since they aren't final and therefore come sometime between the commencement and the end).
    - **UNLESS the individual is a self-represented litigant** (R 11.18) → but here the D must respond to the email or provide written confirmation.

Personal Service on **Individuals,** R 11.5

1. Leave with individual, **service effected on date left with individual** (R 11.5); OR
2. **Send by recorded mail** to individual, **service effected on date acknowledgment signed** "by the individual to whom it is addressed" (R 11.5) – use a process server
    - "**recorded mail**" defined in Appendix to ARC: "means a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing as specified in Part 11"

How to find an indiv: skip tracer; search personal property registry; search certificate of title at Land Titles Office (Court Order required); request a credit report (can only do so in situations in which credit report will be disclosed, *Consumer Protection Act*, s 44); search at motor vehicle registry (only certain situations, like "to a person for use in or for the purposes of, a proceeding before a court or quasi-judicial body", *Access to Motor Vehicle Information Regulation*); Search social media OR hire an e-investigator to do it for you; ask client to talk to people who know the other party

Personal Service on **Corporations**, R11.9, 11.4(1), *BCA* s 256

2 Options:

(1) Leave documents with:

1. **Officer** of a corporation with **management** or **control responsibilities** (*ARC*)
2. **Person with management** or **control responsibilities** at: (R 11.9)
    a. the **principal place of business** in AB, or
    b. the **place of business in AB where the action arose**
3. At the **registered office** (do a Corporate Registry Search) (*Business Corporations Act, i.e., BCA)*

(2) Send by recorded/registered mail to:

1. The **principal place of business** in Alberta (R 11.9(2)(b))
2. **Registered office** (*BCA* s 256(3))** *this is ideal because of when service is affected under the BCA*
3. **PO Box** designated as address for service (e.g., in corporate registry) (*BCA*)

When Service by Mail is Effected: *BCA* vs *ARC*

***ARC*, R11.9(2)(b)**	***BCA*, s256(3)**
Service by recorded mail **effected "on date acknowledgement of receipt signed"**	Service by registered mail effected "**at the time it would be delivered in the ordinary course of mail UNLESS** there are **reasonable grounds** for believing that the corporation did **not receive the notice or document at that time or at all.**" Ordinary course = 7 days after it was ordered.

***Note** – Often personal service on a director/officer is required or an order for substitutional service. **Don't do mail if the company is in dire straits**.*

Personal Service on **Other Entities**

If…	**… then**
The issue is a ***contractual dispute*** and the contract *specifies a method* of service…	You can use that method (R 11.3)
An ***address for service*** has been provided on a ***document that's already been filed***…	You can serve at that address instead of personally (e.g., if SOC already filed and wanting to file a counterclaim, use P's address for service)
The party ***has counsel AND*** **note → general rule is you can't just serve a lawyer **unless** (1) lawyer has written they will accept or (2) they are lawyer of record*	(1) The **lawyer** can accept service on behalf of the party, but that must be in writing (can be email) (R 11.16) (2) You can serve on the **lawyer of record** (R 11.17, R2.24–2.32) - **Lawyer of record**: anyone who puts their name on the address for service on the SOC - Parties can serve that lawyer **UNTIL** the lawyer **files & serves a notice of change of representation** (Form 3) **OR a notice of withdrawal** of lawyer of record (Form 4) (must provide the last known address of the client and file affidavit saying client has been served)
Party is ***represented by a Trustee***/Personal Representative…	Serve the **trustee/personal representative** (R 11.6) (i.e., don't serve the subject) in person or by recorded mail
Party is represented by a ***litigation representative***…	Serve the **LR** in person or by recorded mail (R 11.7, 2.12)
Party is a ***missing person***…	Serve the **public trustee** at their office or recorded mail (R 11.8)
Party is a ***Partnership*** (under the *Partnership Act*)...	Serve **one of the partners** or **someone with management responsibilities**, or **via recorded mail** to the partnership's place of business in Alberta (R 11.10, 11.11)

Party is a ***sole proprietor***…	Serve the **sole proprietor** or serve a **person with management responsibilities** of the business at the place they conduct business, or **by recorded mail** to the principal place of business (R 11.12)
Party is a ***statutory entity*** (e.g., town, city, WCB)…	See the **statute** to tell you how to serve (R 11.14) (e.g., *Municipal Government Act*, s 607)
Party is the ***Crown…***	See ***PACA*** s 13, ***CLPA*** s 23(2). Note: for **Provincial Crown**, can **serve any lawyer** employed by the **Justice and Solicitor General**
Party is ***absent***…	Serve **business representatives** of absent parties (R 11.19)

NOTE – special rules apply to Family Law Applications (see R 12.55–12.58) *(e.g,. Proof of service of SOC for divorce requires a picture of the individual served).*

Service of Non-Commencement Documents

Non-commencement/other documents include: pleadings subsequent to the SOC; interlocutory applications; resulting orders; SOD; reply; Affidavits; etc. NOTE – third party claims & counterclaims are "commencement documents", not other documents.

Can use **methods for commencement documents** OR **other methods**, including:

R 11.21 **Electronic methods** (email, fax) **AS LONG AS**

- Service is effected when the sender **receives confirmation of transmission** (read receipts) or **any reply to the email** (which also counts as confirmation).
- Only do this if they put their email/fax number in their address for service
- In practice, when both parties are represented by counsel, email b/w counsel will be the main way to do it.

R 11.22 **Recorded mail at address for service on most recently filed documents**

- **Service effected at time acknowledgement signed** OR "deemed service" **7 days from when document sent** regardless of when the party checked their mail (***Brace v McKen***)
- Sending non-commencement documents by recorded mail is sufficient proof of service (***Brace v McKen***)

General rule: address listed in pleadings is where you can serve it.

Generally speaking, Court will hold parties to be able to be served with subsequent documents at the place listed on their pleadings: "A plaintiff who commences an action and gives an address for service must appreciate that documents will be served upon him at that address, whether he is there or not and if he does not provide the postal service with a current mailing address, he cannot say he has not been served in accordance with the Rules."

R 11.23–24 **Special rules for service of non-commencement foreclosure documents** (e.g., serving it at the address)

Ex Juris: Service of Documents Outside Alberta

At CL, Court has jurisdiction where the defendant is served **in** the jurisdiction. But, this has **expanded**. Courts in AB will hear a matter where there is a **real & substantial connection between the claim & the jurisdiction**.

Service outside AB is more than notice. Service not only gives notice, but it also **provides Court with jurisdiction over a defendant** who is not in Alberta (***Metcalfe v Yamaha Power Motor***)

If defendant is **in Canada** → **R 11.25(1)**

1. **Court order is not required**. Instead, you must establish a **real & substantial connection** to Alberta **in the commencement documents**.
2. **Method** (R 11.26): Can use: the same methods prescribed for service IN Alberta*;* the methods in the foreign jurisdiction where the party is being served; *AND/OR* methods provided for in the *Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters*.

If defendant is **outside of Canada** → **R 11.25(2)**

1. **Court order for Service *Ex Juris* required in advance** (acquired ex parte) **based on an Affidavit** detailing facts that establish a **real** & **substantial connection** to Alberta (you don't need to include the real & substantial connection to AB info in the commencing doc since it's already established in the Affidavit).
2. **Serve** the person with **commencing document** AND **court order**
3. **Method** (R 11.26): Can use: the same methods prescribed for service IN Alberta*;* the methods in the foreign jurisdiction where the party is being served; *AND/OR* methods provided for in the *Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters.*

Both require a real and substantial connection to Alberta, which will be **presumed** (**R 11.25(3)**) in **situations that include** (non-exhaustive)

- Establish the event leading to the claim happened in AB
- Claim re: land in AB
- Contract made, performed/breached in AB
- Tort committed in AB
- Agreement is governed by law of AB
- Administration of an estate, where the person died in Alberta
- D is a necessary & proper party to an action brought against at least 1 D who can be served in AB *(this is our catch-all, but requires a lot more detail than the other bases for jurisdiction)*

Overcoming Service Problems

Order Validating Service, R 11.27

Can apply to have Court issue an order that "validates service" if Court is satisfied the:

1. **method of service** used **brought** or was **likely to have brought the document** to the attention of the person to be served ***OR***
2. **document would have been served** on the person or would have **come to their attention if** the **person had not evaded service** *(in this case, the date of service is specified in order)*

Use validating service if you've done something already that you think got the doc to the person & you want the court to say "that's good enough"

BUT the court **cannot validate service** when the document was provided to the party with confirmation that document is not being served on that party does **not constitute service**. The **party must understand their legal rights are being engaged** (***Redecopp*** → SOC provided for the purpose of settlement discussions. Before accepting, D1 confirmed that looking at the SOC didn't constitute service & P agreed. P never served the SOC. Later on, P applied for order to validate service on the basis that D2 had a copy. But there was no evidence that D1 was served).

Service by email is validated in ***Thompson v Procrane Inc.***→ "Service is essentially a question of fact: did the person being served actually get a copy of the document. If the document was actually received, the method of service is inconsequential."

Serve it almost any way you want as long as you can prove it came to their attention BUT if you don't do it in one of the prescribed ways, you'll need a court order to say you affected service.

Order for Substitutional Service, R 11.28

Use when you can't serve someone by one of the prescribed methods, but you think there's another way you could get their attention. This is most useful when there's a pot of money & a person takes the pot of money, runs, and can't be found.

Court will grant an Order authorizing service by a different method where:

(1) They are satisfied **you can't serve it in the way specified in the rules** (i.e., explain why service by methods provided in Rules are impractical), AND
(2) Alternative method of service "is **likely to bring the document to the attention of the person being served**"
   - E.g., by Facebook (***Blois v Salaki***) → party allowed to serve OP by serving documents on OPs mom and sending them to OP by FB Messenger.
   - E.g., by newspaper (**R 11.28(3)**) → the Rule calls it "(most common)". It still remains common even though it's antiquated and seems like there's little chance it'll come to a person's attention.

Note: D can apply to set aside Substitutional Service Order.

Order Dispensing with Service, R 11.29

Very **unusual** given the importance of service.

Court can grant an order dispensing with service where:

(1) reasonable efforts at service have **been exhausted** OR are otherwise **impractical/impossible**;
(2) **no or little likelihood** matter will be **disputed**; AND *(this is the most important element)*
(3) **no other method** of service **available**

Note: D can apply to set Order Dispensing with service aside.

Proving Service, R 11.30

1. **Affidavit of Service** (most common way);

- E.g., by mail: State what filed court documents were sent, who sent them, to what address, on what date, and how (registered mail, courier); Attach as exhibits: receipts from postmaster, tracking information & signed acknowledgement, copy of filed document that was served

2. **Affidavit of attempted service** (**R 11.31**): If a person was **unable** to serve, they explain what happened and why through this Affidavit. This Affidavit will be used in an Application for a Substitutional Service Order as evidence about one's attempts to serve.
3. **Written acknowledgement of service** from the party themselves; or
4. **Order validating service**

Setting Aside Service

Defendant can apply to set aside:

1. Service of a commencement document;
2. Order for substitutional service;
3. Order dispensing with service; or
4. Order validating service.

This is important b/c if you've been noted for default, you go to the court and ask them to set aside service, they do, and then you can file your statement of defence.

Renewal of Statement of Claim

GENERAL RULE: SOC **MUST** be served within 1 year of filing (**R 3.26(1)**, same in ABPC as per *Provincial Court Civil Procedure Regulation, s 4*). If you don't serve it within 1 year, it's dead and you can't file it anymore → you **cannot** take any further steps against the litigant who was not served (R 3.28)

> **NOTE, the court's usual ability to vary/extend time periods under R 13.5 does NOT apply to renewal of SOC**

EXCEPTION → 3 month extension: Prior to the year expiring, Courts can grant **ONE 3-month extension for serving** (R 3.26(2)). To get an extension, you **must demonstrate** that you've been **trying to serve but** have been **unable** – generally granted with affidavit outlining attempts to serve (R 3.26(2)).

Factors to be considered in a 3.26 application (***Scott v Westwind Communities***):

1. No unilateral right to a 3-months extension – court has discretion but like always grants it
2. Application **MUST be supported by an Affidavit** and won't get the extension if you don't have one (provide details on attempts to serve and explain reason for lack of service)
3. Purpose of renewal CANNOT be a stalling tactic
4. Prejudice to the Defendant is one factor to consider, but NOT determinative.

EXCEPTION IF (a) P misled by D; (b) service set aside; (c) special/extraordinary circumstances (**R 3.27**)

(a) P is misled by D

- E.g., someone other than actual D purports to be D or their lawyer → leds leads P or P's lawyer to reasonably believe & rely on the belief that: D has not been served, D will not contest liability, or the time limit has been waived
- *Brosseau v Janz Estate:* advice that insurance would cover the accident and that limits had been set and settlement could be negotiated. There was the settlement of the two other claims and one occurred after expiry. Held: insurer/D lost & P applied to renew under 3.27(a) or (c). Court says: "Failure to serve is unacceptably risky behaviour. It could have the effect of ending the lawsuit" → i.e., always serve if you can!

(b) Order regarding service is set aside (e.g., setting aside orders for substitutional, validating, dispensing with service); *OR*
(c) special or extraordinary circumstances resulting solely from the defendant's conduct or from the conduct of a person who is not a party to the action (usually based on D's conduct)
- ***Stremich v Penfanis***: the **extraordinary circumstances must be tied to the lack of service**. Here, P is prevented from applying for an extension before deadline expired due to their physical disability (their disability is not tied to the lack of service)
- Process servers are NOT a party to the action, but failure to serve in time *caused* by a process server can count as extraordinary circumstances (e.g., if they lie about serving the document or they are negligent in carrying out service)
- **Failure** of counsel **to diarize** is **NOT** a **special/extraordinary circumstance** (***McGowan v Lang***)

Procedure on Default

Procedure on default: When you file and serve a SOC and there is no response from D (**R 3.31**)
- Defence has 20 days to file a SOD if served in AB, 1 month if in Canada but outside AB, and 2 month if served outside of Canada
- If someone has failed to file a SOD and are in default, then they are taken to admit everything in the SOC, BUT P still has to prove everything in the claim to the Court (via affidavits or a hearing) to get judgment (***Argent v Gray***)

STEPS TO NOTE IN DEFAULT:
(1) **File an affidavit of service** (showing you've properly served the claim)
(2) Determine:
  (a) is the claim **liquidated** (i.e., set amount/easily calculated)? Is it for **recovery of identifiable property**?
    - If yes → **file default judgment** (recovery of property (**R 3.38**); liquidated demand (**R 3.39**) (***TLA Food Service***)
  (b) is the claim **unliquidated**?
    - If yes → **apply to note D in default** (**R 3.36**), and then **apply for judgment** (**R 3.37**)
      - Once someone is noted in default, **application for judgment** allows court to do one of 6 things:
        - 1. Direct judgment
        - 2. Make necessary order
        - 3. Direct a determination of damages
        - 4. Adjourn the application and order additional evidence
        - 5. Dismiss the claim or any part of it
        - 6. Direct the claim and proceed to trial

SO: A D noted in default may still participate in the hearing where the court determines what the value of the claim is, but they **cannot contradict the facts alleged in the SOC** because those facts are taken as admitted

SETTING ASIDE DEFAULT JUDGMENT: Court can "open up" default judgment (**R 9.15**) where
(1) There was some problem with procedure (ex. service of SOC not actually effected)
(2) D establishes **all three** of the following (***Yehya v Las Palmas Estate Homes Ltd***):
  (a) D has an **arguable defence** *(evidence required)*, **AND**
  (b) D did **not deliberately** let judgment go by default and has some **reasonable excuse for default** such as illness, solicitor inadvertence, **AND**

(c) D **moved promptly** to open default after learning of it.

Amending Pleadings, R 3.62

First Q: have pleadings closed?
Second Q: what are you trying to amend?

Time	Process	Rule
Before pleadings close (see R 3.67) (i.e., no reply filed & served OR before 10 days post-SOD service, i.e., before reply deadline)	Any number of times w/o court permission	R 3.62(1)(a)
After pleadings close (see R 3.67) (i.e., reply is filed & served OR time for F&S of reply expires, i.e., 10 days after SOD was served)	Order of Court (required for addition/ removal/ correction of party, option for other amendments) ***OR*** Consent of Parties	R 3.62(1)(b), 3.65, 3.74
At any time	Consent of parties ***OR*** When filing a response pleading to an amended pleading	R 3.62(1)(c) R 3.62(3)

When do I file a reply? **R 3.33**

- Reply must be filed within 10 days of service of SOD.
- **Only file a reply if you need to** (e.g., D raises a NEW issue requiring response like a Limitation Defence to which you want to raise issue of Fraudulent Concealment, etc).

3 STAGES OF AMENDING PLEADINGS ***(Atilla Dogan v Amec)***

1. **Commencement**: amend to include any allegation, as long as it's not vexatious;
2. **Before pleadings close**: amend any number of times without consent or permission, no evidence necessary
3. **After pleadings close**: amendment only by consent of other party or by court order. Court order will require some sort of evidence in support of allegations in amendment

GENERAL RULE (*Eon Energy*): a **court will allow an amendment to any pleading at any time, now matter how late or careless is the party seeking to amend.**

- **4 exceptions**:
  1. Amendment would **cause serious prejudice** to opposing party, **not compensable in costs**
  2. Amendment requested is **hopeless** (eg. Amendment proposed is not relevant)
  3. Amendment **adds new party or cause of action after expiry of limitation period** – ***UNLESS*** otherwise allowed by statute (see LA s 6) (this is the most commonly raised exception)
  4. Element of **bad faith** associated with not pleading claim in first instance or seeking amendment

PRESUMPTION in favour of allowing amendments (i.e., low bar for amendments to pleadings) (***Pace v Economical***)

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GENERAL RULE RE LATE AMENDMENTS: amendments after questioning delay resolution & increase the use of public & private resources BUT that can be dealt with by paying costs (***Pace v Economical***)

ADDING, SUBSTITUTING, OR REMOVING PARTIES AFTER CLOSE OF PLEADINGS R 3.74
court order REQUIRED. Test: Will the amendment cause prejudice not compensable by costs, adjournment or terms? → If P is being added, new P must consent

AMENDING PLEADINGS AFTER A LIMITATION PERIOD HAS EXPIRED *Limitations Act*, ss 6(2–4)

Adding …	**Requirements**	**Effect/Additional notes**	***Poff v Great Northern Data Supplies AB Ltd***
A new claim (same parties) *LA*, s 6(2)	(1) Added claim must be **related** to the **conduct, transaction, or events** described in **original pleading**.	Sets a new lim period for those claims. Needs to be done within 2 years of time of the cause of action.	Case about adding a new D, but step (1) applies to all & step (2) can apply to *LA* ss 6(3–4) **Test for amendment to add a new D after the expiration of the limitation period:** (1) "Added claim must **be related to**…" [related to = **broad standard** (2) "... sufficient knowledge of claim" takes place in the **Limitations Period PLUS** (i.e., 3 years to serve SOC) & requires that D has **sufficient info to respond** "will not be prejudiced in maintaining a defence on it on the merits."
A new D *LA*, s 6(4)	(1) Added claim must be related to the conduct, transaction or events described in original pleading, ***AND*** (2) Added D must have received **sufficient knowledge of claim** during the **3 year period** ("**Limitation Period PLUS**")	(2) If the D you want to add has heard about the claim **within 3 years of the claim arising**, then that is probably sufficient to bring them in as a D. (2) Must be sufficient info for D to make a response ("will not be prejudiced in maintaining a defence to it on the merits" – ***Poff v Great Northern***)	
A new P *LA*, s 6(3)	(1) Added claim must be related to the conduct, transaction or events described in original pleading, *AND* (2) D must have received sufficient knowledge of **new P's claim** during the 3 year period ("Limitation Period PLUS") (3) Court must be satisfied that **adding a plaintiff is necessary** or desirable **to ensure** the **effective enforcement of** the **claims originally asserted** or intended to be asserted in the proceeding.	(2) there must be sufficient info for D to make a response ("will not be prejudiced in maintaining a defence to it on the merits" – ***Poff v Great Northern***)	

Pleadings Subsequent to SOC

TIME TO RESPOND IN KB *OR* FILE A DISPUTE NOTE IN PC

PLACE D WAS SERVED	**TIME TO RESPOND IN KB** *Time to respond **runs from date service is effected** (i.e., when given to person OR 7 days after sent via registered mail) *File an SOD (R 3.31) OR File a Demand for Notice (R 3.43(3))	**TIME TO FILE A DISPUTE NOTE IN PC (*PC Civ Pro Regs*, s 5)**

In AB	20 days **exception*: *20 days to F&S SOD, but if you fail to serve SOD, you can't be noted in default (**Barcelona v Einarson**)*	20 days
In CA, outside AB	1 month	30 days
Outside of CA	2 months	30 days

EXCEPTION:

R 3.42 TIME TO RESPOND **STOPS RUNNING** IF an App to set aside service, stay an action, or strike an SOC ⇒ P **CANNOT** Note D in Default **NOR** move for default judgment. (*Note this rule does **NOT** include applications for summary judgment under Rule 7.3 **NOR** applications for particulars)*

PROCEDURAL OPTIONS UPON BEING SERVED WITH SOC

OPTION	PROCEDURE
Raise jurisdic-tional issues	1. Submit App to set aside service *ex juris* (i.e., claim no jurisdiction) 2. Submit App to stay proceedings on basis of *forum non conveniens* (i.e. stay proceedings on basis of wrong forum
App to strike the claim, R 3.68	Basis for App: claim, as worded, reveals **no cause of action**.
Demand for Notice, R 3.34	**Demand for Notice:** D does not contest liability (i.e., admits liability), but inquires into how much they are liable for (i.e., what the remedy/damages should be) → this prevents default judgment from being entered. D must also be given notice of all further applications. **Purpose**: to give D who admits their liability under the cause of action sued on a chance to see that they are not held for more than they should be, and to present to the court anything that would be helpful in deciding that (***Bell v Grande Mountain Apartments***) **If D wishes to contest liability, must withdraw Demand for Notice** through Order to Withdraw & filing SOD. ***Bell v Grande Mountain Apartments* test to withdraw** considers: 1. If there is a good defence on the merits 2. If D acted promptly to withdraw Demand for Notice
Statement of Defence, R 3.31	**Use Form 11 to:** 1. Deny contested facts ➢ must be **more than** "D denies everything" (***C(L) v Alberta***) ➢ **Presumption**: If **not specifically admitted** → **denied.** "Silence in a defence is not an admission" (R 13.12) ➢ Partial corrections permitted 2. Admit uncontested facts ➢ "admit a few things and then help the reader by giving a **blanket denial** of every other fact alleged by the person suing" → "X denies all facts except wherein after admitted" 3. Add facts as basis to raise a specific defence. **F&S of SOD** (***Barcelona v Einarson***): **Cannot note someone in default if they've filed an SOD** (even absent service). BUT can **bring App for long** delay b/c filing w/o service does **nothing to advance the action**.

	Reply (P's response to SOD)	**IF** SOD raises new issues, P can file a reply (common in set-off claims & limitations defences) **Substance of Reply:** "may only make admissions or respond to matters **raised for the first time** in the [SOD] (**R 13.10**) + facts not specifically admitted are presumptively denied (**R 13.12**) **Timing of Reply**: F&S within 10 days of SOD service (**R 3.33**); uncommon, but often relate to limitation issues or set-off claims.
	Counter-claim (R 3.56–57) (can be filed as an addition to SOD)	**Counterclaim**: in principle, an SOC that doesn't start a new lawsuit. Filed and served in conjunction with SOD (but as a separate doc). NOTE–you could file SOD and separate SOC, but it's cheaper to do SOD & counterclaim. **Service:** follow rules for commencing docs (but see **R 11.15, 11.17** → usually lawyer of record from SOC to which service can be directed). **Timing:** must be served at same time as SOD & follow SOD requirements in **R 3.57** (i.e., 20 days) **CC available in the following circumstances: (R 3.56)** 1. **D can file CC against P** (e.g., P sues D, D CC against P) 2. **D can file CC against P + 3rd party** (P & 3rd Party becomes D by CC) (e.g., P sues D, D files CC against P & 3rd Party) ➢ **BUT D cannot bring a second P into CC** → can only add a D by CC, not a P (***Lil Dude Ranch***). 3. D files 3rd Party Claim & **3rd Party can file CC against P or D in response** (e.g., P sues D, D served 3rd Party Claim on 3rd Party, 3rd Party files CC against P or D in response). 4. **Set-off:** (1) legal; (2) equitable; (3) contractual (can also be raised as a defence, see below for more details). Set-off in CC is an attempt to claim the additional money you think you're entitled to.
Notice to Co-Defendant, R 3.43 → Claim for contribution *only arise if P wins against D in the first place		**Notice to Co-Defendant** = they are already a D so it's not a commencing doc b/c your not bringing anyone else in. **Cross-claim on co-D**: has to be in tort; person you want to claim contribution from is already a D. **Claim for contribution** is an **independent claim** that arises where: 1. TP breaches **common law duty of care** (tort) to the D or the P (*Contributory Negligence Act*) → independent third party **duty** in tort, contract, or statute **owed to the D**, but relating to same damages claimed by P 2. Breach of **contractual duty** by third party to D; *or* 3. Breach of **statutory obligation** owed by third party to D → when two parties who owe a tort duty to the P for the same damages (e.g., 2 drivers get in a car accident, 1 passenger injured, both drivers owe duty to the P. If P sues only one, then that D could use CL contribution). a. Contributory Negligence Act, s 1 says that if 2 or more ppl are at fault, Court determine degree of fault, but damages are joint & several

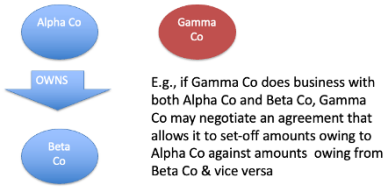
	b. *Tort Feasors Act* → Any tortfeasor liable for damage may seek contribution from any other tortfeasor who is, or would have, if sued, been liable for the same damage. These claims **ONLY arise if P wins against D in the first place** (*D basically says: "If P wins against me, then I'm claiming against this person". If P withdrew their claim, there wouldn't be a claim against D → Christine says some case law says it could survive but she doesn't really think so)*. **Damages** in the contribution claim are the *same* damages as the ones claimed by the P. **Notice:** Claim for Contribution requires a **Third Party Notice** – i.e., if you wish to claim contribution under *Tortfeasors Act* or *Contributory Negligence Act*, you must serve the party you are claiming contribution in respect of through a **Notice to Co-Defendant**. Response not required. **Timing:** MUST be filed within 20 days after D1 files their SOD (R 3.43)
Third Party Claim / Third Party Notice, R 3.44 *arise before P's case is decided (forces contribution to happen during P's matter instead of after)	**Rationale**: avoiding multiple actions, avoiding contrary or inconsistent findings, allow third party to defend P's claim against D, save costs, determine the issues between the D and third party ASAP **Service**: type of **commencement** document → Party serving the TPC must follow the commencing document rules **AND** must include a copy of the SOC and SOD. **Time frame:** D must file & serve on P & third party (i.e., third party Defendant) within 6 months of filing the SOD or Demand for Notice ***AND*** before judgment entered against the defendant (**R 3.45**) → note: 6 month period is a procedurally timeframe and *not* a limitation. So long as you don't breach the limitation period (***LA*, s 3(1.1)**), you can file a third party claim outside of the 6 month period. Limitation period = earliest of either: (A) 2 years from the later of (i) day D served with SOD or (ii) day D 'discovered' claim against TPD; OR (b) 10 years from when claim against TPD arose. **Available when… (R 3.44)** (a) A TP is or might be liable to the party filing the TPC for all or part of the claim against that party (b) a TP is or might be liable to the party filing the TPC for an independent claim arising out of (i) a transaction or occurrence or series of transactions or occurrences involved in the action between P and D, ***or*** (ii) a related transaction or occurrence or series of related transactions or occurrences (c) TP should be bound by a decision about an issue between P and D. ➢ ***O'Connor Associated***: TPC will not be liable if the actions of D2 are not sufficiently connected to P&D1 (e.g., Advisor was not bound b/c the claim about the advisor providing bad due diligence is a defence and not an accusation. If D establishes TP was relied on, they're not liable & so TP wouldn't be either. **Procedure after service of TPC** 1. TP files SOD (or Demand for Notice)

	➢ In TP's SOD, they can: i. Contest P's claim against D; ii. Contest D's claim against TP (**R 3.49**); *or* iii. Both ➢ SOD or Demand for Notice has the same time limits for serving as D has to serve SD (**R 3.49**) 2. Reply to TP SOD can be filed (if necessary) by: a. Plaintiff; *or* b. Defendant (i.e., third party plaintiff) 3. BUT If TPD doesn't defend, can note TP in default, but you usually can't get judgment (because D may not be liable to P before you know if there is a claim against the TP) and even if you do, you can't enforce judgment without application (**R 3.53**)

SET OFF must be pled and it can be either a defence ***or*** a counterclaim (**R 3.59**). Often, it's used as both.

1. **Defence** → attempt to **avoid paying another party** by determining what is eligible to be claimed by P in reality.
   - If P says D owes them $X and D says P owes them $Y, set-off subtracts one from the other to determine what can be claimed (i.e, the difference b/w the two can be claimed).
   - Defence example: If P sues D for $100,000 & establishes claim. D defends, establishing set-off for $150,000. Court order D owes P no money.
2. **Counterclaim** → attempt to **claim the additional money** you think you're entitled to
   - example: If P sues D for $100,000 & establishes claim. D counterclaims, establishes set-off of $150,000. D gets judgment for $50,000.

THREE MAIN TYPES OF SET OFF:

LEGAL	**EQUITABLE**	**CONTRACTUAL**
Requirements to claim: 1. **Mutual obligations**; AND 2. **Debts** or **unliquidated claims**	Requirements to claim: 1. **mutual claims**, whether liquidated or not, **arising** from the **same contract or series of events** or otherwise closely connected. 2. Debts **cannot** be liquidated i.e., must be **unliquidated debts**	Requirements to claim: 1. A contract that allows to expand or restrict rights of set-off
E.g., A owed $50K by B (debt, liquidated), B owed $40K by A (debt, liquidated). A sues B for $50K, B pleads legal set off, and A gets judgment for $10K.	E.g., A claims debt of ($120,000) against B for work on building. B claims that A's work was poor, and cost them $80K compensate the poor work. DAMAGES ARE NOT LIQUIDATED. Cost to fix defective work done by A ($80,000) and B's debt of	

	$120,000 = Residual claim, after equitable set-off, is ($40,000)	

Disclosure

Step 1: Documentary Disclosure & Production of Records

When pleadings close, issues as defined by the pleadings are set. At this point in time, parties turn their mind to discovery–the first thing we look at is document disclosure.
Rules of Disclosure are in **Part V of the Rules**.

Purpose of disclosure, **R 5.1(1)**:

(a) to **obtain evidence** that will be relied on in the action,
(b) to **narrow and define the issues** between parties,
(c) to encourage **early disclosure** of facts and records,
(d) to facilitate evaluation of the parties' positions and, if possible, **resolution of issues** in dispute, and
(e) to **discourage** conduct that unnecessarily or improperly **delays** proceedings or unnecessarily increases the **cost** of them – including trial by ambush.

Affidavit of Records

R 5.5 every party must serve an Affidavit of Records (AOR) within (note, does **not** have to be filed, just served):

- P has to serve within **3 months** of the FIRST SOD being served on them
- D has to serve within **2 months** of receiving P's AOR
- Third Party has to serve within **3 months** of filing an SOD to Third Party Notice

R 5.14 Other party gets a copy of the other side's documents (either can look at their actual docs or get copy – in practice, always a copy)

R 5.32 Unlike SOC, SOD, Third Party Claim, AOR is **not** filed at the courthouse.
All **document exchange** in litigation **is voluntary**. BUT **for this system to function it is vital that the litigants and their legal counsel take this discovery obligation seriously.**

Purpose of disclosure in AOR: If you have a copy of a record & don't produce it and somehow the other party finds it, this will harm CL's credibility; producing documents (even those that hurt us) can be done to help us frame our case.

Instructing CL re AOR: tell CL to (1) go through all emails & search for keywords (name of OP, subject matter, emails to/from certain ppl; (2) dig up paper or electronic records that relate to the lawsuit; (3) tell them to give you **everything** so you can determine what's relevant, privileged, & produce anything (even if inculpatory)

Lawyer's duty in discovery: allowing a client to swear an affidavit of records which omits a key record is suborning perjury, and is a breach of the Code of Conduct.

Analysis for whether to produce something:
Step 1: is it in CL's control?
Step 2: is it relevant & material?
Step 3: is it subject to privilege?

BASIC REQUIREMENTS FOR AOR: disclose all **relevant** and **material** records that **are** or **have been under the party's control** (i.e., lost), specifying if they are **producible** or **privileged**

- **Records:** Paper docs (e.g., invoices, charts, receipts, ITRs, printed copies of emails, letters, police statements, minutes of meetings); video recordings; audio recordings; electronic records (e.g., email in its native form, databases, accounting records, portable storage devices, social media postings, metadata attached to documents on someone's computer)
- **Relevant** (**R 5.2**): things that help determine issue(s) raised in pleadings *or* things that help ascertain evidence that will help determine issue(s) in pleadings
- **Material** (**R 5.2**): things that go to weight of evidence (to what extent will the relevant thing help determine issues? If only a tiny chance, then it's immaterial & doesn't need to be included)
- ***Kaddoura v Hanson:*** At production stage, need only show that there is a **plausible line of argument that records may be relevant and material**; **do not** have to produce docs that relate to unrealistic, speculative lines of analysis, devoid of an air of reality. This is skewed heavily in favour of production.
- ***1400467 Alberta Ltd v Adderly***: To prevent **trial by avalanche** (i.e., overwhelming the other side w/ documents), parties are limited to producing **relevant** and **material** records. OP can apply to court for redone AOR if AOR is insufficient.
- Do **not** disclose records that are privileged (but identify those records are not being produced due to privilege and identify the privilege)
- Implied undertaking that anything released in disclosure is used *only* for the litigation.
- Control test (***McAllister v Calgary***)
    - A record is in a party's control if it has a **legally enforceable right to access** the record.
    - A record is **NOT** in a party's control where it can request a record, but has **no ability to compel compliance** with that request

FORM Use Form 26, **R 5.6.** Must include:

1. **Affidavit** wherein affiant swears to accuracy and completeness of affidavit ("No other relevant and material records have ever been under the party's control")
2. Schedule 1 – Relevant, Material, Producible Records under litigant's control that are being produced
    - **R 5.7** Producible records must be **numbered** & identified. *Can* be bundled (e.g., invoices, date range), but make sure to number them if you want to prove you produced them later & for the purposes of questioning.
3. Schedule 2 – Relevant, Material, Privileged Records under litigant's control
    - **R 5.7-5.8**: Must **number** the records (5.7) and **describe grounds** for objection (5.8; i.e., type of privilege) – can be very vague (previously had to provide a more thorough description as per ***CNRL v Shawcor***, but R 5.8 overruled that)
4. Schedule 3 – Relevant & Material Records no longer under litigant's control
5. Place where producible records can be examined (not generally used in practice – usually send a copy)

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Schedule 1

Relevant and material records under the Plaintiff's control for which there is no objection to produce:

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

INCOMPLETE AOR OR IMPROPER CLAIM OF PRIVILEGE R 5.11:

1. Court can give permission to question an adverse party on its AOR
2. Court can grant an order to get OP to:
    a. Disclose records
    b. Produce records over which privilege has been claimed
3. Court *can* inspect impugned records to assess privilege claim in R 5.11, but courts prefer not to (***CNRL v Shaw***)

CONSEQUENCES FOR INCOMPLETE/INCORRECT AORs:

1. **R 5.16**: Court can **bar** party **from using document at trial**;
2. ***Kent v Martin***: Court can order **cost consequences** (for party, personally for the lawyer) or **professional discipline** (for lawyer). In Kent, $200K awarded against party that didn't provide sufficient AOR.
3. ***Kent v Martin***: other remedies include: request for specific docs, Order for further AOR, Order for more precise discovery, contempt, punitive costs

CONSEQUENCES FOR LATE AORs: A party cannot carry out questioning of other parties until it has served its AOR (**R 5.20**) subject to agreement. If late, Court ***may*** impose "a penalty of 2 times the amount set out in items 3(1) of the tariff in Division 2 of Schedule C" (**R 5.12**; i.e., between $1,300-4,050 if it's column 1 action)

EXCEPTION to consequences for lateness: Penalty under **R 5.12** will **not be imposed** when the party can show it had **sufficient cause for late service**. High threshold – party must show it was diligent (i.e., did everything it could but ran into extraordinary circumstances; e.g., flood damage, fire, sudden medical emergency) (***Sun Life Assurance***). IN REALITY THIS IS NOT A HIGH BAR AT ALL – "I forgot" is often sufficient.

MODIFYING TIME PERIOD TO SERVE: **R 5.12** indicates **period can be modified by agreement** of the parties or by court order. Modification ≠ automatic; party must apply (***Chevalier v Sunshine Village Corp***)

PRESUMPTION OF DEEMED ADMISSIONS R 5.15: A party (making ***or*** receiving an AOR) is **deemed** to admit that a document listed in the AOR:

(1) Is authentic (original or true copy) AND
(2) Was sent by sender and received by the addressee
UNLESS the party serves notice on the adverse party **disputing either of these within 3 months** of document production ***OR*** the party disputes either (or both) in its pleadings (if you want to withdraw admission after 3 months, you have to make application to court to do so)

DISCLOSURE = ONGOING OBLIGATION R 5.10: If a party **finds, creates, or obtains control of** a relevant and material record after AOR is served, party must

(1) notify other parties
(2) provide other parties with copies/opportunity to inspect
(3) serve supplemental AOR

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SWEARING R 5.9: AOR must be sworn by the party (*OR* corp representative if party = corp *OR* lit representative, if appointed). Alternately, "a suitable person" (other than lawyer of record) can swear AOR if it's inconvenient for party, corp rep, or lit rep A suitable person to do so AND there's consent of parties OR a court orders allowing it. **Usually sworn at trial.**

CORPORATE REPRESENTATIVES R 5.4: provide evidence for a corp through AOR and questioning; Corp rep is chosen by the corp *or* appointed by corp. Can be >1 w/ consent of OC.

DOCUMENT **AFFIDAVIT OF RECORDS**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

Affidavit of Records of [Name And Status] Sworn (or Affirmed) by _____ ON _____, 20____.

I, _____, of (municipality, province), have personal knowledge of the following or I am informed and do believe that:

1. I am the plaintiff/defendant/plaintiff's representative/defendant's representative.
2. The records listed in Schedules 1 and 2 are under the control of the plaintiff/defendant. (*Schedule 1→ producible records & I don't object, Schedule 2→ producible records but I object to producing them)*
3. I/The plaintiff(s)/The defendant(s) object(s) to produce the records listed in Schedule 2 on the grounds of privilege identified in that Schedule.
4. The records listed in Schedule 3 were previously under the control of the plaintiff/defendant, but ceased to be so at the time and in the manner stated in Schedule 3. (*Schedule 3 → records I lost possession of (say when possession was lost & how)*
5. Other than the records listed in Schedules 1, 2, and 3, I/the plaintiff(s)/the defendant(s), does/do not have and never had any other relevant and material records under my/the plaintiff's(s')/the defendant's(s') control.

Other Discovery Options (NOT AOR)

Anton Piller Orders

Anton Piller Orders: (essentially) civil search warrants granted in regular civil litigation. Anton Piller Orders are used if the client is concerned that some evidence of misuse of property OR evidence may be destroyed

THE TEST (***Celanese Canada Inc. v Murray Demolition Corp***):

1. A strong *prima facie* case;
2. The alleged damage must be very serious;
3. Convincing evidence that the D has in its possession incriminating documents or things; AND
4. P must show a **real possibility** that D may destroy such material before the discovery process can work.

How to obtain Anton Piller Order: Obtained in an *ex parte* hearing (i.e., no notice, all dependent on Affidavits that haven't been cross-examined on so your duty for disclosure is very high, you need to provide everything even if it doesn't look good for you). **Rationale:** we don't want OP to destroy docs & *ex parte* proceeding protects this.

Result of order: Results in appointing an independent lawyer (AKA Independent Supervising Solicitor) along with a team of people who act as an officer of the Court & can storm into the home/business/law firm of D and conduct a sweeping search of everything, including paper and electronics and seize the items

Orders for Inspection, R 6.26

The court has authority to (applied in ***Monsanto v Schmeiser*, 2004 SCC 34**):

(1) Make an order for a party to **inspect property**;
(2) Make an order allowing party to **take samples**, **make observations**, **undertake experiments**; or
(3) Make an order to **enter land** to allow for the above.

Discovery from Non-Parties, R 5.13

The Court can **order non-parties to disclose documents** if you submit an application & can show the record is (applied in ***Cullihall v Lyanage***):

(1) under non-party's control,
(2) relevant and material, and
(3) producible at trial (not privileged)

Norwhich Order

Norwich order: allows Court to order information from a non-party (even before litigation starts) to: (1) ID wrongdoers, (2) find & preserve evidence, or (3) trace & preserve assets (***Alberta Treasury Branches v Leahy***)

THE TEST:

(1) evidence of a valid, *bona fide*, or reasonable claim;
(2) Third Party involved in acts complained of;
(3) Third Party is the only practicable source of the information available;
(4) Third Party can be indemnified for any costs for any inconvenience or cost Norwich Order would bring; AND
(5) Interests of justice favour disclosure.

Obtaining Documents from Public Bodies: *FOIPP* Application

When the Crown is not a party, it does not need to submit to discovery in an action (***Interpretation Act*, s 17**), so you can't bring a 5.13 application, but you CAN make a ***FOIPP*** application

- If you feel the docs are within the power of the P, you should get the P to get them b/c there will be less redaction (which will prevent you from reading it)

Pros	**Cons**
- Can get documents prior to commencing litigation - Can get documents more broadly than just what's pleaded in the lawsuit	- More grounds for denying access, see *FOIPPA*, s 16–29 - Can be slow, expensive - Less effective enforcement remedies

	- Redacted

Step 2: Questioning

Purpose: (1) helps understand the other side's case; (2) Helps get certain admissions in discovery that you can use in trial; (3) helps assess witnesses (good or bad witness?); and (4) helps tell if there are other records out there that should have been produced that have not been produced

PROCEDURE R 5.25, 5.26

1. Before questioning starts, **witness is sworn in/affirmed**
2. Witness **questioned by OC** (These Qs are in a transcript that belong to the adverse party's counsel. E.g., if P's counsel questions D, the transcript belongs to P, therefore only P can read this transcript in at trial)
3. Witness ***can*** be **questioned by own counsel** to provide further explanation/clarification *(unusual since there isn't anything one's own counsel doesn't already know about)*
4. Witness may be **questioned further** by OC

TIMING R 5.20: Party usually can't question until **after AOR has been served** & it **always takes place after document discovery** (b/c you want to see the docs before you ask questions) ⇒ P can question any time after SOD has been served on P *OR* time for serving has run out AND D can question any time after SOD has been served. If D doesn't not serve a SOD, they are not entitled to question.

ARRANGING QUESTIONING: Technical requirement to **serve Notice of Appointment** to question someone – requires "conduct money" allowance (**R 6.15–6.17**); in practice, used mostly for witnesses as lawyers will work out dates for questioning w/o Notice of Appt & Conduct $ (but if OC asks for conduct money, you should too!)

- **Conduct money**: per diem for appearing + actual costs of getting there + additional amounts
- **If** the Notice has been served and the witness doesn't show up, the court reporter will wait half an hour, after which it will issue a certificate of non-attendance that you can use to get a court order requiring witness to appear.
- Conduct money breakdown (occasionally changes):

Base Fee	Meals (usually just lunch)	Transportation	Accommodation
Witness: $50/day Expert: $100/day	Breakfast: $9.20 Lunch: $11.60 Dinner: $31.75 (total daily: $41.55)	Bus fare: $X Air faire (>200km travel): $X Private vehicle: $0.505/km	Private home: $20.15/night Hotel: $140.00/night

WHO CAN BE QUESTIONED R 5.17: AB has the broadest right to question in all of CA, 5.17 includes:

1. Adverse parties
    - **Test to determine who is an adverse party** in ***Turta v CPR***: "Adverse parties" are broader than just the opposite party → **Are the parties in an adverse position? look at the pleadings *and* record as a whole to determine if the parties are adverse. You can examine witnesses toward whom you are adverse.**
        - ***Golden Estate v Neilson***: mom and spouse of deceased man found to be adverse parties because they were also "**true parties**" since the action related to the estate & was in their benefit.
        - ***CCS Corp v Secure Energy***: settlement put D1 & D2 in an adverse position, so D2 could examine D1's witnesses.

2. If the adverse party is a **corporation** → can question **officers, former officers, & the corp rep**
3. **Lit Rep** (& the represented if (1) they are competent to give evidence & (2) Court gives permission)
4. **Employees & former employees** of adverse party (***Tremco v Gienow*** confirms)
5. **Auditors & former auditors** of adverse parties
6. **Partner/former partner**
7. The **Crown** only **if** they are a **party** (***PACA* s 11**)
8. A **child only if** they meet the requirements under ***Evidence Act*, s 19**:
    - A judge must decide if child understands the nature of the oath:
        - If judge thinks the child understands the nature of the oath, they can testify
        - If judge thinks child doesn't understand the nature of the oath but believe the child understands the importance of telling the truth, the child can testify not under oath but there will be limitations to what can be done w/ their evidence.
9. If key evidence can't be obtained by any of the above parties (i.e., parties in **R 5.17**), a party ***may*** be able to question a **non-party who "provided services"** to the non-party if they have: (1) agreement of parties *or* (2) court order (**R 5.18**).
    - To use **R 5.18**, the **information sought** from the non-party **must be related to the services** that the non-party provided to the adverse party (***Cogent Group c Encana Leasehold Ltd***) →E.g., condo owner didn't understand the nature of a leaking issue in the building, so Christine got permission from the P to question their service provider who (obviously) understands the leaking issue.
10. You can also **interview a witness pre-trial,** if they are willing:
    - **Ex-employees or other corporate officers** provide evidence that you can use to prepare the evidence they will provide at trial. This is just like doing a witness interview, but it's under oath & with other parties there. It can be used to **impeach** that witness at trial if there are inconsistencies b/w the interview & trial, but they **cannot be read in as evidence against the corporation** (R 5.29, ***CDM Direct Mail v CIPR***)
    - **Non-parties** IF they consent *OR* serve a Notice to Attend that will compel them to trial (**R 8.8, 8.9**) → Note – this is risky if you don't know what they're going to say
    - **NOTE:** If you want information from a TP, you can question them as a witness under **R 6.8** WITHOUT needing to make them a party to get discovery through AOR.

UNDERTAKINGS DURING QUESTIONING R 5.30: Parties have an obligation to "**reasonably prepare**" for questioning and **bring records** which are likely to be required (R 5.23), likewise corp reps have an obligation to "reasonably inform" themselves (R 5.4), BUT sometimes a witness still doesn't know about something that's relevant, material, & something they could find out. Here, they can give an **undertaking** to find out and provide the answer (one context where non-lawyers can undertake to do something). Once person **undertakes**, they must (1) **comply** or (2) **ask Court to be relieved of it**.

- To be **relieved** of an undertaking, person must show that:
    (1) the **undertaking was given inadvertently**;
    (2) it **should not have been given**; and
    (3) the other side has **not been prejudiced *or*** the **prejudice can be repaired**.
- Undertakings are an indulgence b/c they give an opportunity to provide the information needed (***Psychologists Association of Alberta v Schepanovich***)
- During questioning, the Undertaking requests are directed at the lawyer (**not** the witness) to determine whether they should be granted. Lawyer responds to request with either:
    - "yes, we'll accept that undertaking" (in which "best efforts" are the standard) or "we will make our best efforts to accept that undertaking"
    - "no, the undertaking is refused"; or,
    - "I'm taking the undertaking under advisement" (i.e., i'll think about it & get back to you)

GROUNDS FOR OBJECTIONS R 5.25(2), (3): Tell your CL "take a moment before answering a question" so that you can object if you need to.

1. OC is asking for **privileged information**
2. OC is asking for something **not relevant and material**
3. OC is asking for something that is **not a question of fact** (ie. legal interpretation, opinion)
4. OC is asking for something/being **unreasonable, unnecessary** (e.g., abusive, sarcastic, etc.)
5. For a **corp rep**, it would be **unduly onerous** to inform him/herself
6. Other grounds recognized at law (E.G., *MVA*)

IF OC OBJECTS TO PROPER Q: (1) try to **resolve** it **during questioning**, ***OR*** (2) use **R 5.25(4)** → **apply to** the court to **determine the validity** of the objection

TRANSCRIPTS OF QUESTIONING: Court reporter **prepares transcript with exhibits** attached (**R 5.31**) BUT transcript is NOT filed at courthouse b/c it **belongs to the questioner** (**R 5.32**).

READING IN: questioner can "read in" excerpts at trial (contrast w/ cross examination on Aff transcripts where the *entire* transcript must be filed at courthouse) & OP can adopt questioning party's questions & read in excerpts

- CANNOT put in excerpts so abbreviated they "would or might be" misleading.
- Can read in statements from questioning if they **contradict** statements during trial, but CANNOT read statements consistent from questioning to trial (***Browne v Dunn***)
- Can read in statements that witness mentioned at questioning, but did **not** mention at trial (***Alberta Ltd v Trail***)

GENERAL RULE: OP CAN'T use questioning of their CL

> **EXCEPTION** (***Dame v Wong***; **R 8.14**)**:** CL is (1) dead; (2) unable to give evidence before Court (disability, accident, ill health); (3) cannot be required to attend trial; (4) CL refuses to take oath/answer questions; (5) other sufficient reasons. BUT read-ins are **restricted** to portions that relates to important aspects of the case where there is no other way to prove those facts (**R 8.14(3)**)

READING IN EXCERPT FROM CORP WITNESS R 5.29 only allowed if the examined is a corporate **officer *OR*** if EE evidence is put before a corp rep & acknowledged by them (NOTE – few grounds to refuse). BUT if a corporate witness's discovery testimony at questioning is NOT acknowledged by a corporate representative, it is an error for KB Justice to admit it (***CDM Direct Mail***)

ABUSIVE QUESTIONING: repetitious, lengthy, irrelevant, about de minimus matters, overly aggressive tone, sarcastic tone (***Holowaychuk v Lopishinsky***); unnecessary/excessive interruptions, improper objections, coaching/trying to feed answers to one's CL (***Landes v Royal Bank of Canada***).

> **LAWYER OBLIGATIONS RE QUESTIONING *Code*, 5.1-2**: lawyer must not: make suggestions to a witness recklessly or knowing them to be false; counsel witness to give untruthful or misleading evidence; improperly dissuade a witness from communicating w/ other parties, giving evidence, or from attending; needlessly abuse, hector, or harass a witness. **5.2**/***Landes***: laywer cannot communicate with witnesses during cross-examination except with leave to do so or agreement from counsel.
>
> **RESPONSES TO ABUSIVE Q:** can stop the questioning or tell OC you will stop questioning if they don't stop asking abusive Qs (***Canalta Concrete v Camrose*** CB at 218)

OBJECTIONS IN QUESTIONING *Canalta*: if you wouldn't make the objection at trial, don't make it in questioning.

REMEDIES FOR ABUSIVE Q-ING:

(1) end questioning & then apply for relief from Court under **R 5.3** with two possible outcomes (i) no further q-ing; (ii) further q-ing must be before judge/master/person designated by the court.
(2) Complaint to Law Society (possible disciplinary proceedings)
(3) Costs (e.g., ***West Edmonton Mall Property Inc v International Stereo Centres Ltd,*** no costs were awarded to the parties due to abusive questioning)

LAWYER OBLIGATIONS WHEN COMMUNICATING W/ WITNESS GIVING EVIDENCE: *Code of Conduct,* 5.41 must not influence [potential] witness to give false, misleading, or evasive evidence; **5.41-2** must not obstruct an examination or cross-examination; **Commentary** "... lawyer is not permitted to communicate w/ witness during cross-examination except with leave of the tribunal or w/ the agreement of counsel."

WRITTEN INTERROGATORIES R 5.28 alternative method of questioning; counsel provides written Qs to OC/OP & they **provide their answers in an Affidavit**. If further questioning is needed, must apply to Court.

QUESTIONING (CROSS EXAMINATION) ON AN AFFIDAVIT R 6.7 & **QUESTIONING IN AID OF AN APPLICATION R 6.8**: Alternative types of questioning where **entire transcript** of question **goes before Court** as if it was done before the Court.
In practice, it's usually easier to just do an Affidavit (but if you're in a rush, this works ok)

Implied Undertakings, R 5.33

IMPLIED UNDERTAKING, R 5.33: Information acquired through disclosure can **only** be used in the proceeding (i.e., *that* litigation) **UNLESS**

- The relevant **court orders otherwise**;
- **Parties agree** otherwise; or
- **otherwise required/permitted by law** (e.g., imminent risk to public safety)

EXCEPTION TO R 5.33: parts of disclosure that are **filed with the Court are subject to the public record** (contrast to AOR which is not filed w/ Court). Implied undertaking rules does **not** apply to:

- Questioning (**R 6.7, 6.8**, open court principle in ***Hall v Willcox***);
- Affidavits;
- Exhibits to the affidavits;
- Cross-examination transcripts;
- Questioning excerpts "read-in."

TEST TO BE RELIEVED FROM IMPLIED UNDERTAKING: Balance two interests wherein the reason for asking to be relieved must be at least as strong as the public interest advanced by disclosure. Balance of:

- (1) **public interest advanced by disclosure** (***Juman v Doucette*** – detection and prosecution of crimes is insufficient); ***AND***
- (2) **public interest advanced by the implied undertaking rule** (privacy of litigants & full disclosure in civil litigation)

TEST FOR PARTIES TO BREACH IMPLIED UNDERTAKING W/O COURT ORDER:

(1) **statutory exception** (e.g., child abuse in *Child Youth and Family Enhancement Act*, s 4(2));
(2) **public safety** is at risk; or
(3) to **impeach an inconsistent statement**

Privilege

Privilege is an **exception to the obligation** on litigants **to disclose**.

Include privileged docs in AOR, but exclude from questioning (i.e., OBJECT)

Privilege **protects interests and relationships**, which rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of the availability of evidence relevant to the administration of justice.

Course importance: If privilege wasn't properly claimed & you want to use a doc at trial, you can't if you left it out of the AOR; failure to produce relevant docs that are later discovered can undermine CL's AOR & credibility; failure to maintain privilege may harm your CL's case and get you in trouble, as **lawyers are required to maintain client's privilege unless instructed to waive**.

FIVE MAIN TYPES OF PRIVILEGE:

Type	Test/Requirements for Application **First step for any priv:** look at **each doc individually** (NOT the whole file) (***AB v Suncor Energy***)	Other
Solicitor Client Privilege (SCP)	Test from ***Solosky v The Queen***: (1) communication **b/w a lawyer** and a **CL**; (2) made for the **purpose of** giving or receiving **legal advice**; (3) made with the **intention** that it be **confidential** **Exceptions**: (1) risk to **public safety**, (2) accused's right to make **full** answer and **defence**, (3) Criminal communications **SCP = PFJ** & can only be abrogated w/ clear, explicit, unequivocal language in a statute (***Info and Privacy Commissioner of AB v U of C***) **Only CL can waive privilege** (can be express– e.g., in pleadings–or implied–e.g., CL shares advice with other ppl) IF claim puts content of SCP directly in issue → CL has waived SCP (***Goodswimmer***)	**Rationale**: If CL does not have guarantee of confidence, candour will be inhibited and CL will be unwilling or unable to obtain adequate legal advice (***Solosky***) **SCP HAS NO END DATE**. NOTE: Solicitor = the lawyer, legal assistants, paralegals **Statutory abrogation example**: *FOIPPA*, s 56(3): "Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2)." → **not** clear, explicit, & unequivocable enough to abrogate SCP.
	Sub-type of SCP: **Common interest privilege** Disclosure of advice from a lawyer to another party **will not waive SCP** where the other party has a **common interest,** i.e., where the parties are on the same side and making joint arguments (e.g., one defendant	

	discloses to another) – (***Canada v Iggillis Holdings Inc)***	
Litigation Privilege	**Test:** measured at **time of creation of the record** + Burden of Proof on party asserting privilege: (1) Litigation is **underway** or reasonably **anticipated** (2) **Dominant purpose** of **creating** the doc is in **preparation for litigation** (***AB v Suncor Energy***) → i.e., lit privilege does **not** cover docs created for some other purpose (e.g., statutory compliance, workplace policy) EVEN IF those docs were collected for purposes of litigation (creation must be for lit) **Exceptions**: (1) risk to public safety, (2) AC's right to make full answer and defence, (3) Criminal communications, (4) evidence of an abuse of process Can only be abrogated w/ clear, explicit, unequivocal language in a statute (***Lizotte v Aviva Insurance Company of Canada***)	Records that were **created by** a party that were **in explicit contemplation of**, and **for the dominant purpose of**, litigation **Rationale**: creates a "zone of privacy" in adversarial systems of litigation → protects the process, whereas solicitor-CL privilege protects the relationship b/w lawyer and CL **PRIVILEGE ENDS WHEN LITIGATION ENDS** (***Lizotte v Aviva Insurance Company of Canada***)
Settle-ment Privilege	**TEST** (***Union Carbide***): **substance of the document** includes an **intention** to make a settlement/compromise. "Without prejudice" is **not** required or determinative. **Exceptions** (***Bellatrix Exploration Ltd v Penn West Petroleum Ltd,*** 2013 ABCA 10) **(1)** Preventing double recovery **(2)** Communications are unlawful (e.g., threats, fraud, extortion) **(3)** Prove settlement was reached and to determine terms (***Union Carbide***) (privileged docs become unprivileged when settlement is reached, so we can use those previously-privileged docs as evidence the settlement was reached) **(4)** Settlement posture may be relevant to determining costs	**Rationale:** Protects communications exchanged by parties as they try to settle a dispute (***Union Carbide***). Parties should be supported in their attempts to resolve their disputes short of relying on the courts – more likely to do so "without fear that information they disclose will be used against them in litigation"
Case-by-case/ new privilege	***Wigmore* test/principles to find new privilege(*AM v Ryan*):** 1. Communications **originated in confidence** that they would not be disclosed 2. **Confidentiality is essential** to full & satisfactory maintenance of the relations between the parties 3. **Relationship** is one the community believes should be **fostered** 4. **Injury** resulting to the relationship by disclosure of the communication must be **greater than** the **benefit** thereby gained for correct disposal of litigation (e.g., If something like health (mental, physical) is at issue, and it was put at issue by the P themselves, then likely to not be privileged)	Parties may assert a new privilege if it required by a **public good** transcending the normally predominant principle of utilizing all rational means for ascertaining the truth (***AM v Ryan***) – **allows for the law of privilege to evolve**

Statutory privilege	Test: does the statute contain specific privileges? - E.g., *Evidence Act,* s 8: Spousal privilege - E.g., *Traffic Safety Act,* s 11: driver privilege (a compelled statement by driver to police after an MVA cannot be used in Court proceedings) - E.g., *Fatality Inquiries Act,* s 48: if witness is asked an incriminating question, their answer cannot be used against them in litigation	E.g., ***BC v Philip Morris***: couldn't use health records in possession of Plaintiff because basis of litigation was *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, which restricted the production of those records → i.e., statutory privilege prevented production of records.

Solicitor Client	Litigation
Applies to communication b/w lawyer & client	Can ALSO apply to communication with stranger to litigation OR to self-represented litigant
Communications must have been confidential	Can cover communications made with no expectation of confidentiality or documents that are non-communicative
Applies regardless of possibility of litigation	Litigation or reasonable apprehension of litigation required
No end date	Is over when litigation is over

Chambers Practice

Chambers: a courtroom is called "chambers" because of the *nature* of the matters being heard and the manner in which they are being argued. Chambers is everything but the trial. 2 types: regular & special.

Regular/Application chambers: courtroom used for daily hearings of **short, interlocutory applications** on a **list** (second floor of court house)

Special chambers: a courtroom used for **longer non-trial** matters that take 2+ hours ("trial in a box")

Chambers deals with pre-trial matters such as: service applications; compelling answers to questions/undertakings; creating deadlines/timelines (litigation plan); foreclosures; debt matters; landlord & tenant; civil restraining orders (justices only); summary judgment (this is a significant part of an AJ's role).

Do not bring into Justice's Chambers what belongs in AJ! → don't go in front of a justice on an AJ matter (they will be mad :))

Applications on Notice

By default, all applications **must be made with notice** unless statute or CL state otherwise.

PROCESS:

1. Applicant serves **Application** (Form 27) and **Affidavit in Support** (Form 49; provides the evidence required to make an order, see ***First Investors***) (anything you rely on has to be served) on **all parties** in and **all parties affected** by the Application (**R 6.3(3)**) according to the **the general rule** (i.e., **5 days or more** before scheduled to be heard).

2. File **Application**, **Aff**, & **Proof of Service**.
3. Respondent may serve & file a **reply affidavit**.

FORM 27 CONTENTS "Before the Presiding AJ in Chambers" *(no specific name b/c you won't know)*; Remedy claimed or sought *(e.g., app for summary judgment)*; Grounds for making this application *(i.e., what it is about the facts that make it suitable for this application; e.g., "Applicant lives in AB")*; Material or evidence to be relied on *(Aff of CL; Notice to Admit, etc.)*; Applicable rules; Applicable Acts and regulations; Any irregularity complained of or objection relied on *(i.e., something you need to bring attention to the court e.g., Resp can't be located to be served, Affidavit not sworn in person, proceeding even though Resp asked for Adjournment etc.)*; How the application is proposed to be heard or considered *(usually in person)*.

AFF IN SUPPORT (FORM 29) Provides evidence. If your Application makes findings of fact, there must be a sworn Affidavit supporting those facts if you wish to get an order (***First Investors***) – **EXCEPTION**: **Application to Strike cannot be served with an Affidavit** (it's based on commencing docs alone)

SCHEDULING: albertacourts.ca > court operations & schedules > scheduling > select "applications judge" > select "Edmonton regular chambers" > pick an available date from menu. Scheduling is pursuant to AJ Chambers avail & usually ~2 weeks in advance (NOTE – usually takes 1-2 weeks for clerks to file docs, so **book 3 weeks in advance**)

ABRIDGING TIME R 13.5: Court can abridge time limit for service (e.g., shorten) or **adjourn** the matter IF sufficient reason.

REPLY AFF R 6.6: Respondent must serve reply affidavit "a reasonable time before the application is to be heard or considered" ⇒ **Reasonable time**: at least 24 hours

CROSS EXAMINING AFFIANT: can request to cross-examine applicant's affiant first, which will require an adjournment of the existing hearing date. **TEST**: Judge may refuse if cross examining the request is in bad faith, but it's more common the judge will allow it (e.g., lawyer says "I don't want to adjourn to allow for cross examination b/c this is beyond dispute, irrelevant, no way other side would succeed, etc." BUT judges will say "no, we're in an adversarial system, & its the right of individuals to cross examine")

SPECIAL CHAMBERS: requires a Request Form w/ preferred dates listed → Clerks provide a date.

FILING AN APP: File via fax using naming conventions online (gets docs in correct urgency pile). KB moving to electronic filing through a lawyer's account (lawyer gives assistant access, assistant files docs; this allows for a levy toward a lawyer's insurance premium).

Without Notice Applications, R 6.4

R 6.4 W/O NOTICE APP CAN BE MADE IF (1) Notice is **not necessary** (e.g., completed uncontested things like an application for substitutional service); (2) Giving notice **might cause prejudice** to the applicant (e.g., application for an *Anton Piller* Order)

R 6.13 PROCEEDINGS RECORDED if only one party is present

HEIGHTENED DUTY OF CANDOUR Code of Conduct; ***Secure 2013 Group v Tiger Calcium***: b/c only one party is present there's a heightened duty of candour. I.e., the person in court has an obligation to tell the Court *everything* (both things that are good *and* things that are bad for their case). **Rationale:**

balances need for ex parte applications w/ the importance of protecting the adversarial objectives of the Court process.

REMEDIES FOR BREACH OF CANDOUR DUTY *Secure 2013 Group v Tiger Calcium*: order set aside; indemnity costs; cause of action in tort; professional consequences

Desk Applications

DESK APPS can be used for **completely uncontested matters**. (Previously, desk apps could be used for contested matters when parties consented to proceed by desk app (i.e., when both parties are repped by counsel but don't want to go to court). Previously, Desk Apps required Consent Order & leave).

Application Procedures

APPLICANT DOCS: Application, Aff, Originating pleading, Brief w/ authorities, & proposed form of order
RESPONDENT DOCS: Aff, response pleading (SOD), Brief w/ authorities, & proposed form of Order

SIMPLE APPs: attend Regular Chambers (20 min or less); App = MAX 7 pages.
COMPLEX APPs: attend Special Chambers using Special Chambers App (>20 min); App = MAX 20 pg.
Specials are hard to get into & have introduced NEW triggering dates to (hopefully) make things better:

Specials dates are released	⇒	**Triggering date** = date you book w/ specials coordinator (i.e., day you contact coordinator to book). SINCE booking date now = triggering date, counsel should make surreal of evidence/docs are together <u>before</u> you book for specials.	⇒ 2 weeks	Applicant's materials due 2 weeks <u>after</u> triggering date	⇒ 2 more weeks	Resp's materials due 4 weeks <u>after</u> triggering date

Issue w/ new triggering date: no specials available. One party has all materials ready and just waits for dates to open up BUT OC is out of the loop.

Evidence for an Application

Affidavit Evidence

TECHNICAL RULES Form 49, R 13.19–13.21

1. # paras
2. Para 1: name & residence of affiant, role of affiant in the parties in lawsuit + statement re personal knowledge or belief. (I am P; I am D; I am the bookkeeper for D, and as such I have personal knowledge of the matters which I am testifying to, and if I don't I have reasonable belief."
3. Use 1st person (Aff should be in CL's words → can impact CL's credibility).
4. Sworn before commissioner for oaths + their signature
5. IF Affidavit + exhibits exceed 25 pages, **tab exhibits** or consecutively number the pages with exhibits
6. AB Lawyers and Students-at-law are Notary Publics & Commissioners for Oath (*Notaries and Commissioners Act*, s 3(1)(b), *Evidence Act*, s 15–17, re: oaths (clerks are commissioners))
    - NOTE: You **cannot be a lawyer and a witness at the same time.** If you are a necessary witness, you should withdraw as lawyer. BUT you can commission CL's documents (this is different from being a witness) (*Code of Conduct*, R 5.2).

7. **Fiat**: If Clerk **refuses to file Affidavit** because of an **irregularity** → get **fiat** from an AJ to get it filed **R 13.38** (**Fiat**: "Let the within [document] be filed/registered/processed notwithstanding [the technical deficiency]."

EVIDENTIARY REQS FOR INTERLOCUTORY APPS can contain hearsay evidence as long as it states (1) source, (2) why it's believed to be true ("I am advised by [source of knowledge] and do believe that…"). Hearsay allowed b/c interlocutory apps do not have a final disposition

EVIDENTIARY REQS FOR FINAL APPS (e.g., summary disposition, trial) **cannot contain hearsay** evidence b/c they are dispositive, but they. All **evidence must be firsthand**.

QUESTIONING ON AN AFF R 6.7 person who makes an Aff in support of an App or in response or reply to an App may be questioned, under oath, on the Aff by a person adverse in interest on the application.

- ➢ Right to question on Aff is a **wide right** (can't use inconvenience as an excuse if it's timely), BUT the **entire transcript must be filed** (contrast to q-ing on an App, where excerpts only) (***Smith v Coperstone Capital Inc***). Note → wide right to cross examine an Aff also applies to the AOR (see ***Penn West Petroleum***)
  - **Limit to the right**: Qs must be **relevant to the extant application** (not just about anything)
- ➢ **Limited ability to ask for undertakings when questioning on an Affidavit** (compare to questioning during discovery where there is a wider ability to ask for undertakings). BUT **undertakings are appropriate where** (***Rozak Estate v Demas***):
  1. Affiants refer to documents/information in their affidavits
  2. Affiants could only know the information in their affidavits if they had consulted documents/information
  3. The information is important to the issue and having the affiants inform themselves:
     a. Is not overly onerous
     b. Is going to significantly assist the court in determining the application

QUESTIONING: DISCOVERY VS AFFIDAVIT

All provisions are almost identical, just under different rules	**Questioning for Discovery**	**Questioning on Aff**
Serve Notice of Appt	R 5.21(1) Form 29	R 6.15 Form 29
Time for Serving	R 5.21(2): 20 or more days BEFORE questioning	5 days or more before questioning
Payment of Allowance	R 5.21, R 6.18 Schedule B Amounts	R 6.18 Schedule B Amounts
Apply to Court to Compel Attendance	R 5.21, R 6.38	R 6.38
Filing	R 5.31 Read-in portions of a transcript are filed	R 6.20(5)(b) ENTIRE transcript is filed

Other Evidence

R 6.11 OTHER TYPES OF EVIDENCE FOR AN APPLICATION are usually attached to Affs, but can also be admissible as evidence on their own:

- Affidavits (tab exhibits)

- Written transcript of questioning done specifically for application, R 6.8. **Entire transcript** goes in
- **Read-ins** from transcript of questioning (done during discovery) or **attach as exhibit** to Affidavits by party *adverse in interest*, R 6.11, R 5.31
- **Admissible records in an AOR** under R 5.6 (Note – only *some* documents are admissible in Court when listed in an AOR. HOWEVER, if someone doesn't explicitly dispute the fact that it's evidence, it must be taken as evidence by the Court. Easier to append to Aff or questioning as an Exhibit. Can also attach as "Exhibit for identification" if OP claims they didn't see X email).
- **Answers to undertakings** (better as exhibit)
- **Exhibits** from **questioning**
- **Answers to written interrogatories** (i.e., answers to questioning; they're in Affidavit form, so you just refer to that Affidavit)
- **Answers to notices to admit**
- Live **oral evidence** (extremely rare), R 6.11(1)(g) (Evidence you need in a Chambers appearance is all written – rarely oral)

Chambers Procedures

CHAMBERS PROCEDURE

Check-in (9:30am) →	**First Apps: *ex parte*** →	**Second Apps: Adjournments by consent** →	**Third Apps: Consent Orders** →	**Fourth Apps: List**
	In AJ → usually sub service In Justice → usually civil restraining orders	Adjournments (by consent)	Consent Orders	>10 minutes→ Make App when called 10-20 mins→ ask to go to end of list >20 mins → try to do it but may have to schedule Special

ADDRESSING PPL IN CHAMBERS

- Prov Ct Judge = Your Honour, Madam/Sir, Judge
- KB AJ = Your Honour, Madam/Sir, Judge [Name]
- KB Justice = My Lord/Lady, Your Ladyship/Lordship, Madam/Mr Justice [Name], Madam/Sir
- OP = My friend, My learned friend (KC ONLY)

R 9.15 PROCEDURE FOR MISSED APPLICATIONS

9.15(1) Court *may* set aside, vary or discharge a judgment or an order on Application

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

(b) following a trial or hearing at which an affected person **did not appear** because of an accident or mistake or because of insufficient notice of the trial or hearing

9.15 (2) App to set aside/vary/discharge needs to be **within 20 days after the earlier of**

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

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

CHAMBERS OPTIONS

KB = Civil Chambers (Justice or AJ), Family (&EPO) Chambers; KB Commercial List (e.g., corp insolvency, receiverships)

PC = Chambers 1x/week (looks more like mediation)

Applications Judges (AJs)

JURISDICTION set out in ***Court of Queen's Bench Act*, s 8–16** (basically same jurisdiction as Justices with some exceptions → contempt, writs, & trials – crim matters & family)

AJs **can** hear	AJs **cannot** hear (*CQBA,* s 9(3)):
- Most interlocutory, procedural matters (incl. ones that resolve the claim, i.e. summary judgment, striking applications) - Matters by consent, s 9(1)(b)	- Trials - Contempt proceedings - Writs - Applications for injunctions (other than pre-judgment attachment orders under the Civil Enforcement Act) - Things required by statute to be done by a "judge" (e.g., Property settlements re minors)

Note, though, that if a judge has touched something in some way, an AJ will not touch it (e.g., restraining order ordered by a justice & counsel went to AJ for the related substitutional service order. AJ wouldn't deal w/ it b/c restraining orders are their jurisdiction & the sub order is related to that therefore AJ won't deal with it)

BOUND BY ALL OTHER KB: ***South Side Woodwork (1979) Ltd v RC Contracting Ltd (1989)*** AJs are bound by decisions of all other courts; "little peckers" decision. Any legal system with superior courts inherently creates a pecking order ~ "I'm bound by decisions of all other courts. Masters of chambers [i.e., AJs] occupy bottom rung of judicial ladder – judicial pecking order does not permit little peckers to overrule big peckers"

QUESTIONS OF FACT: AJs aren't s 96 judges, so they don't have the power to hear trials. BUT they can hear summary judgment. Trials deal with disputed questions of fact; whereas, summary judgment deals with disputed law (but consistent facts). ***Hryniak*** said that if issues can be solved solely on written submissions, AJs can address & Janiver expands that. **AJs do not have jurisdiction to determine disputed of contentious questions of fact** (***Janvier***)

- **EXCEPTIONS** to rule that AJs do **not** have juris to determine disputed questions of fact:
  1. IF one party's evidence is complete destroyed during cross-examination so that no reasonable person could possibly rely on it anymore (i.e., questioning) on the affidavit;
  2. Evidence is entered rendering a party's evidence completely non-credible; OR
  3. The parties agree to have the Master decide the matter, see Court of Queens Bench Act, s 9(3)(b)
     - In ***Schaffer v Lalonde***, (p. 252 casebook) the Court held that this power to have AJs decide contested matters of fact should be used **broadly** – in line with culture shift in ***Hryniak v Maudlin***, 2014 SCC 7 to expand AJ powers to resolve more issues pre-trial

ORDERS: Pre-pandemic → person who won drafted the Order and AJ signed off. Post-pandemic → winter draft the Order, send to AJ to change as they please, then it's done. NOW → Send a copy of Order before the Appearance, but bring a copy with you (as they'll often just sign in Chambers or send in by email protocol)

CKBA s 12 APPEALS FROM AJ are allowed & appealed ***de novo*** (not bound on evidence of original App, all facts are looked at anew). **Timing**: File notice of appeal within 10 days of order being entered (R 6.14(2)) + must be returnable (i.e,. scheduled to be heard) within a reasonable amount of time not to exceed 2 months (have it heard & then adjourn *sine die* until you can get a Specials date). **New evidence** can be included if judge is satisfied it is "relevant and material" (R 6.14(3)). **Standard of Review** from AJ to justice = **correctness** (***Bacheli v Yorkton Securities Inc***) & there is NO deference to AJ.

Top of Doc: Command + ⇧

Admissions (Chapter 19)

PRESUMPTION: Failure to defend/file an SOD = admission of all facts in pleadings.

R 13.12 Facts not admitted in pleadings are **denied**.

R 5.15: Admissions re: authenticity & transmission of documents (Justice Summers class)

NOTICE TO ADMIT, R 6.37

FORM: Form 33 → set out facts/opinions that you want admitted & serve on all other parties

TIME FOR RESPONSE: Parties have 20 days to serve response on all other parties.

PUSHED TO RESPOND ON TIME DEADLINE, *Stringer*: If you get pushed to make an admission based on a time deadline (or if you push someone to do so), the court can allow it to be set aside (see below "Withdrawing an admission"

EXTENSION FOR RESPONSE: two options for extension = (1) ask party serving Notice to Admit for an extension & confirm extension in writing (NOTE – ethical obligation to grant reasonable requests for extension so long as no prejudice to a party, ***Code of Conduct*, s 7.2-1**); (2) apply to Court for an extension under **R 13.5** (rely on this option if first option doesn't work; if the Court grants you the extension, you can seek to recover the costs of this Application)

CONTENT OF RESPONSE:

1. Admit facts/opinion
2. Deny facts/opinion ("I refuse to admit it because…")
3. Object to requested admission (on grounds of (a) material is privileged; or (b) admissions requested are irrelevant, improper, or unnecessary)
4. No response at all/No timely response = deemed admission

R 10.33(2)(b) COST CONSEQUENCES FOR FAILURE TO ADMIT *if* party fails to make *reasonable* admissions (E.g., OP refuses to admit they live in Edmonton, so you have to go through the process of getting proof they live here. Court would award costs for the process of getting proof of where they live).

TEST FOR WITHDRAWING AN ADMISSION, *Stringer*: test can apply to withdrawing any admission (including **R 5.15** authenticity of docs, not just the withdrawal in an extension situation.

1. Was admission **intentional, inadvertently made, or inadvertently permitted to happen** due to operation of rules? *(basically did the time run out?)*
2. What **explanation** is offered for allowing admission to occur? *(here, being out of the country with a 200+ page Notice)*
3. Has there been **delay in moving to withdraw admission**? What's the explanation for the delay?
4. Has the applicant provided **sufficient evidence that facts may not be true** and there is a genuine issue important enough to warrant sending the fact to trial? *(if you want to withdraw an admission, try to have some sort of evidence that it may not be correct)*
5. Would it **cause** the **other party prejudice** that cannot be remedied with costs or other terms?

Experts (Chapter 20)

Generally, **opinion evidence** is **not admissible** at **trial UNLESS**:

1. It is something a **lay person** would **generally** know; or,

2. It is provided by a **qualified expert** in the area and the expert is **expressing an opinion**.
    a. Must satisfy ***Mohan*** **test**

MOHAN TEST FOR EXPERT OPINION ADMISSIBILITY AT TRIAL:

Step 1: Assess **Logical Relevance** (***R v Mohan***)

1. Relevance ⇒ opinion is relevant to decide matters at trial
2. Necessity ⇒ opinion is necessary to decide matters at trial; If expert opinion is **not absolutely necessary** to assist the court in coming to their conclusion, it will **not** be allowed/
3. Absence of an exclusionary rule ⇒ No exclusionary rule that would keep evidence out
4. Properly qualified ⇒ expert is properly qualified

Step 2: Assess **Legal relevance** ⇒ Does the **probative value outweigh the prejudicial effect** of the evidence?

1 EXPERT/ISSUE AT TRIAL R 8.16: limited UNLESS court orders otherwise (problem: issue ≠ clear)

COURT'S EXPERT R 6.40-43 Court can appoint its **own** expert

COURT ORDERED CUSTODY FOR MED EXAM R 10.54 Court can order person can be taken into custody for purposes of medical exam being performed if the person (1) refuses to do so & is therefore in contempt of court; (2) is suffering from mental disorder; (3) is likely to cause harm (to themselves, others, etc.)

MVA → SPECIAL EXAMINER FOR MINOR INJURIES In MVA, you can get a special examiner for **minor injuries**: Assessment by Certified Examiner under *Minor Injury Regulation*, AR 123/2004 of whether or not an injury is a "minor injury" and thus subject to a cap on recovery of non-pecuniary damages (e.g., pain & suffering). Results are **presumptive evidence** of whether an injury is a minor injury or not.

EXPERT REPORTS:

LITIGATION PRIVILEGED: prepared for the dominant purposes of litigation & so the litigation privilege exists until all related litigation is concluded (***Piikani Nation***). Can share expert report with other people who "control the mind" of your CL without waiving privilege (e.g., adjustor for the company that's your CL), BUT – privilege must be waived if you want to use the report at a trial (you have to give the report to the other side before trial.

REFERENCES: If there's a reference in an expert report you produce, you must also produce the underlying report.

FORM: Form 25

SERVICE: must serve on the other side IF the party intends to rely on the expert report at trial (**R 5.35(1)**).

SEQUENCE (instead of **time** requirement):

1. Party bearing onus of proof (usually P) **serves expert report(s)**
2. Other party/parties **serve rebuttal** (can raise new issues)
3. Party bearing onus of proof can then serve a **surrebuttal**.

EXCHANGE OF EXPERT REPORTS: must be exchanged **before a trial date is requested** (**R 8.4(3)(c)**) (AND YOU MUST – advise the trial coordinator of experts being called to trial irl).

OBJECTIONS TO ADMISSIBILITY OF REPORT: provide the other side **with notice of the objection before trial** (**R 5.36**), otherwise you need court permission to object at trial.

NOTICE TO CALL EXPERT AT TRIAL: to call expert witness at trial, you **must** give other side notice by serving the expert report on the other side prior to trial (**R 5.35**)

TWO PHASES OF EXPERT EVIDENCE AT TRIAL: PHASE 1: (1) provide qualifications to the Court (give the Expert a copy of their resume, ask if its there go through expert's resume focusing on areas where expertise is granted); (2) tell the Court what the expert is an expert in (e.g., standard of care for a nurse in a city hospital); (3) Court makes a decision. PHASE 2: if they're qualified, introduce their opinion (if not qualified, they can't give their opinion). NOTE – you can stop OC when they are in phase 1 and say you consent to the expert being an expert (softens the blow of judge knowing all of the reasons they're an expert)

PERSONS WHO MUST FILE EXPERT REPORTS

Parties who must file	**Independent experts** (AKA "hired guns"; ***Kon Construction***)	**Witnesses with expertise** (i.e., ppl involved in events underlying the litigation)	**Litigants**
Notice Requirements	**Must** provide **advance notice** of their opinion	**"Should"** provide **advance notice** of opinion	**Advance notice** of opinion **not required**
Qualification Requirements	**Must** be **qualified**	**"Prudent"** to be **qualified** (if they're going to diagnose or provide any expert opinions on diagnosis, treatment, prognosis, future care, permanent impairment	Do **not** need to be qualified
Examples	E.g., Medical expert retained to provide opinion evidence for litigation like standard of care experts)	E.g., A treating physician – they aren't just brought in as a third party witness, but they have first-hand experience	E.g., Doctor sued for negligence, professional engineer employed by corporate D

Kon Construction: it is **good practice to provide expert statement for witnesses who are both opinion & fact witnesses**

EXPERT REPORT AT TRIAL W/O CALLING EXPERT (R 5.39, 5.40) Form 33 lets party provide notice to OP that it would like expert report entered w/o calling expert.

RESPONSE: OPs have 2 months to respond stating if (1) OP **objects to all or part of the report** being put into evidence; (2) OP would like to have **expert attend for cross-examination**

DO NOT FILE expert opinion at courthouse before trial **UNLESS** the **court requires** it for some specific purpose (cost consequences if you unreasonably object)

TESTING OC'S EXPERT: Questioning (discovery), cross examine (trial), disclosure of expert change of opinion

R 5.37 QUESTIONING OP'S EXPERT during discovery **if** other party agrees or Court orders. Treat evidence secured this way as "evidence of an employee of the party who intends to rely on

the expert's report" (**R 5.47(4)**). This evidence can't be read in at trial as against the party (because it's evidence of an employee)

CROSS EXAMINE OP'S EXPERT at trial. May need to request their attendance if the party relying on the expert proposes to put the Report in as evidence.

R 5.38 CL'S EXPERT CHANGES OPINION If your expert changes their opinion after reading OP's expert's report, you must **disclose in writing** to OP – **ongoing obligation of disclosure**

MEDICAL EXAMINATION, R 5.41 3 ways to get med expertise if a party's health is an issue:

1. Parties **jointly agree on a health professional** to examine party and provide joint opinion
2. **Court order** 1 (or more) health professionals examine party *(Court can do this whether the parties have their own experts or not – expert paid for by both parties usually)*
3. IF P has been examined by health professional of his/her own choosing "who **will or may be proffered as an expert**" → THEN Court can order that plaintiff be examined by **1 (or more) health professionals selected by D**

★ **NOTE CL CAN BE SUBJECT TO MED EXAM BY OP IF THEIR HEALTH IS AN ISSUE**

SAFEGUARDS (**R 5.42(1)**): Client can elect for one of the following safeguards (they have to pay for the options & provide to the other side): (1) Have additional health care professional present; (2) Videotape medical exam; (3) Make word-for-word recording

STATUTORY WAIVER OF LITIGATION PRIVILEGE (**R 5.44(3)(b)**): If requested by OP under **5.44(2)(b)**, CL must provide "a report of every medical examination previously or subsequently made of the physical or mental condition" [at issue] → This amounts to a **statutory waiver of any litigation privilege** (***Reid v Bitangol***) **SO, if you've hidden any reports from physicians using litigation privilege, if OC asks for production under 5.44(2)(b), then you have to give it to them.

LIMITATIONS: **R 5.44(2, 5)** Court can **limit medical exam** (***McElhone v Indus School*** → May be possible to limit examination, but you have to have some evidence for any hope of limiting; ***Adacsi v Amin*** → no evidence that P was fearful of knowledge that could've resulted from blood test/if P had discussed psychological impact of blood test, court MAY have denied the request)) **OR compel** party to undergo tests, give samples etc (Court can compel blood sample through R 5.44(2), ***Adacsi v Amin***). **R 5.3(1)** Court can **waive any right wrt discovery if** expense, delay, danger or difficulty is "**grossly disproportionate**" **to benefit**

ENTITLEMENT TO REPORT R 5.44(3): Person who undergoes Medical assessment is entitled to a detailed report by health professional (so if you want an IME, whatever you get goes to the other side)

HEALTH CARE PROFESSIONAL (ARC Appendix): member of the College of Physicians and Surgeons of Alberta (doctor), chiropractor, dentist, occupational therapist, physical therapist, psychologist registered nurse under AB Health Act *OR* registered/certified as one in another jurisdiction who has been agreed to by parties or approved by court OR a person appointed by the Court who's qualified to conduct a medical exam.

Other Evidence (Chapter 21)

Qing TRANSCRIPTS AT TRIAL R 8.14 General Rule: evidence can only be "read-in" by (adverse) party that questioned a witness. **EXCEPTION (*Wong Estate*):** Court can permit a party to "read-in" evidence of

witness from questioning if the witness is: (1) Dead; (2) Unable to testify in person because of accident, ill health, disability; (3) Unwilling to take oath/answer proper questions; (4) Other sufficient reason.

EVIDENCE *DE BENE ESSE*, R 6.21 evidence taken "in case of future need." To effectively retrieve evidence *de bene esse*, the person should be questioned **under oath** with a **transcript retained**. Note – you can do this in person *or* by video. Reasons for evidence *de bene esse*: Witness may die; Witness may be too sick to testify at trial; Witness may leave jurisdiction; Cost & inconvenience of bringing witness to testify live disproportionate to benefit of live testimony; Other good reason.

QUESTIONING WITNESS OUTSIDE AB, R 6.22 Witnesses can be questioned in another jurisdiction if: Witness too sick or ill to travel to Alberta for trial; Witness likely to die before trial; Witness cannot be compelled to attend trial in Alberta; Cost & inconvenience of bringing witness to testify live disproportionate to benefit of live testimony; Other good reason.

> **PROCESS**: Prepare a Court Order that complies with **Form 31**; Can request assistance from foreign judicial authority using **Form 30** (e.g., order compelling attendance); Alberta court has an **obligation to offer assistance to foreign judicial authorities** who wish to question parties in Alberta, R 6.24; **Transcript of questioning must be provided** to clerk of court, R 6.23(3); IF questioning in a foreign country, check with Canadian embassy re appropriate procedure

NON-ORAL EVIDENCE AT TRIAL R 8.17 General Rule: At trial, evidence is elicited from witnesses through oral testimony. **EXCEPTION**: Court can order that evidence be provided in another form → e.g., Use of transcript from questioning under R 6.21 (*de bene esse*), questioning outside of Alberta under R 6.22, use of Affidavit Evidence with compelling reason (***Toliver v. Koepke***) NOTE — Even in the exception, the **Court protects the adverse party's right to cross-examine** the witness.

Managing Litigation

Discontinuance, R 4.36–4.37

COSTS FOR DISCONTINUANCE: Party discontinuing must **pay adverse party's costs**, **R 4.36(4), 4.37(2)(b)** – ***UNLESS*** parties agree otherwise (so when you settle, include, as part of the settlement, that you will pursue discontinuance w/o costs or specify the costs)

TIMING OF DISCONTINUANCE:

P can discontinue:	1. **BEFORE trial date is set**: by serving **Form 23**, Discontinuance of Action, on **all parties**. 2. **AFTER trial date set, before trial**: by consent of all parties OR Court Order (note – other party gets full costs for up to that point) 3. **Once trial has started**: by Court Order.
D can discontinue:	**At any time** by serving **Form 24** on plaintiff (i.e, doesn't matter if trial has set, is started, etc. – rare b/c it would result in P noting D in default & P would get costs)
LR can discontinue:	Upon getting **permission from the court**, **UNLESS** specifically authorized to discontinue in appointing order or instrument (**R 2.19**).

POSSIBILITY TO SUE AFTER DISCONTINUANCE: *Newel Post Developments Ltd* says discontinuance by P does **NOT** preclude P from suing on the same cause of action again so long as

there's no limitation issue (**R 4.36(5)**). **To avoid this, get a discontinuance AND A RELEASE** signed as to agreement as to discontinuance without costs by opposing party.

> "Consented as to discontinuance without costs" = you can discontinue w/o costs b/c the party agreed. Get other party to sign (simply saying "discontinuance without costs" doesn't actually waive costs, need consent). You could say "discontinuance without costs as per X agreement" → Christine isn't positive this would work, but thinks it could.

FORM 23 DISCONTINUANCE OF CLAIM Simple form that just states that P "discontinue(s) the action against the defendant(s) NAME(S)"; No one signs it UNLESS there's consent to discontinuance w/o costs; You can make this form a partial discontinuance by listing only the D or P that are discontinuing.

FORM 24 DISCONTINUANCE OF A DEFENCE Simple form similar to Form 23 but for a D.

Managing Delay

DELAY IS DISCOURAGED: (1) Before commencing documents filed by limitation periods; AND (2) After commencing documents filed b/c (i) There are specific time periods in the rules AND (ii) There are general rules re: delay.

RELIEF FOR DELAY POSSIBLE WHERE:

1. Delay has **caused prejudice** (**R 4.31**) → AKA "Application for Delay" (almost impossible to win)
2. Delay **exceeds set time period** (currently 3 years) (**R 4.33**) → AKA "Application for long delay" (more likely but still rare)

DELAY CAUSING PREJUDICE AKA APP FOR DELAY R 4.31: Where party (usually claimant) has delayed, the adverse party can apply to **dismiss other party's action, if the prejudice is significant**

- **Significant prejudice presumed** when delay is **inordinate and inexcusable** but **can be rebutted**
  - **LIMIT**: D's slowness may excuse P's delay. **D has obligation** under rules to **manage dispute & plan for resolution in timely & cost effective way** (***TransAmerica Life Canada v Oakwood***).
    - E.g., If D failed to file things in good time or was slow to follow undertakings
    - Pre-***TransAmerica***, we said it was the responsibility of P to move the claim forward. ***TransAmerica*** contrasts a D doing nothing vs D's delay in not following their procedural obligations which can result in a D not being able to claim slowness on the part of the P. Showing a D delayed specifically in their procedural obligations *may* be enough to preclude them from claiming P delayed.
    - ***TransAmerican Life*****:** "There's no doubt there was delay. There's no doubt the delay was inordinate. BUT there's no evidence of prejudice" since D remained employed in the insurance industry despite P's delay for their fraud & deceit claim. So here, the Court says it was **excusable** on the part of the D (i.e., it was inordinate, but not excusable so we can't presume significant prejudice & instead require evidence).
  - **LIMIT:** P's **lack of legal knowledge** does **NOT excuse delay** (***Morrison v Galvanic Applied Sciences Inc***)

RELIEF FOR 4.31 DELAY is **discretionary** → court "may" dismiss claim or grant other relief (Contrast with mandatory relief under R 4.33).

ALTERNATIVES TO 4.31 DELAY APP should be included in App due to 4.31 rarity:

1. **Order Setting Timelines** (**R 4.9**): this is a procedural order. In ***TransAmerica*** the court said this type of Order should **routinely be made in an unsuccessful delay application.**
2. **Removal of pre-judgment interest** to claimant for the period of the delay (***TransAmerica***)
3. **Costs** on person who delayed (***TransAmerica***)

APP FOR LONG DELAY R 4.33 delay of 3 years or more; court **cannot** vary this time period *(recall: Court also couldn't extend the time to file a claim after an extension of limitations period).* The **Long Delay clock begins running 1 year after SOC served** *OR* **when SOD is served**, whichever is **EARLIER**.

OMITTED TIME PERIODS:

- Time when action **stayed/adjourned** by Court
- Time when parties **agree to suspend** action
- **Delay** provided for **in** an **undisputed litigation plan**
- **During Covid**, all actions had a 75 day added due to court shut down due to covid from March 15 – June 1, 2020 (those will all be over by end of June 2022)

DROP DEAD RULE: Court **MUST** dismiss if no **significant advance** in 3 or more years (**R 4.33(2)**)

SIGNIFICANT ADVANCE: measured using a **functional approach**, asking if the step moved the lawsuit closer to resolution in a meaningful way having regard for the nature, quality, genuineness, timing and outcome of the steps? ***Jacobs v McElhanney Land Surveys Ltd*** provides examples of advances:

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

General rules:

- wait 3 years full years until after last significant step and THEN file. Don't file before b/c it'll bring it to OP's attention.
- You can't correct a 3 year gap by taking a significant step AFTER 3 years have passed. Here, OP can object & apply to dismiss.
- If you participate in a step after the 3 years have passed, you may be barred from bringing a long delay application
    - Significant step → 3 years pass → P takes another significant step → D responds → D later applies to dismiss but their application for long delay is barred as per 4.33(2)(b)

STANDSTILL AGREEMENT, R 4.32 stopping the running of the 3 year period by **express agreement.**

PROCEDURE: Must advise other parties to litigation of any standstill agreement (R 4.32); Best practice to hold off the time in R 4.33 is to specifically call your agreement a standstill agreement & reference the rule being stayed (***Brian W Conway Professional Corporation v Perera***)

SUSPENSION as an alternative: If other party won't agree to standstill agreement, can apply to court to declare period "suspended" (**R 4.33(9)**)

LITIGATION PLAN, R 4.4(2) varies based on case complexity: standard OR complex

COMPLEX: If you have a complex case, you **MUST** enter into a litigation plan whereby parties have obligations to comply with the plan & you have to go to court to change the litigation plan.

STANDARD: Default for all cases **UNLESS** parties indicate it is complex case; litigation plan NOT required, but can be used if parties want .

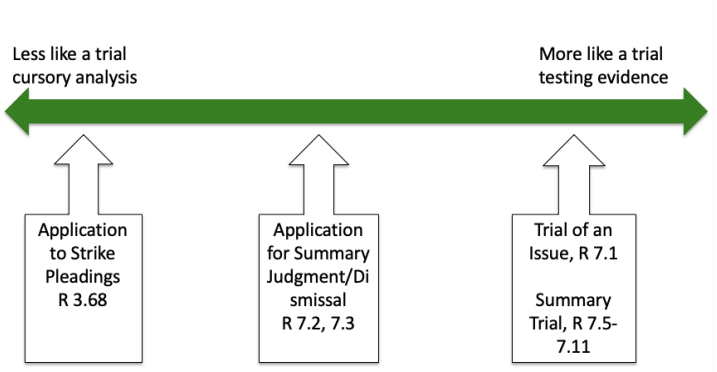
TO OBTAIN R 4.4(2): make lit plan & serve it on other party who will: (1) agree; (2) disagree; (3) fail to respond. Without response, lit plan deadlines are deemed actual deadlines.

IF NO AGREEMENT REACHED R 4.4(2): Party may **apply to the Court for a procedural or other order** respecting the plan or proposal.

Disposition without a Trial

CULTURE SHIFT AWAY FROM TRAD TRIAL *Hryniak* (2014) "Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised." "However, **undue process and protracted trials**, with unnecessary expense and delay, **can prevent the fair and just resolution of disputes**…" This requires a **shift in culture**. The principal goal remains the same: **a fair process that results in a just adjudication of disputes**. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — **proportionate, timely and affordable**.

TOOLS FOR RESULTS W/O TRIAL:



APPLICATION TO STRIKE, R 3.68(2) Court can strike out pleadings (and potentially enter judgment) **if**:

(a) the Court has **no jurisdiction** (*Use an affidavit)*

(b) a **commencement document or pleading** discloses **no reasonable claim or reasonable defence to a claim** (***most common reason for Application to Strike being brought**, NO AFF!!!)*

- ★ One of the only Apps that **MUST** be done without evidence (**R 3.68(3)**) → NO AFFIDAVIT
- ★ **TEST: assuming the facts in the pleading are true, is there a valid reasonable claim or defence?**

- ➢ **Assume** that **facts in the Application/as plead are true UNLESS** they are **manifestly incapable of being proven** (***Knight v. Imperial Tobacco Canada Ltd***).
  - E.g., ***Standing v BC***: case about Sasquatches → Court is allowed to be sceptical in the case of sasquatches since they are manifestly incapable of being proven.
  - E.g., ***Joy v Pelletier:*** P claims that doctors, medical facilities & government agencies have conspired with US Government to "eliminate him, and interfere with his ability to live freely as a Martian" → "patently ridiculous" pleadings = motion to strike granted
- ➢ Be **generous** and **err on side of permitting novel but arguable claims to proceed** to trial because law changes (***Knight v. Imperial Tobacco Canada Ltd***)
- ➢ *If cross-application to amend a pleading is heard, it is heard BEFORE hearing the Application to Strike (note – App to Strike is most common when dealing with SRLs who make outrageous claims)*

(c) commencement doc/pleading is **frivolous, irrelevant or improper**;

(d) commencement doc/pleading constitutes an **abuse of process** (e.g., collateral attack) (*Use an Aff)*

- E.g., ***McLelland v McLelland:*** Court basically says "I'll know it when I see it" but provides a list of examples: Using court for illegitimate or collateral purpose (ie **collateral attack**); Court process is **unjustifiably oppressive to a party**; or, Use of court procedure would bring **administration of justice into disrepute**. In McLelland, bringing case in BC & AB was an abuse of process – struck in AB.

(e) an **irregularity** in a commencement document/pleading is **so prejudicial** to the claim **that it is sufficient to defeat the claim**.

3.68(4) OTHER GROUNDS FOR STRIKING PLEADINGS are punitive: Failure to serve affidavit of records; Failure to comply with ongoing obligation to disclose documents; or Failure to produce documents when ordered to do so by a court.

3.42 NOTE IN JUDGMENT/DEFAULT NOT AVAIL WHEN APP TO STRIKE IS PENDING: when D's application to strike is pending, P cannot apply for default judgment/noting in default. Respondent to an application to strike will often bring a cross-application to amend its pleadings which is usually heard first.

SUMMARY JUDGMENT VS APP TO STRIKE

Summary judgment often better choice b/c..	**BUT…**
Court has **broader scope to dispose of claim/defence** (e.g., can decide against a party with a weaker claim, can weigh evidence)	**BUT** summary judgment Apps **require evidence** before court (unlike motion to strike). SO if you're trying to plead App to Strike w/ Summary Judgment in the alternative, you'll have to bring an Affidavit but it can't be reviewed unless the App to Strike is unsuccessful.
Application to strike does not "finally determine" the issue, P can issue another statement of claim, whereas summary judgment does & new statement of claim barred by *res judicata* (***Ernst v. EnCana Corporation***).	**BUT** summary judgment takes longer.

SUMMARY JUDGMENT/DISMISSAL, R 7.3 Can the issues be fairly decided on a BOP on the record before the Court without oral evidence?

Summary judgment	Summary dismissal
when the Court grants judgment in favour of a party (usually P) after an application	when the Court dismisses a claim against a party (usually D) after their application

7.3(1) GROUNDS FOR SUMMARY JUDGMENT party may apply to Court for summary judgment for all or part of a claim if:

(a) **no defence** to a claim or part of it; (i.e., applying for summary judgment)
(b) **no merit** to a claim or part of it; (i.e., applying for summary dismissal) and/or
(c) **only real issue is** the **amount** to be **awarded**.

EVIDENCE FOR SUMMARY JUDGMENT/DISMISSAL: Apps made on **Aff** evidence (**R 7.3(2)**) & can be supplemented w/ **other** evidence (**R 6.11**)

> **AFF CONTENTS** (R Part 13, Division 4, Subdivision 2): **cannot** contain hearsay (**R 13.18(3)** → 1st party info REQUIRED b/c this is a summary disposition; style of cause; Day sworn and who swore it on front page under Style of Cause; Divided into numbered paragraphs, generally w/ one factual statement for each para (e.g., "I know…"); Sworn before a Commissioner for Oaths; **NOTE: There is a right to cross-examine** on an Affidavit even if it's not contentious.
>
> **OTHER EVIDENCE**: transcript of questioning, judicial notice, transcript of cross on affidavit, admissions, answers to written interrogatories, exhibits entered in discovery, excerpts from questioning → note that If application is based on admissions or documents, apply under R 7.2.

FORUM FOR SUMMARY JUDGMENT/DISMISSAL: AJs hear summary judgments as long as there are **no competing affidavits**. If there are competing affidavits, AJs can still hear them **as long as:** (1) one affidavit has been "destroyed by cross examination" or significantly undermined on cross-examination; (2) one party's assertions are self-serving & unsupported; or, (3) the issues can be fairly decided on a BOP on the record before the Court *(in the first two situations, there are really no competing affidavits BUT in the third situation, the Court has discretion re whether they can still hear it despite competing Affs. Situation 3 has come under scrutiny after Hryniak)*

OLD SUMMARY JUDGMENT TEST: Used to be whether Court had to consider competing evidence & whether Applicant could prove more than a BOP (i.e., an unrealistic chance of success).

POST-HRYNIAK SCHOOLS OF THOUGHT RE SUMMARY JUDGMENT TEST: (1) high burden for App (unassailable of very high likelihood of success); OR (2) record is sufficient.

SUMMARY JUDGMENT TEST *Weir Jones*, confirmed in ***Pomeroy***: applicant must **establish**:

1. **factual basis** for their application **on a BOP**, **AND**
2. that there is **no genuine issue for trial** (i.e., Can the issues be fairly decided on a BOP on the record before the Court without oral evidence?), assessed with following considerations:
    a. disputes about **material facts** (i.e., is there a conflict in Affs that remains after looking at cross examination & content of the assertions?)
    b. **credibility** issues (can those issues be resolved only by seeing witnesses?) – see ***Pomeroy***
    c. complex **factual issues** (e.g., battle of the experts; scientific or medical requiring a report),
    d. **complex legal issues** requiring a full trial record
    e. problems with **quality of evidence** (Is there something about the evidence that makes it difficult for Respondent to put their "best foot forward?) ***Weir Jones***

    i. Respondent must put "best foot forward", but sometimes all the evidence will be in the applicant's control. As a result, Respondent can't put best foot forward)
    ii. E.g., in case of medical negligence where a Dr brings App for Summary judgement, all of the info is in the hands of the dr & none of it is really in the hands of the patient.

- If factual basis + no genuine issue for trial, judge applies BOP standard to decide on summary judgment. This is the case where (***Hryniak***):
    a. 1) allows judge to make necessary findings of fact,
    b. 2) allows judge to apply the law to facts,
    c. 3) **proportionate**, more expeditious, less expensive way to achieve a just result *(3rd requirement has nothing to do w/ weighing or quality of evidence → it's about access to justice & suggests there's a sliding scale of natural justice & procedural fairness. If what you're fighting about it a small thing, then maybe less natural justice & procedural fairness should apply & if what you're fighting about is a big thing, then maybe more natural justice & proc fairness should apply)*

CONTRAST–WEIGHING EVIDENCE VS SUMMARY DETERMINATION *Pomeroy:* elusive distinction that matters b/c under s 96 *CA*, it's federal responsibility to adjudicate disputes (i.e., hear trial) BUT AJs are not s 96 judges! **Adjudication** = hearing conflicting evidence & choosing one over the other. **Summary judgment** = merely deciding that, based on evidence in front of you, summary decision can be made fairly w/o trial (i.e., if credibility/oral presentation is not important to the decision & it's a mere interpretation of facts, AJs can make the decision).

DEFENCE W/O FACTUAL & LEGAL MERIT = SUMMARY DISPOSITION POSSIBLE, *Anders*: Condo Corp bans insuite laundry & 2 owners refuse to remove in-suite laundry on basis of no receipt of ban (factually w/o merit) & laundry machines exempt under *Civil Enforcement Act* (legally w/o merit) → w/o legal & factual merit, judgment can be made completely on facts before an AJ. Trial not necessary.

CONTRACTUAL INTERPRETATION = SUMMARY DISPOSITION POSSIBLE, *Pyrrha Design*: P sues D for breach of settlement agreement. Court asked to review photos of the jewellery made by D and decide if it has prohibited characteristics set out in the agreement. So long as no one disputes it's jewellery, the court can just apply the contract and make a decision SO trial isn't necessary.

COURT HAS AUTHORITY TO GRANT SUMMARY DISMISSAL ON APP FOR SUMMARY JUDGMENT, *Pyrrha Design*, *Judicature Act* s 8, R 1.3(2) "A remedy may be granted by the Court whether or not it is claimed or sought in an action." Court can decline an applicant's SJ and **grant SD** in favour of the adverse party **even if they didn't make a cross app** (***Plum & Posey***)

UNSUCCESSFUL SUMMARY JUDGMENT/DISMISSAL

1. Application usually dismissed → Go to trial, costs to successful party
2. Cross App → P brings summary judgement, D brings summary dismissal – Court rejects summary judgement, but grants summary dismissal
    a. **BUT** Court can decline an applicant's SJ and **grant SD** in favour of the adverse party **even if they didn't make a cross app** (***Plum & Posey***)

SUMMARY TRIAL R 7.5–7.11: Trial on basis of pre-determined evidence (like a Summary Judgment App EXCEPT it's **in front of a KB Judge** & there's more flexibility on the type of evidence → in a summary trial there *may* be oral evidence)

SUMMARY TRIAL TEST:

1. Is this matter **suitable for summary trial**?

- Factors to determine whether matter is suitable (***Duff***):
  - ➢ Amounts involved (proportionality)
  - ➢ Complexity of the matter
  - ➢ Urgency of the matter
  - ➢ Any prejudice likely to arise by reason of delay of the decision
  - ➢ Cost of taking the case forward to a conventional trial in relation to the amount involved (proportionality)
  - ➢ The course of the proceedings (how have the proceedings been conducted to date?)
  - ➢ Whether all witnesses or only some were (will be) cross examined in court (cross examination suggests against a summary trial)
  - ➢ Whether there is a **real possibility** that the defendant can bolster its evidence **by discovery** of the plaintiff's documents and witnesses
  - ➢ Whether the resolution will depend on findings of credibility

2. Can the court decide disputed questions of fact **on affidavits or by any of the other proceedings** authorized by the rules for Summary Trial?; and (***Imperial Oil)***
3. Would it be **unjust to decide the issues in such a way**? (***Imperial Oil)***
4. **Apply BOP to dispose of the claim *or* proceed to full trial**:
   - If **suitable** for Summary Trial, court applies civil burden of proof to dispose of claim → on a BOP has the [P/D] established its [claim/defence]?
   - If **not suitable** for Summary Trial, the matter proceeds to full trial.

PROCESS

1. Party applies to have a summary trial:
   a. Must provide at least 1 month's notice
   b. Use **Form 36**
      i. Set out what will be determined at summary trial (e.g., the whole claim, or part of it)
      ii. Set out why this is an appropriate matter to be determined at summary trial
   c. Append affidavit & other evidence to be relied on FOR SUMMARY TRIAL (so court can assess propriety)
2. Adverse party can either:
   a. **Object** to matter proceeding by way of summary trial, **R 7.8**, or
   b. Respond by **serving evidence that adverse party will rely on** at summary trial (at least 10D before scheduled hearing), **R 7.6**

WHEN JUDGE DECIDES IF MATTER CAN BE HEARD AS SUMMARY TRIAL

- They can decide **before** summary trial, e.g.,
  - Application for summary trial
  - Respondent objects
  - Hearing re: whether summary trial should be used (**R 7.8**):
    - Is issue suitable for summary trial
    - Will summary trial resolve matter
- They can decide **after** summary trial
  - Application for summary trial
  - Respondent objects, court hearing, objection dismissed
  - Summary trial hearing

    - Court can still decide that summary trial not appropriate, but "perhaps there is a higher onus", see ***Manson Insulation***, 2013 ABQB 702 at para 27
        - "It would be unjust to decide the issues on the basis of the summary trial." (**R 7.9**)

SUMMARY TRIAL NOT MEANT TO ENCOURAGE LIT IN SLICES (***Imperial Oil***)

SUMMARY JUDGMENT VS SUMMARY TRIAL

- Conceptually different:
    - Summary Judgment – is a trial necessary?
    - Summary Trial – a version of a trial
- Ontario rule the SCC considered in *Hryniak* was a hybrid summary judgment/summary trial rule and this has resulted in confusion in other jurisdictions where these are treated as separate procedures.
    - Summary trial = "paper trial" on the civil standard *(this is a simplification, it's really a pre-determined evidence trial)*
- Practically – summary judgment applications more common than summary trials.

TRIAL OF A PARTICULAR QUESTION, R 7.1 A party can apply to court for an **order that an issue or question be dealt with first**, must show (***NEP v. MEC***):

1. Potential to **dispose of entire claim**, or
2. Potential to **shorten trial**; or
3. Potential to **save expense**; and
4. **No significant prejudice** to other party to have a fair hearing.
   Once the issue is decided it is *res judicata* & therefore creates an issue estoppel (*Bailey v. Guaranty Trust Co***).

Parties can agree to put a question of law to the Court.

Trial of a Particular Question is best for "simple, readily extricable preliminary issue" (e.g., limitations defence which can get rid of the whole claim, issues on standing which can get rid of the whole claim)

S 96 judges: superior courts are federally appointed, so anything that falls within federal jurisdiction

Lawyer of Record (Chapter 4)

Lawyer of record (R 2.24) lawyer whose name appears on the commencement doc, pleading, affidavit, or other doc filed or served in an action.

EFFECT:

- **SERVICE** on lawyer of record = valid service until representation is termination (**R 2.30, R 11.17**)
- **DUTIES** (1) conduct litigation in a manner that further purpose & intention of ROC (**R 2.25**); (2) Continue to act as lawyer of record while recorded as such.
- **SELF REP** not allowed if CL has Lawyer of Record UNLESS Court permits it.
- **ENDS WHEN**: (1) served with notice of change of rep OR (2) notice of withdrawal of lawyer of record

R 2.28 PARTY FIRES LAWYER OF RECORD: Party must serve notice of change on other parties & formal lawyer. They can then hire new lawyers ***or*** become SRL.

R 2.29 LAWYER WITHDRAWAL: One remains a lawyer of record **UNTIL** the lawyer serves a **notice of change of representation OR a notice of withdrawal of lawyer of record** (must provide the last known address of the client and file affidavit saying client has been served).

R 3.30 Court permission required after a trial is scheduled
Fitzpatrick 2020 ABCA: withdrawal allowed pending appeal
Cengic 2020 ONSC 986 withdrawal NOT allowed pending trial

R 2.32 AUTOMATIC TERMINATION death, disbarment, suspension, etc.

R 2.27 LIMITED RETAINER If acting on limited retainer basis, **must** inform court (also wise to inform adverse parties)

Costs (Part 10 & Schedule C)

COSTS PURPOSES:

1. **Indemnification**
2. **Judicial Economy**
3. **Promote reasonable settlements**
4. **Penalize misconduct/non-compliance**
5. **Cost of litigation**

TERMS:
Each party shall bear its own costs: neither party gets costs of application

Costs in the cause: party who is entitled to costs at end of proceeding, entitled to cost of application

[Named Party] in the cause: if named party receives costs at end of proceeding, he/she is entitled to the costs of the application

Costs to [named party] in any event of the cause: named party gets costs of interlocutory steps irrespective of outcome of case, but not until case concludes

Costs to [named party] payable forthwith: named party gets cost of step right away – default costs

Costs reserved to the trial judge: TJ decides who, if anyone, gets costs of interlocutory step

Silence = costs to the winner payable forthwith in any event of the cause **R 10.29** (default)

R 10.29 GENERAL RULE losing party pays winning party's costs (see also ***Pillar Resources***)

R 10.31 WIDE DISCRETION: Courts have **wide discretion** re awarding costs.
Pillar Resources: In absence of agreement to the contrary, KB has discretion to award costs.

Schedule C = starting point, but there are policies that impact the starting point for costs, including: indemnification, judicial econ, promote reasonable settlement, penalize misconduct/non-compliance, cost of litigation.

NO TRIAL = SCHEDULE C: If you don't go to trial, costs from Schedule C are used. If parties want anything else/more, you will have to apply to get a Court order (this takes time & money so most ppl don't bother).

R 10.50 AGAINST LAWYERS can be awarded against lawyers who engage in "serious misconduct"

R 10.47 LIT REPS Lit Reps for P are personally liable for costs

INDEMNIFICATION COSTS cover: legal fees (in part, specifically party-party costs), disbursements (e.g., searches, filing fees, service costs, medical charts, Freedom of Information requests), other costs (e.g., in-house printing, file open fees, laser printing, etc.), taxes (e.g., GST on disbursements & other costs). When we talk about indemnity below we are talking only about fees. For the most part, you get all of your disbursements, other costs, & taxes. It's really the legal fees that are up for discussion.

THREE DEGREES OF INDEMNIFICATION FOR LEGAL FEES:

1. **Full indemnity**: you get everything
    a. **Solicitor & their/his own CL costs**: legal fees still get paid even if unreasonable. Very rare unless in contract.
        - ***Tiger Calcium***: very rare. If awarded, usually by contract such as foreclosure on mortgage)
        - ***Pillar Resources***: misconduct can result in full indemnity.
2. **Substantial indemnity**: you get most of what you are deserved
    a. **Solicitor-CL costs**: person gets their legal fees paid, but only if they're reasonable.
        - ***Tiger Calcium****:* possible if there's reprehensible, scandalous, or outrageous conduct by a party during proceedings OR if someone alleges fraud against someone else but can't prove it.
        - In ***Tiger Calcium***, the conduct of former counsel was egregious so as to merit solicitor-CL costs BUT not so egregious as to award costs against lawyer personally.
        - ***Pillar Resources***: misconduct can result in substantial indemnity.
3. **Partial indemnity**: you get some of what you are owed
    a. **Party-party costs**/Schedule C costs
    b. **Lump sum costs**
    c. ***Pillar Resources***: Successfully part normally only gets partial indemnity for fees (except in exceptional circumstances, i.e., if it says otherwise in the contract)

DISBURSEMENTS: Always review disbursements to make sure they aren't actually fees or damages, they must be disbursements (***Balogun***) + cannot claim disbursement not put into evidence (in ***Balogun***, surveillance fees were not allowed b/c they were not put into evidence at trial)

SECOND COUNSEL FEES: Second counsel fees are sometimes awarded, but you have to prove it was so complex it required second counsel; not awarded in simple action (***Balogun*** → no second counsel fees were awarded b/c the case was a "simple damages case")

COST CONSIDERATIONS (R 10.33; *McAllister v Calgary*):

- result (degree of success of each party)
- amount claimed/recovered
- Importance of issues
- Complexity of action
- Apportionment of liability (if 50/50 apportionment, Court may not award costs)
- Conduct of a party (shorten or delayed action)
- Refusals to admit reasonable things
- Starting multiple actions that should have been one action;
- Contravention, non-compliance with rules;
- Misconduct by any one party

- Any other matter related to the question of reasonable and proper costs

McAllister: party & party costs should generally represent a **partial indemnification of the successful party** at a level of about **40-50% of actual costs. Schedule C is based on this ideal** (so AJ Summers said if you want more than Schedule C, you should go to Court)

Schedule C (Fees) Cost Calculation

Starting point = Schedule C

- Schedule C is **only for fees**. After you finish the "fees"/Schedule C, then you are DONE with Schedule C.
- **Bill of Costs** is literally just following Schedule C (**treat it as a step-by-step checklist – was there commencement docs? Trial? ½ day of questioning?**)
    - Bill of Costs = Calculation of Party-Party Costs by the party entitled to costs. Usually discussed and agreed to
    - If you can't agree on costs, you can go to **Assessment (i.e., formal Bill of Costs) & Review Proceedings**

Item	I ≤ $75K	II > $75K, ≤ $200K	III > $200K, ≤ $675K	IV >$675K, ≤$2M	V > $2M
1(1) Commencement documents (i.e., pleadings incl drafting, issuing, filing, serving, reviewing & amending EXCEPT pursuant to R 605(7) & desk divorces)	$1350	$2025	$2700	$3375	$4725
6(1) Uncontested applications *(Default judgement; Uncontested trial)*	$400	$540	$800	$945	$1080
6(2) Applications without notice to another party	$135	$135	$135	$135	$135
(1) Contested Application	$675	$1000	$1350	$1685	$2025

- If action is complete → look at amount awarded and find it within columns I-V
- If action is not complete → look at amount P claimed and apply it to I-V
- **R 10.42** If an action could have started in ABPC but it was started in KB (i.e., if the award is <$50K AND the jurisdiction of the court is sufficient that you could have brought it in ABPC) → costs = 75% of column I

ASSESSMENT used to determine how much to claim from losing party

- Form 44 "Bill of Costs"
- **R 10.35** = Bill of Costs is the starting point
- Sets out the costs claimed by the winning party for: lawyers fees (Starting point = partial indemnity under **Schedule C** BUT If full indemnity, invoices should be attached); disbursements (attach receipts); other charges (e.g., photocopies, postage, fax); GST

- Bring Form 44 to Assessment Officer for a decision on the Bill of Costs.
- Assessment appointment not necessary in default proceedings, **R 10.36(1)** OR if approved by party adverse in interest, **R 10.36(3)**
- **R 10.44 Appeal available** to KB Justice if you disagree with the assessment within 1 month

REVIEW available to lawyers who would like to collect an unpaid bill OR CLs who are unhappy with lawyer's Bill of Costs and would like it reduce.

- **TIME LIMIT, R 10.10** one year time limit to convert your bill to a judgment (previously 6 mos)
- **PROCESS:**
  - File Form 22 & pay the fee
  - File retainer agreement
  - File Invoices subject to dispute
  - Serve the above 3 documents on the other party at least 10 days before appointment for review (requires same type of service as a commencement document, R 10.13(5))
  - If lawyer is served & fails to respond, lawyer forfeits right to payment, R 10.14
- **R 10.20** Review officer's decision **can be entered as judgment** of court on application
- **R 10.26 Appeal available** to Court of QB Justice within 1 month,
- **R 10.4** Lawyer who applies for review can also apply to "charge" client's property **IF** lawyer's services helped to recover or preserve the property (e.g., if you helped someone w/ a foreclosure & won, your bill can be charged to CL's property)
- **REVIEW OFFICER CONSIDERATIONS, R 10.19**
  - (1) Retainer Agreement
  - (2) **R 10.2** Factors:
    - the nature, importance and urgency of the matter,
    - the client's circumstances,
    - the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,
    - the manner in which the services are performed,
    - the skill, work and responsibility involved, and
    - any other factor that is appropriate to consider in the circumstances.
  - **EXCEPTION**: special rules re: contingency fee agreements, R 10.7, 10.8

Review & Assessment Officers (i.e., senior lawyers employed by the Provincial Government) conduct above reviews & assessments.

SECURITY FOR COSTS

ARISES WHEN: Party (usually D) worried that adverse party (usually P) is judgment proof, because: (1) Adverse party has no exigible assets; (2) Adverse party has no exigible assets in Alberta; (3) Possibility of being subject to a costs award ≠ incentive to behave reasonably if a litigant knows (s)he can never be forced to pay the costs (NOT – security for costs can be sought by a P against a D though Court's are more reticent to grant these orders)

FUNCTION: a party's ability to continue litigation is **contingent on party providing security** for costs. If party providing security ultimately **successful** → gets security back. If party providing security ultimately **unsuccessful** → other side's costs can be paid from security

FAILURE TO PROVIDE SECURITY: If party **fails to provide security** for costs by date specified, **claim/defence can be dismissed/struck**

TEST, R 4.22–4.23 Court asks if it's **just & reasonable to order security for costs** having regard for (**exception** – higher threshold test for *Business Corporations Act*)

(a) **whether** it is likely the **applicant** for the order **will be able to enforce** an order or judgment against assets in Alberta;
(b) **ability** of respondent **to pay** the costs award;
(c) **merits of the action** in which the App is filed;
(d) whether an **order to give security** for payment of a costs award **would unduly prejudice the respondent's ability to continue** the action;
- Conflicts w/ A2J → sometimes you bring an action but you don't have any money (e.g., you were in an accident & were injured)

(e) any other matter the Court considers appropriate.

IMPOSING AS A CONDITION: Court may also **impose security for costs** as **condition** (e.g., when a party is repeatedly not complying with timelines, party narrowly avoids summary judgment application, party applies to set aside default judgment, etc.)

SECURITY FOR COSTS UNDER *BUSINESS CORPORATIONS ACT*, s 254

APPLICABLE WHEN: (1) Application brought by D against (2) a P corporation

TEST:**"[plaintiff] will be unable to pay the costs of a successful defendant"** → focuses only on inability of P to pay costs of successful defendant

Amex Electrical: BCA **test is a higher threshold** than under R 4.22 (e.g., harder for defendant to succeed on security for costs application)

Cannot get security for costs in some situations, see e.g., Business Corporations Act (Alberta), s 191, 200, 231, 243

SECURITY FOR COSTS IN LEGISLATION: Public Trustee Act, SA 2004, c P-44.1, s 30(2); Companies Act, RSA 2000, c C-21, s 101(1)(b); Consumer Protection Act, RSA 2000, c C-26.3, s 17(4); Builders Lien Act, RSA 2000 c B-7, s 48(1)

R 14.67 SECURITY FOR COSTS AVAILABLE ON APPEAL

COSTS & A2J

- **SRLs can get costs "in appropriate circumstances"**, **R 10.31(5)** and ***Bologun v. Pander***
- **PRO BONO** lawyers can get costs (**1465778 Ontario Inc. v. 1122077 Ontario Ltd**)
- **ADVANCED COSTS** possible if **action has some sort of clear public good** (advanced costs = an order requiring Party A to pay litigation costs of party B as the action proceeds). Arises in following situations:
  - Litigation re: division of matrimonial property, where 1 party has title to all the assets
  - Statutory basis for advanced costs in circumstances:
    - Oppression Actions under the *Business Corporations Act*, s 243(4)
    - Some regulatory Proceedings, e.g., under the Environmental Appeal Board Regulation, 19(3)
  - Rowbotham Order (a Charter remedy being sought can sometimes result in advanced cost award)
  - **Public interest litigation**, ***BC Minister of Forests v Okanagan Indian Band***).

    - Rule: **ONLY applies where court would be participating in an injustice against the litigant personally or the public generally by declining to order advanced costs** (***BC Minister v Okanagan; Anderson***)
    - ***Anderson v Alberta***: impecuniosity is the guiding principle (if prioritization of **pressing needs** has left a body unable to fund public interest litigation, advanced costs can be awarded; merely funding "reasonable" priorities over public interest litigation is not sufficient to grant advanced costs).
- **PROTECTIVE COSTS ORDER** limits costs liability of litigant if litigant ends up being unsuccessful (***Farlow v. Hospital for Sick Children***)

Settlements

LAWYER'S ETHICAL OBLIGATIONS under *Code of Conduct*: (1) encourage CL to settle on a reasonable basis (R 3.2-10); (2) inform CL of settlement proposal & explain the proposal properly (unless they said something like "reject all offers below $__"... but still be cautious b/c it's not really allowed) (R 3.2-1); (3) get instructions about making offers & accepting/rejecting offers (R 3.2-4).

COURT APPROVAL FOR SETTLEMENT REQUIRED IF: (1) one party is repped by a LR (R 2.19); (2) if litigation is a class action (*Class Proceedings Act*, s 35); (3) if required by statute (i.e., *Minors' Property Act*, SA 2004, c.M-18.1).

BASIC PREMISE OF SETTLEMENT OFFERS: if Party A makes a reasonable offer & Party B declines it, Party A may recover a **higher costs award if Party B fails to beat the offer at trial.**

TWO TYPES OF OFFERS: Formal (**R 4.24–4.30**) and Informal/Hybrid (i.e., ***Calderbank*** offers).

FORMAL OFFERS, **R 4.24–4.30**

FORM: **Form 22** (Sample Pleadings at 23–25) → Set out WHO is making offer, on WHOM it is being made, the TERMS of the offer & the METHOD for acceptance. THEN Serve on other side (DO NOT FILE – court doesn't know about offers until after trial decision)

SERVICE: at least 10 days before Application or trial (**R 4.24(1)**)

LENGTH OF OFFER (**lapse, R 4.24(3)**): Offer stays open for the shorter of:

1. Until application is heard/trial starts; OR
2. 2 months after service

➢ ALTERNATELY → A longer period specified in the offer (**R 4.24(3)**).

WITHDRAWAL OF OFFER (**revocation**, **R 4.24(4)**): Court permission required to withdraw offer earlier than the default lengths above.

ACCEPTING, R 4.25: (1) file the offer & its acceptance, then (2) serve notice on party who made order that offer has been accepted & terms of any judgment or order in the offering have been agreed to, then (3) apply to court for Order consistent with the offer.

COST CONSEQUENCES, **R 4.29**: **Default rule is that winner gets costs**, but this is changed by formal offers:

- **R 4.29(1) if P makes an offer**, D doesn't accept it, & then judgment awards D with less money than P's offer, P is entitled to **double the costs** for all steps after the offer was served.

- **R 4.29(2) if D makes an offer**, P doesn't accept it, & judgment is less than D's offer, **D is entitled to (normal) costs** for all other steps after the offer was served.
- **R 4.29(3) If D makes an offer**, P doesn't accept, then **P's claim is dismissed**, D gets **double costs** for all steps after offer was served.
- **R 4.29(4) Courts will not award costs in the following circs**:
    - if **indemnity costs are awarded under R 10.31(1)(b)** → Indemnity costs are usually only awarded if it is in the contract that is the subject of the action or if there has been misconduct by one party during the course of the action (e.g., they allege fraud).
        - In ***Pillar***, Prime West's misconduct included an attempt to introduce additional evidence in written argument at the conclusion of the trial, unproven allegations of fraud – unproven alleg of fraud can always give rise to indemnity costs.
    - If it's **not a genuine offer**
        - Genuine offer is one that is reasonable given relative strength of parties' positions ⇒ in ***Union Square***, Ds offered to settle on basis that P discontinues action & all parties bear their own costs = genuine offer. P sued after the expiration of limitation period

APPEALS, **R 14.59**. Must make offer specific if you wish to appeal (***Caproco Corrosion***)

INFORMAL OFFERS/HYBRID OR CALDERBANK OFFERS: Used when formal offers are not available (e.g., closer to trial).

FORM: When submitting offer, notify the other side that the offer is "without prejudice", except as to costs. UNLESS using Calderbank, then just say it's a "Calderbank" Offer

COST CONSEQUENCES: **Court has discretion to award higher costs where reasonable informal offer was made & refused** (***Calderbank***). Court will consider:

- Fact of offer
- Comparison of offer made vs. final resolution of claim
- Timing of offer
- Recipient's ability to assess offer

SETTLEMENT PRIVILEGE

R 4.27 Formal offers are (a) **made without prejudice** and (b) **not an admission** of anything (unless otherwise agreed to by the parties)

R 4.28 formal offers must be kept confidential and not disclosed to the court until (a) it is accepted or (b) the remedy for the claim has been decided. In other words, while settlement discussions are generally privileged, they may be disclosed when relevant to determining costs (***Bellatrix Exploration***).

R 4.33/*Whirlpool Canada* formal offers may be provided to the Court to show that settlement conditions are a "significant advance for the purposes of R 4.33" (i.e., to avoid long delay)

Trial

SCHEDULING BY CONSENT, R 8.4

FORM Form 37 (**R 8.4(1)**) includes:

1. Mechanics, **R 8.4(2)**: how long, # witnesses, # experts, jury?

2. Certifications, **R 8.4(3)**: pre-trial steps complete, or will be completed in timely way, including:
    a. Questioning & Undertakings
    b. Expert report disclosure & Medical Exams
    c. Pre-trial applications
    d. Alternative dispute resolution complied with or waived

CONFIRMATION, R 8.7: at least one party **must confirm** trial date **3 months before** trial

TRIAL SCHEDULING ISSUES:

1. One party refuses to certify the matter as ready for trial → Apply to have Court schedule the matter (**R 8.5**)
2. One party certifies the matter as ready for trial under Form 37 & then changes their mind → Doesn't matter. Completion of Form 37 (event absent filing) is an undertaking that, absent mutual error or unilateral mistake in completing the form (Court App required), P & D will take **no further pre-trial steps** (***Benc v Parker*** → D changed mind but couldn't get order compelling P to undergo medical exam b/c D had signed Form 37).

JURY TRIAL, R 8.1–8.2: DEFAULT = matter is heard by a trial judge alone (**R 8.1**). **BUT** you can send a request to Chief Justice (or delegate) for jury trial **before** trial date is set (**R 8.2**)

CIRCUMSTANCES WHERE JURY TRIALS ARE AVAILABLE, *Jury Act*, s 17:

(a) action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
(b) action founded on any tort or contract in which the amount claimed > $75K, or
(c) action for the recovery of property with value >$75K.

DISCLOSURE OF WITNESSES FOR TRIAL:

- Provide # of witnesses expected in Form 37, **R 8.4**
- Update # of witnesses when confirming trial date 3 months before, **R 8.7**
- Disclose names of witnesses, **R 8.9**
    - Plaintiff, 1 month before trial
    - Other parties, 20 days before trial

COMPELLING ATTENDANCE OF WITNESSES:

- In Alberta → At least 20 D before trial, serve Form 40 + conduct allowance, R 8.8
    - Court can order peace officers to compel compliance, R 8.9
- Outside Alberta, but in Canada → Apply to Court under *Interprovincial Subpoena Act*

Judgments & Orders

TECHNICAL REQUIREMENTS R 9.1 Name of judge or Master who made order; Date & location pronounced; Date entered.

GENERAL RULE R 9.2 SUCCESSFUL PARTY PREPARES.

TIME TO DRAFT: 10 days to prepare draft & circulate to other parties

RESPONSE FROM OTHER PARTIES within 10 days or order can be entered. Responses:

- Approve draft

- Object to draft & provide grounds
    - VALID GROUND = does not represent what was ordered
    - INVALID GROUND = disagree with court
- Can request that court **waive requirement to seek party's approval** of draft, **R 9.4(2)(c)**

SERVICE: Submit for signing, file at Court house (w/i 3 months), serve on other parties, R 9.4, 9.5, 9.8

JUDGMENT LENGTH: lasts for 10 years for judgments re payment of money (***Limitations Act,* s 11**), but can be renewed (**R 9.21**)

FUNCTUS OFFICIO*, *Doucet-Boudreau when a judge has entered a judgment they've exhausted their authority on the matter. Creates finality of judgment from courts/prevents variations so that court doesn't continually hear applications to vary its decisions (which would lead to a court assuming the function of an appellate court and would deny litigants a stable base from which to launch an appeal).

VARYING JUDGMENTS:
R 9.13 Court can **VARY** or **REOPEN** order to hear new evidence **UNTIL ORDER IS ENTERED** (i.e., filed)

R 9.12–9.14 Once entered, Court can **vary order to**: (1) Correct mistakes arising from "accident, slip or omission" **R 9.12**; (2) Ensure party receives remedy it's entitled to "in connection with the judgment" **R 9.14**

R 9.15(1) Once Order is made, Court can **vary** order

1. **Without notice** to an affected party, **OR**
2. **In absence of affected party** due to mistake/insufficient notice

R 9.15(4) Broader ability to set aside, vary, or discharge interlocutory orders

Summary Trials, Justice Jerke

ABKB 12 years, original justice who heard case from Lethbridge about man who sought alternative care for sick son.

Summary Trials in the Age of a Culture Shift

- Culture shift wrt A2J discussions: Pressure from scarce resources, cost and time of court resources, increase in SRLs - these have contributed to the open discussion about access to justice.
- National Access to Justice Committee Report: "The problem is not restricted to the courts. Access to justice **does not mean unlimited access to judges or even increased access to judges - it is a system wide problem**…"

Feedback on trials:

- Trials = myth & times are changing
- Old summary judgment presumption → "send it to a trial that will never happen"
    - Replace it with a new **summary judgment presumption**: "**what can I do to resolve this litigation?**" **attitude change required*

Culture shift (Hryniak):

- "Without public adjudication of cases, evolution of common law is stunted. Increasingly, recognition that culture shift is required in order to create an environment promoting timely and affordable access to the justice system."
    - We need to **simplify pre-trial procedures**
    - Move emphasis away from the conventional trial and toward **proportional procedures tailored to the needs of the particular case**.
    - Balance:
        - Procedure
        - A2J
    - **New models of adjudication can be fair and just → e.g., summary trials*

Summary Trials are NOT Summary Judgments (despite widespread lack of clarity; no continuum, totally distinct)

Summary judgment: way of resolving disputes without a trial.

- Available BEFORE or at any time DURING PRETRIAL PROCESS.
- **IF unsuccessful** →the trial is needed :(
- If successful → creates *res judicata*

Summary Trial: type of **streamlined** or **expediated** trial (affidavits common, expert testimony not called, business records often brought forward w/o proof).

- Result of Summary Trial = final adjudication & *res judicata* **regardless** of outcome

Summary Trial vs Standard Trial (***Weir v Jones***):

1. Standard trials = presumptively viva voce
2. Summary trials = streamlined evidentiary process (affidavits common, witnesses not always called, business records/other docs introduced w/o proof)

When is Summary Trial Suitable?
Starts with rules 7.5 and 7.8

Application for judgment by way of summary trial

7.5(1) A party may apply to a judge for judgment by way of a summary trial on an issue, a question, or generally.
(2) The application must
(a) be in **Form 36**,
(b) **specify the issue or question** to be determined, or that the claim as a whole is to be determined,
(c) include **reasons why the matter is suitable** for determination by way of summary trial,
(d) be accompanied with an **affidavit** or any **other evidence** to be relied on, and
(e) **specify a date for the hearing of the summary trial** scheduled by the court clerk, which must be **one month or longer after service of notice of the application on the respondent**.
(3) The applicant may NOT file anything else for the purposes of the application except
(a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or
(b) with the judge's permission.

Objection to application for judgment by way of summary trial

7.8(1) The respondent to an application for judgment by way of a summary trial may object to the application at or **before the hearing of the application** on either or both of the following grounds:
(a) the issue or question raised in the claim, or the claim generally, is not suitable for a summary trial;

(b) a summary trial will not facilitate resolution of the claim or any part of it.

(2) Notice of the objection and anything on which the objector intends to rely **must be filed and served on the applicant 5 days or more before the objection is scheduled to be heard**.

(3) The judge **must dismiss the objection if**, in the judge's opinion,
(a) the **issue or question** raised in the claim, or the claim generally, **is suitable for a summary trial**, and
(b) the summary trial **will facilitate resolution of the claim or a part of it**.

Summary Trial Appropriateness Test: *O'Neil v Yaskowich* (Shelley J)

1) Can court **decide disputed questions of fact in affidavit or by other proceedings** allowed for in rules?
2) Would it be **unjust** to decide issues in this way? Factors:
    - $ Amount involved
    - Complexity of matter
    - Urgency
    - Prejudice likely to arise by reason of delay
    - Cost of taking case forward to conventional trial
    - Course of proceedings
    - Whether all or some witnesses will be examined in court
    - Whether there's a real possibility D can bolster their case based on questioning, discovery, and witnesses
    - Wether resolution depends on findings of credibility
        - LIMIT: credibiltiy can weigh against proceeding by summary trial BUT viva voce isn't always necessary. STs can occur where there's conflicting evidence as long as admissible evidence makes the necessary findings of fact to come to a conclusion.

***O'Neil* strongly encouraged use of summary trials.** Southern AB did so w/ family & civil disputes to expedite/save $ using the following tools:

- Conversations with lawyers
- 4.10 Case conferences
- 4.13 Case management hearings
- New ways for families review (pilot project in Med Hat)
- Private chambers
- Regular chambers
- Oral and written decisions
- Town hall meetings held with the bar

Southern AB Results were encouraging (set nearly same # of summary and full trials & heard same number of each). Bar & litigants bought into it.

- Began to start looking at summary trials as the default – only full trials where summary are not available. (Hirschian approach).
- **Reframing of the question** from why is a summary trial appropriate to *why couldn't it be appropriate?*

Summary Trial Problems:

1. **Current Process to get summary trial sucks**
2. **Process for hearing sucks**
3. **Judicial Schedule Sucks**

Current Process → suggested process

Current 2-step process is too complex, uncertain, unclear, & risky. 1. R 7.5 (Application and possible objections) 2. R 7.8 (hearing of objections that results in possible trial or possible dismissal)	**Jerke J's Proposed Process:** 1. Determine suitability for summary trial on procedural grounds & substantive grounds → **judge will focus on issues & types of evidence needed to establish the facts necessary to adjudicate the matter** a. Make App w/ Aff, friend oppose w/ Aff, come & argue, Judge decides if it's suitable on procedural grounds (will it work?), will the issues work? Is it fair or just? Is it going to be possible to get the right evidence to make the key determinations of fact? 2. Summary trial (actually happens) *Form 36 = sidestepped! A2J+*

Process for the Hearing: Going to Summary Trial

Hearing Management order required BEFORE summary trial:

- Judges go through all of the questions when ordering hearing management before summary trial:
  - Why is a summary trial **suitable** to resolve this dispute?
  - How **long** will the trial take?
  - What are the **specific issues** to be decided?
  - What **steps do the litigants need to take** to be ready for the trial ?
  - What **evidence** will be permitted R6.11
  - What **limits and requirements** are on **Affs**?
  - Will **oral evidence** be allowed?
    - If so, what are limits on direct and cross-examination?
  - When are **briefs** required?
    - **Limits** are on the briefs and arguments?
  - Reinforcement of **finality** of Summary Trial

Judicial Scheduling

- Summary trials are shorter
- But the following is required:
  - Time to read
  - Time to hear
  - Time to decide

Key to Success:

- Articulate the issues: separate legal & non-legal
  - Non-legal issues → send to supports & ADRs. Judges shouldn't decide financial/social/relationship issues
  - BE SPECIFIC about questions that need to be answered → to determine if Summary Trial is appropriate it's KEY to know what Q's need to be answered so we can determine what evidence is required so we can know if it can be heard by summary trial
- Reinforce legal obligations of the parties
- Be creative

    - Out-of-court cross-examinations?
    - Read-ins from discovery questioning?
    - Limiting time in cross-examination to 30 minutes?
    - Limiting amount of direct evidence (e.g., 5, 10, etc. mins)
    - Expert “hot-tubbing” (creating panel of experts to discuss the issues concurrently)
    - Alternately, could use procedural order/ hearing management order as a mock up for having material placed into a binding JDR.

Why would you do a summary trial instead of judgment? (Christine’s question - could be on the exam)

- High chance of getting punted on a summary judgment → despite Hryniak & Shelley J’s new flexible test, still hard to meet the bar.
- Not going to have the same amount of evidence.
- Higher probability judge hearing it won’t decide it because they need to assess credibility or because they think it's too complex for adjudication by summary judgment w/o a fuller work-up.
- A summary trial is a much fuller process so runs less of a risk.
    - Summary judgment app = $5K… then it gets denied :(

Is there some benefit to doing this because it can go to a KB judge instead of an applications judge?

- If you apply for summary judgment and you are denied and you appeal at KB, that’s pretty much double the cost for the client.
- Summary trial is probably faster than summary judgment getting appealed and re-appealed (flip flop! Waste 2 years!!!)
- Biggest considerations for CL: cost & efficiency

To what extent does value of the claim affect your decision?

- Implication is higher value of claim should militate towards a full trial. He is not convinced this is true - why would a relatively simple $3M matter be more important than a complex $30K matter?
- Remember - these factors are not determinative and they need to fit in with the context of the rest of the case.

Are there types of cases more suitable for summary judgment than summary trial?

- Not really - maybe limitations act stuff or things that are narrow and mostly a question of law.

Is the two-step process being utilized across Alberta?

- The process is not court-wide and is not grounded in the rules. But the tides seem to be changing.

Provincial Court, Judge Corbett

Statutory Court - not a court of inherent jurisdiction. Cannot hear anything from an Act that defines court as ABKB. (Condo Prop Act, Builder's Lien Act, etc.)
Increase in limits to $100,000. This will allow more litigation in PC, which will move everything more quickly. Trials can be set in 4 months (one day) or 6-7 months (multi-day).

Rules + Written Regulations

- Back of volume II of the ARC there are civil procedure regs for PC.
- S. 8 of the Provincial Court Act allows the Judge to apply the ARC when needed (discretionary)
- Relevant Regulations: 176-2018; 179-2018

Pleadings: Not as strict as ABKB because there are so many **SRLs** in PC. Won't consider striking improper pleadings unless they are vexatious. Will often call SRLs to go through their pleadings and try to figure out what their cause of action is.

Service:

- Part 12 s. 40-50 of the regulation. Civil claims need to be **served within 1 year**. Same as KB. If you screw up service you are out of luck unless still within limitations period.
- No jurisdiction over civil enforcement, that needs to come from ABKB. All PC can do is give judgments.
- Civil claims = SOC in PC
- Dispute Notes = SOD in PC
- Substitutional service - same as ABKB. Need to show that you've taken some steps to properly serve the person.
    - Corbett J likes sub service from Facebook or an app but she needs to know that you got a response from that person.
- Desktop applications are very quick in PC - returned in 2-3 days.

Amending Pleadings

- You can amend at any time before the matter is scheduled for PTC, mediation, binding ADR, or trial.
- Can amend without leave and without a court order.
- Beware that s. 13 confines you to your pleadings so if you make a claim for a certain amount and then the proper claim is more or less, it cannot be granted if your pleadings were not amended to reflect the change.
- S. 24 of the regs - applications to amend.
- 7 day return periods on applications.

Questioning and document disclosure

- Nothing in procedural regs that says you can do questionings - but you can.
- Has folks exchange "will say" statements to narrow issues so 1,000,000 witnesses don't need to be called.

Evidentiary Rules: In the PCA, s. 36 says that it is not bound by the laws of evidence and any oral or written evidence can be admitted (discretionary). "Whether admissible in a court of law or not"

PTCs

- P Files civil claim, D file dispute note.
- Mediation services picks the file up and screens it. If they think it is appropriate for mediation services you're streamed there. If mediation doesn't work for you (too complex or mediation fails), you get sent to a PC judge (there are 5). Then the judge reviews the file and determines the proper regulation track:
    1) Regular trial with PTC
    2) Regular trial
    3) Binding JDR (have to consent, no appeal)
    4) Simplified trial
- PTCs are off the record. 45 minutes (1 hour for wrongful dismissal)
- Here for three reasons:
    1) Share with one another a little about your case.
    2) Discuss settlement. Starts with asking the parties if they even want to talk about settlement.
        a) Judicial settlement conference: Here are the issues I have with your case, have you thought about X, Y, Z? How are you going to prove this? Do you have an expert?
        b) Settlement happens often at PTCs, or parties start thinking about settlement.
    3) Where are you in the process? Do you think you need to amend your pleadings? Any interlocutory applications? How many witnesses?
- Sometimes in the middle of trial judges will trade parties and talk about settlement
- In the Tariff (Schedule C for PC) there are designated costs for litigation costs for SRLs vs those with counsel (still kind of an open Q in ABKB but recent case law saying that SRLs should get some lawyer costs)

Trials Regular trials are the same as ABKB.
Tip: When you come in, tell me the issues.