

LAW 452
CIVIL PROCEDURE

1. INTRODUCTION

CivPro → QB rules (not provincial or CA)

The Effect of Prior Case Law on New Rules

- Stevens and Cote takes the position that the old case law applies, unless the words have substantially changed the rule
- The Albert Law Reform Institute → the new rules change everything; it's an actual re-write of the old rules
 - The new rules focus on co-operation, it emphasizes moving the process in a timely and cooperative way.
 - It allows for new arguments

Core Principles:

- Natural Justice and Natural Fairness
 - The rules works to safeguard parties and there is impartiality
 - It incorporates the Rule of Law (i.e. the law needs to be accessible; the law has to be properly enacted)
 - Natural justice has two rules:
 1. Fair hearing – i.e. due process
 - a. The new rules allow both sides to be heard
 - b. **3 assumptions** afforded to individuals in a fair hearing:
 - i. Sufficient notice of the case
 - ii. Any person is entitled to know about the evidence that will be produced against them
 - iii. The right to contest, protect, or contradict the evidence against you, and the right bring your own case (the right to counsel, the right to cross-examine etc.)
 2. Rule against bias – no one should judge their own cause

Process of a Civil Action (see Handout)

Step 1 – Pleadings

Step 2 – Evidence Gathering

- Used to be “examination for discovery” etc. now → questioning
- Two ways to gather evidence:
 - Documents (expert reports) – anything that is not privileged
 - Oral Questioning

Optional Strategies during Evidence Gathering:

Settlement

During Step 2 parties may settle in 3 different ways:

- Outside of litigation
- Under the RoC
- In Mediation (settlement through mediation **MUST** be tried)

Chamber Application

- i.e. to obtain substitutional service
- both sides might be there, but applications can also be made ex parte

Trial Alternatives

- Striking out, default judgements, etc.

Step 3 – Trial

Notes:

- If the RoC uses the term:
 - “**Court**” the application can be brought in front of a **Master or a Judge**;
 - If it says “**Judge**” the application cannot be brought in front of a **Master**
- Definition of a Master in the QB Act
- Prescribed Forms – the forms in Schedule A

Jurisdiction:

1. Does the decision maker have territorial jurisdiction?
2. Does the decision maker have jurisdiction over the person
3. Is the subject matter of the litigation within the scope of the decision maker’s authority
4. Is the amount of damages, or the remedy sought, within the monetary limits or scope of the decision maker’s authority

Territorial Jurisdiction

- Actions in personam – the ability to summon the person before the Court
 - Provinces have broader territorial jurisdiction than they used to (not necessarily international though)
 - A Person can consent, or submit to having a Court have jurisdiction over them (i.e. where their registered office is)
- Action in rem – actions against land
 - CL rule – the Court has jurisdiction if the land is located in their jurisdiction
- Jurisdiction over subject matter – jurisdiction cannot be consented to or submitted to
 - Inherent jurisdiction – jurisdiction over any matter unless a statute limits their authority, or gives the jurisdiction to another body – CL principle
 - If a rule doesn’t exist, QB judges have jurisdiction
 - s. 96 Courts
 - Judicature Act applies and the QB act applies
 - See Chapter 2

***Baxter Student Housing v. College Student Housing* 1976 2 SCR 475**

- Establishes that inherent jurisdiction cannot be used to override a statutory rule

Federal Court Act – property of the federal government, contracts with the federal crown, etc → federal jurisdiction

Provincial Court Act – criminal matters or civil matters in provincial court

- \$25K limit
- Simpler process
- Small claims – www.albertacourts.ab.ca

Rule 2.24(1)

- The lawyer of record – the lawyer who is served with documents for the client
- Certain responsibilities apply → must ask for instructions

Rule 2.28

- Changing the lawyer of record (by the client), or self-representation status

- Must serve notice on all parties and file an affidavit of service

Rule 2.29 – the lawyer may apply to withdraw

- If the lawyer wishes to withdraw, they must inform every party to the action and include the client's last known address
- Only 10 days after service is the lawyer able to withdraw
- Instances where the lawyer can't withdraw: after a trial date has been scheduled (**2.31**) → need Court permission

Undertakings

- Any promise to another party that they will rely on
- An undertaking made to another lawyer must be fulfilled

Trust Conditions

- *Witten* case

Costs

- Core Principle: indemnification (partial)
- Partial recovery of actual expenses
- Self reps can also claim some of their costs
- What are Costs?
 - Filing fees
 - Witness expenses – transportation fees, payment for testimony
 - Expert reports
 - Actual costs aren't given – Schedule B is used
 - Generally can't claim any costs prior to action being started

Authority:

CA Act – s. 12

QB Act – s. 21

- Subject to any provision to the contrary, or enactment, the award of costs is under the discretion of the judge (same provision in both acts)

Party/party costs – partial indemnification

Solicitor/client costs – compensation for actual costs → full indemnification is usually only given when the other side has acted very badly

The Rules – Part 10 of the RoC

- **10.29(1)** – a successful party to the application is entitled to a cost award against the unsuccessful party
- **10.31** (court ordered costs award) and **10.41** (assessment officer's decision)
- Disbursements vs. Costs
 - Disbursements are paid to a third party by a lawyer (generally not recoverable) → i.e. a real estate transaction where a percentage of the land value must be paid to file at the LTA → the firm is a flow-through and those costs are not recoverable

Note – **4.29(1)** If a plaintiff makes formal offer to settle, but it is not accepted by the defendant, and the plaintiff receives a judgment that is equal to or greater than the settlement value → the plaintiff is entitled to double costs

4.29(2) – if the defendant proposes a settlement, and the plaintiff gets a judgement that is equal to, or more favourable, the defendant is entitled to all costs or steps taken after serving the formal offer

4.29(3) – if the defendant presents a settlement, and the plaintiff doesn't receive a judgment, the defendant is entitled to double costs

Multiple Defendants

There are ways to draft orders which reduce the plaintiff's liability for costs (i.e. if they file an SoC against many defendants)

- Apply for a Bullock Order – the costs that are payable by the unsuccessful defendant will include the payment that must be made by the plaintiff to the successful defendant. The payment is paid to the plaintiff and then to the successful defendant
 - *Bullock v. London General* 1907 1 KB 264

- Apply for a Sanderson Order – the court orders the unsuccessful defendant to pay the costs directly to the successful defendant. There is no flow-through the plaintiff
 - *Sanderson v. Blyth Theatre Co.* 1903 2 KB 533

The test for these orders will be whether or not it was reasonable for the plaintiff to include all the defendants in the action.

- If the action was properly brought, but at the end of the trial the judge finds that only one defendant was clearly liable, the plaintiff can apply to the Court so that they don't have to pay costs for the successful party
- If the unsuccessful defendant is unlikely to pay the successful defendant, then an Sanderson Order is unlikely
- Either Order can be granted even if there are different causes of action claims against each defendant (i.e. multiple causes for the same injury). This is also true where the relationship and the roles of the defendants are different.

Review or Assessment

- Under the old rules, a client or a lawyer, could “tax” their account → i.e. when there were disputes between lawyers and clients regarding their bill.
- When a bill is reviewed, it becomes an enforceable order by the Court of QB (i.e.. JEL mechanisms can be used) → if you just have a bill, it's only enforceable as a small claim
- **10.5** – allows lawyers to make retainer agreements (explains billing, how to pay, what is charged for, etc.)
- **10.7** – contingency agreements → payment is contingent on the outcome of the action (were not allowed in all provinces in the past)
- Review or assessment can be appealed to a judge
 - It's an appeal on the record (vs. appeal de novo); an appeal that is based on the original evidence before the original decision maker
 - Appeal de novo – not only appealing the prior decision, but you may also introduce new evidence (taxation appeals were de novo)

2. COMMENCEMENT OF AN ACTION

Chapter 4

s. 3.2 – How to start an action

- Filing in the appropriate judicial centre:
 - An SoC
 - An originating application, or
 - A notice of appeal

3.25 – contents of a Statement of Claim

Steps – Plaintiff:

1. determine the parties

- a. Facts must show a cause of action against each defendant
 - i. if no cause of action is given for a defendant, they can get costs and can move to strike the action.
 - ii. An amendment to an SoC might be made with a court order

2. Does the party have capacity to sue?

- a. i.e. children, people who are deceased

3. Has the cause of action arisen prior to bringing the action?

- a. i.e s. 119 of the BCA → action won't arise until an action has been brought against the corporation and that action has been exhausted

4. Bars to actions

- a. Statutory bar
- b. Contractual agreement
- c. Failure to obtain an essential prerequisite to the action
- d. Res judicata
- e. Bar against the cause of action (public policy reasons)

BARS TO ACTIONS:

Statutory Bars:

Examples:

- A. **Timothy Hnatiuk**, 2009 ABQB 659 – example of a plaintiff injured on the job with multiple possible defendants (employer, other employee, and customer) → who is a defendant? Section 21(2) of the WCB Act states that an EE does not have a direct cause of action against their ER, they have to bring the action against WCB.
 - o NOTE – the court can still consider the ER's contributory negligence (or another statute barred defendant) in order to reduce the liability of other defendants
- B. Section 14 of the *QB Act* – no action can be brought against a Master if he actions outside his jurisdiction, unless he acted maliciously
 - o Also, no damages can be awarded against a party to acted on an order given by a master without jurisdiction (s. 14(2))
- C. Section 69 of FOIPP – no action against a Commissioner who has acted in good faith
- D. **Limitations Act – p. 36** – preserves evidence, prevents deteriorating memories, etc. It doesn't abolish the action, but is a complete defence to an action
 - o Economic reasons – contingent liabilities of corporations are recorded and it determines the funds to be reserved, and requires the corporations to maintain records at a high costs.
 - o 2 cored principles of limitations:
 - a. Knowledge – the limitation period starts when the claimant “discovers” the claim (**s. 3(1)(a)**)
 - b. Repose (finality) – the act provides a fixed limitation period which provides an absolute time limit of 10 years (**s. 3(1)(b)**) → NOTE the defendant has to plead the *Limitations Act*, it doesn't automatically apply

- Definitions – the action applies to remedial orders, which do not include a declaration of rights and duties, enforcement of a remedial order, judicial review of a decision or a writ of habeus corpus (**s. 1**)
- Concealment – if a defendant conceals their wrong, the period is suspended – **s. 4**.
- Persons under Disability – **s. 5**
- Adding a claim – if a action is already proceeding, you can add a related claim, even though the limitation period may have expired – **s. 6**
- Minors – the limitation period is suspended while someone is a minor (**s. 5.1**) → minor is someone < 18 yrs old. This doesn't prevent a guardian from bringing the action, but it does mean that the minor can bring the action 2-10 years after they turn 18.
- Agreement – parties can agree to lengthen the period, but it can't be reduced (**s. 7**)
- **s. 8** – part payments
- Limitations law is substantive – **s. 12** → affirms *Castillo* – substantive law of other jurisdictions may be applicable in Alberta Courts.

How to determine if the limitation period has expired:

1. Look at s. 3 → knowledge, “ought to have known”
2. Was the plaintiff physically injured to the extent that they were incapacitated
3. Is your plaintiff a minor?
4. Was there some type of agreement between parties to suspend the limitation period?
5. s. 6 of the Act – claims added to a proceeding
6. Could a cause of action arisen at a later time?
7. Is there another jurisdiction that has a longer limitation period where the action can be brought
8. Is there any claim of fraud which would stop the clock?

NOTE – if you know that your client's action is completely time-barred, you cannot make a claim for your client because you may face discipline from the law society.

Limitations Act – s. 6

s. 6 of the *Limitations Act*

- If you think you are out of time, you can try to add a claim or a party to a previously commenced proceeding that was within the limitation period
- The claim can be added directly or indirectly (i.e. a counterclaim, a third party notice, or an amendment).

s. 6(2) – Adding a claim, but no change in parties

- The added claim has to be related to the conduct, transaction, or events described in the original pleading
- The claim can be added by the defendant or the claimant.
- i.e. further injuries in a tort claim, or an increased magnitude of an injury

s. 6(3) – Change of claimant

- Even though the limitation period has expired, the name of the claimant can be corrected (if it was wrong)
- NOTE – strangers to the relationship can't be added → i.e. the passenger in a car accident can't be added to the action beyond the limitation period
- In order to amend the claimant, there are 3 requirements:
 - There has to be a relationship – related conduct
 - No prejudice to the defendant - the defendant has to receive sufficient knowledge of the change of claimant within the limitation period, plus the time provided for the service of process (3 years).

- The added claim must be necessary to ensure the effective enforcement of the claims originally asserted (so a stranger won't pass this test)

s. 6(4) – Change of Defendant

- Need the relationship and the notice to the defendant requirement above.

s. 6(5) – Burden of Proof

- The claimant has the burden of proving subsections (3)(a)(b) and (4)(a)
- The defendant has the burden to prove lack of sufficient knowledge in (3)(b) and (4)(b)

Conflict of laws

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.

Contractual Agreements

- i.e. agreements with your insurance company (can't be paid and then sue)
- *Arbitration Act – s. 7* – parties can ask the court to stay the proceeding until the arbitration has been decided.

Failure to Meet a Prerequisite

- i.e. given the other party notice (in debts etc.)

Res judicata

- You can't retry an action that has already been decided.
- CL rule
- The losing party cannot sue again for the same cause of action, or a different cause of action of a related issue
- Merging causes of action (issue estoppel – CHECK)
 - Same issue, same parties, same claim

Danyluk

- Plaintiff applies to the ESC for unpaid wages and then commences a court action
- ER fires plaintiff and only gave her 2 weeks pay in lieu
- The employment standards officer made a decision, so the ER claimed that the action could not be pursued in Court because the matter was decided
- The SCC recognised that under the CL, the plaintiff might be barred from her action, but based on the employment standards complaint process, it wasn't really a judicial process (i.e. both sides didn't testify, no appeal was available, the officer had no legal training).
- Therefore, even though all the above conditions were met (same issue, same parties, etc.) the court decided not to bar the action.

Public Policy Bars

- i.e. suing on gambling debts

3. WHO ARE THE PARTIES?

Chapter 5

Corporations

- *Alberta Business Corporations Act*
 - s. 9 – a business comes into existence when it's registered
 - s. 16 – corporation is a “person”
 - A corporation must authorise an action in order to be named a plaintiff
 - s. 227(2)(a) – if a corporation dissolves after it commences an action, the action continues (also applies when defending an action)
 - A corporation can be sued up to 2 years after it's dissolved, and any property of the corporation still in existence is subject to the action.
 - Shareholders can sue directors
- *Partnership Act*
 - Partners are liable for themselves, each other and the firm
 - **Rule 2.3** – individual partners may be called upon to pay the judgment when a partnership is sued

Motor Vehicle Accidents

- Something about when family members drive cars and get into accidents → they are treated as employees?

Subrogated claims of the Alberta government → it used to be that the plaintiff in a motor vehicle accident had to agree to claim damages for the government based on health care costs. These don't apply anymore because of the soft-tissue injury cap.

- In other accidents, it still applies (??)

Class Proceedings Act – p. 53

- Not all plaintiffs need to have the exact same injuries
- A class proceedings claim must be certified before the action can continue → if it's not certified, you can't pursue the action as a group (**s. 3**).
 - So serve the SoC, then certify
 - **s. 5** → the requirements:
 - The pleadings disclose a cause of action
 - There is 2 or more persons
 - There is a common issue
 - The most efficient way to proceed is a class proceeding
- s. 3(a) – 90 days to certify
- There is a representative plaintiff who must represent the interests of everyone in a class → they have to plan and they can't have conflicting interests
- After certification a notice goes out describing the injuries, and whoever gets the notice will be able to participate → no notice means they can't participate.
- Multi-jurisdiction proceedings – Alberta put in a recent amendment which allows an action to be brought in Alberta, even though some claimants may live outside Alberta.

Societies Act

- **s. 3** - 5 or more persons that form an association for charitable, artistic, social educational, scientific, etc. purposes that do not include running a business.
- **s. 14** – if you register, you have all the rights and powers of a corporation.

- **s. 21** - members are not personally liable for debts, however in order to bring or defend an action, you must have your corporation registered under the *Societies Act*.

Deceased Persons

- Need a Personal Representative – can be an executor (named in a will) or an administrator (appointed by a court) – to bring the action. This can be done without naming the beneficiaries → cannot name a deceased person because they and their estates are no legal entities.
- If there is no PR, the court can appoint an administrator.
- The new rules refer to the PR as a Litigation Representative (?)
- Payments are made to the Court and then the PR
- If a party dies with an interest in an action, their interest continues for the benefit of their estate (*Survival of Actions Act*). The name in the style of cause would be amended to the PR.
- **Fatal Accidents Act**
 - **s. 8** – damages for bereavement – in AB you don't need to prove damages association with grief and loss if you've lost a parent, a spouse or a child → in Ont., you have to get on the stand and prove why you've suffered.
 - Amendments in the fall got rid of distinctions between illegitimate children, and the marriage requirement (they no longer apply)

Ferraiuolo Estate v. Olson

- PR, the deceased's son, brought an action under s. 8 of the *Fatal Accidents Act*.
- Looked at the SoC from twen
- The old s. 8 was found to be unconstitutional

Infants

- *Family Law Act* – a PR is appointed and they must act in the interests of the child. The PR (litigation representative) is an officer of the court
- If an action is brought against a minor, their guardian may defend the action (the litigation representative).

Incapacitated Adults

- *Mental Health Act*
- *Adult Guardianship and Trustee Act*
 - A Guardian can bring an action on behalf of an incapacitated person if an order is granted. A trustee can also bring an action.

Rule 2.12 – LRs and service of documents

- Must serve documents on the LR
- There are 3 types of LRS
 - Automatic – authority to commence, settle or defend as per an order, a grand of probate, springing power of attorney, etc., other than a will
 - Self-appointed – if someone who needs an LR doesn't have one, the court will allow an interested person to file an affidavit under the rules to request to become an LR (rule 2.14) → i.e. parents of an injured minor
 - Court-appointed – where there is no executor or administer, or an interested person – when appointed, they are liable for costs, they may be given the authority to settle or discontinue the action.
 - Damages are paid into court → costs are paid to the LR

Self Represented Litigants

Rule 2.22 – Self Represented Litigants – SRLs

- A person is able to represent themselves in QB

- **2.27** - The person can retain a lawyer for a specific purpose, but everyone must be aware that they are only there for one purpose. When 2.27 applies, that lawyer is not the lawyer of record.

Rule 2.24(2)

- If someone has a lawyer of record, they cannot appear in court as an SRL.

Rangelander Holdings Ltd. v. Calgary

- Madacalo was stopped by the city from working on their land because they didn't have a permit. They appealed to the SDAB and then to the ABCA.
- Mr. Peddle wanted to represent the two corporations in the action in front of the ABCA → **Rule 2.22** only allows individuals to represent themselves, BUT does not allow corporations or people to be represented by other people.

Proceedings Against the Crown

Interpretation Act

- s. 14 – no enactment is binding on the the Crown unless the act expressly states that the Crown is bound – pg. 71
- *Proceedings Against the Crown Act* – almost treated like a corporation – pg. 71
 - ***Canada Deposit Insurance Corp. v. Prisco*** – there is a CL immunity for the Crown which has now been codified.

4. PLEADINGS – GENERAL RULES

Chapter 6

Pleadings:

- 1.
- 2.
3. **Frames the issues for the court**
 - The court will only decide on the issues named
 - Tells you what documents and information is required.
4. Provides a clear record of what the issues are
 - Think res judicata
5. Advocates your position

Material Fact Pleading

- In the US they plead the cause of action, not the material facts.
- In Canada, if you don't plead material facts, your action could be struck
- There is a spectrum between material facts and evidence → pleadings do not plead evidence, they plead material facts!
- Particulars are in the middle – they are required so that the other side knows what they did wrong.
- The statement of claims should contain the relief sought if the cause of action is proven
- Statement of defence – needs to respond to the action, or the plaintiff can strike out the irrelevant parts (and this could lead to a summary judgment).

Two questions to ask:

1. Does my statement of claim advance a valid cause of action, or does it advance a valid defence?
2. Have I pleaded all the material facts needed so that if the judge finds my side to be true, I can obtain a judgment?

Rule 13.6(1) - Pleadings must be succinct, and divided into consecutively numbered paragraphs with dates expressed in numerals, unless words make it clearer

Rule 13.6(2) – what is required in the pleadings:

- Facts
- A matter that defeats a claim of another party
- The remedy claimed

Rule 13.6(3) – you must name a pleading that may take the other party by surprise (duress, estoppel, fraud, etc.).

Rule 13.8(1) – other contents may include: alternative claims or defences, a statement of a point of law, and a matter that arose after the commencement document was filed.

Rule 13.10 – replies to SoDs can only include admissions, or responses to matters raised for the first time in the SoD → you can't bring up new issues.

Rodaro v. RBC

- Improper disclosure was never plead by Rodaro, therefore it could not be used at trial

Thomas J. Duncan Ltd. v. Sigurdson

- The defendant asked to have the claim struck because there was a complete defence based on a point of law → assignment of the plaintiff's right to money.

Allan v. New Mount Sinai Hospital

- Patient specifically asked that a needle not be put in her left arm; the doctor put it in her left arm.
- The plaintiff sued for negligence – but the court found that it should have been an action for battery. Although battery wasn't plead, the court allowed the plaintiff to amend their statement of claim.

Pyramid Construction (Calgary) Limited v. Feil and Feil

- Facts not plead at trial could not be relied on at appeal

Judicature Act

- **s. 8** – the Court's jurisdiction to apply remedies
- Rule 1.3(1) and 1.3(2) – the court can give any relief that is available under the judicature act. The Court can grant any remedy, whether or not it's claimed, but that is subject to the JA --. The plaintiff has to properly bring forward the claim in the proceedings.

MacCabe v. Westlock Roman Catholic Separate School

- Should loss of future earning be based on female specific earning tables? the Court found that the table discriminated against women, and therefore the male table should be used.
- The CA found that the facts did not support the finding of discrimination by the trial judge.

5. INTEREST, VENUE AND SERVICE

Interest

Chapter 7

Judgement Interest Act

- s. 2 – interest is given from the date of the cause of action
- s. 4 – the interest rate is set every year by a regulation
 - 2011 – 1.85%
- No interest on punitive damages or on costs; no interest on money paid on a formal settlement; not interest on consent judgements
- s. 3 – the court can refuse to award interest
 - **Fox Creek Town** – the court must have a compelling reason not to award interest
- s. 3(4) - The trial judge generally decides matters of interest, and the CA gives deference (unless there has been a change in the substantive judgment).

Venue

Chapter 7

- File where the plaintiff lives
- Or choose where to file (but close to where the parties live)
- **RoC 13.5** – the parties are able to agree on time limit variations, and most other rules
- One of the parties can bring an interlocutory action to vary venue, etc.

Service

Chapter 10

- The plaintiff must be able to prove service
- The Defendant may claim improper service
- **3 Primary Questions:**
 1. How do you service documents?
 - **11.4** – service is done by a method contained in an enactment
 - Need a commencement document
 - **11.5 – service to individuals** - service can be personal, or by registered mail → individual or a representative (a trustee, etc.)
 - **11.5(2)** – service is effected on the date it's left with the person, or the date it's signed for
 - **11.9 – service on a corporation** – leave it with an officer, a person who appears to manage the business, or send it by recorded mail to the principal place of business
 - If a document is served on a litigation representative of a corporation (as per 11.7, then service is effected as per s. 11.9)
 - **11.10** – service on limited partnerships
 - **11.14** – service on statutory and other entities
 - **11.17** – service on lawyer of record → can be effected service

Sending documents, other than commencement documents:

- **11.21** – service by electronic method → generally by fax because you need to be able to prove in Court that it was received
- **11.22** – service by recorded mail – it's effected when signed for, or 7 days after it was sent

Sending documents Internationally:

- **Old:** *Service Ex Juris* - The Court was allowed to order that a defendant could be served outside of Alberta; however, you had to prove that AB is the best jurisdiction.
- **New: 11.25(2)** - Service outside Canada incorporates the real and substantial test – still need an order. Support for the application is provided by affidavit
- *Forum Non Conveniens* – is AB the most appropriate jurisdiction to hear the matter?
- Defendants can argue that AB is not the right jurisdiction.
- NOTE – just because the action is brought in AB, AB law may not apply (conflicts issues)
- **11.25(3)** – when a real and substantial connection is presumed (land in AB, a tort committed in AB, etc.)

***Yugraneft Corporation v. Rexx Management Corporation* [2010] 1 SCR 649**

Facts: Russian company that developed and operated oil fields in Russia was at one time supplied materials for its operations by Alberta corporation — Following contractual dispute, company commenced international commercial arbitration proceedings in Russia — Arbitral award of US\$952,614.43 in damages was issued in favour of company on September 6, 2002 — Company applied to court in Alberta for recognition and enforcement of award on January 27, 2006 — Application was dismissed, and decision was upheld on appeal — Company appealed — Appeal dismissed —

Decision: Having adopted treaties as part of International Commercial Arbitration Act, Alberta was required to recognize and enforce eligible foreign arbitral awards — One of treaties was intended to allow contracting states to impose local time limits on recognition and enforcement of foreign arbitral awards if they so wished — In case of federal states, such limitations are to be determined by law of enforcing jurisdiction within federal state — In terms of whether or not Alberta law subjected recognition and enforcement of foreign arbitral awards to limitation period, **only Limitations Act applied in this case**

- Arbitration Act and Reciprocal Enforcement of Judgments Act did not apply — Application for remedial order based on judgment or order for payment of money was subject to 10-year limitation period (s. 11 of Limitations Act) — All other applications for remedial order fell under two-year limitation period, subject to discoverability rule (s. 3 of Limitations Act) — Arbitral award was not judgment or court order, and company's application fell outside scope of s. 11 — Under treaty, party to arbitration had three months to apply to local courts to have award set aside — Company had two years after December 6, 2002 to commence proceedings against corporation in Alberta, meaning that its action, brought on January 27, 2006, was clearly time-barred — Even taking into account discoverability rule in s. 3(1)(a) of Limitations Act, company's proceedings were time-barred.

Service outside Alberta:

- ***Morguard Investments Ltd.*** [1990] 2 SCR 1077
- Land in AB with a mortgage; mortgagor foreclosed on the land.
- Changed *Ex Juris* requirements.
- The SCC found that enforcement of foreign judgments is different than enforcing judgments between provinces → each province should give credit to another province's order and people should not be able to escape liability just because they crossed the border
- **The real and substantial connection test** – Rule **11.25** – if a real and substantial connection exists
- between the action and the facts, and the province of AB, *service ex juris* order is not needed.

Questions Cont'd

2. What date is service effective on?
 - ***Interpretation Act* – s. 23(1)** – serviced is presumed if the document is sent by registered mail (7 days in AB, 14 days in CA)
3. How do you provide evidence of proper service?
 - **11.30** – service of commencement and non-commencement documents

- By affidavit (different requirements for commence and non-commence)
- By acknowledgement or acceptance by the person served
- By an order under 11.27
- **11.27** – validating service where a defendant won't sign or acknowledge service
- *Fontaine v. Serben* – defects do not invalidate service (?)
- **11.28 - substitutional service** – this is used before service is attempted b/c service is impractical
 - Need to provide an **affidavit** outlining:
 - Why service is impractical
 - Propose an alternate method of service
 - Why this method is likely to bring the document to the attention of the party
- **Knott Case** - many people need to be served (multiple defendants)
 - Affidavits provided to show that one of the defendants could not be located for service
 - The Court ordered that service could be substituted by doing 3 things (ad in newspaper; forward a copy of the SoC to his employer; or by using Facebook)
 - The plaintiff was able to show that the defendant was using his FB account, therefore putting it on there would likely bring it to his attention

Renewal

Chapter 11

- **3.26** – Time limit for service after the SoC has been filed → 1 year
- Can apply to extend by max. 3 mos, but must apply before the 1 year has expired (“renewing service”)
 - Can also claim an “unusual circumstance” applies and the time should be extended
 - **3.27** – “unusual circumstances” – times can be extended (no limitation) if
 - someone led the plaintiff to believe that:
 - the defendant had been served, and they relied on it;
 - or led them to believe that liability won't be contested;
 - or that the time limit will not be relied on and will be waived
 - If a substitutional service order is set aside
 - A special circumstance exists resulting from the defendant's conduct, or a someone not a party to the action.
- **3.28** - If an SoC is not served on time, the action is over
 - If you've run out of time, try to find an “unusual circumstance”
 - If the limitation period hasn't expired, you can file a new SoC (\$\$)

6. PARTIES AND CAUSES OF ACTION

Chapter 9

A. Amendment

- The key question is, what is fair?
- **Test:** Will the amendment result in prejudice to the other parties that cannot be compensated by costs, or an adjournment.
- **Rules:**
 - **3.62** – 2 options to amend

- By agreement between parties
 - **Before the pleadings close**, they can amend anything without the Courts permission
 - **After pleadings close**, parties can amend the claim by removing adding, substituting or correcting the name of a party with the court's permission (or with consent)
- The parties must file and serve the amended pleading within 10 days of the filing
- **3.62(3)** – a responding party may amend their document before or after the pleadings close, and without the court's permission if it's in response to an amended claim, or a reply to an amended SoD
- **3.62(4)** – response must be filed and served within 10 days
- **3.67** – pleadings close when a reply is filed and served by the plaintiff
- **3.74** – Changes to parties after pleadings close
 - The Court may order that the party be **added**, but they must have the consent of the person proposed to be added
 - The court may **remove or correct** a party name, if they are satisfied that the order should be made
 - **The test:** The order won't be made if prejudice would result that can't be remedied by costs
- **3.65** – permission of the Court before or after pleadings close
- **Hodge v Carey Industries** – you need evidence to show the court why the amendment should be made
- **Rago Millwork v. D. Woodhouse**
 - You must provide specific information about what you want to amend.

NOTE - if the limitation period has expired, you cannot apply to amend unless you fall under s. 6 of the *Act*

- i.e. if you started the claim within the limitation period, and you need to add a party (the same event caused the damage, and the new defendant was aware of the action)

B. Joinder of Claims and Parties

Generally done by plaintiffs

Joining Claims

- **3.69** – a party may join 2 or more claims in an action unless the Court orders otherwise; a party may sue or be sued in different capacities in the same action → they don't have to all have the same interest in the action
- **3.70** – 2 or more parties may join to bring an action if the claim arises out of the same transaction or occurrence or series of transactions; a question of law or fact common to the parties is likely to arise; **or**, the Court permits it.
- **3.71** – the Court may separate the claims if keeping them together will unduly complicate or delay the action, or it will cause prejudice to a party
 - **3.71(2)** – The court has various options when claims have been separated (i.e. order separate trials, order costs, or excuse a party from attending the trial)

3.70

- Joinder (“Joining”) of claims – multiple claims, one defendant; one plaintiff and multiple defendants
 - The claim arose from the same transaction, or series of transactions
 - There is a common question of law or fact
 - The Court allows the actions to be joined

- Joinder of parties – multiple plaintiffs and 1 cause of action
 - Need to decide who will be liable for costs
 - Are there possible conflicts of interest between joined parties?
 - More parties = more delays
 - Why join parties? Economy, and avoiding the risk of inconsistent decisions re: funds and determinations

Addition or Substitution after Expiry of Limitation:

The Crown v. Railink Canada Ltd.

- S. 6 of the *Limitation Act* discussed

C. Res Judicata

Issue Estoppel

Angle v. Minister of National Revenue

- *Res Judicata* discussed
- The Tax Court decided that one party owed money to the other; they only assessed the taxes of the individual and what she owed, not a final judgment on her debt to the corporation (???)
- The Court found there was no issue estoppel because the issue hadn't been determined, the Corporation had to obtain a separate order to claim money against Angle.

D. Consolidation

Generally done by defendants

- 3.72 – consolidation of 2 actions (i.e. that two actions should be tried at the same time)
 - Note! Joining and consolidating are pretty much the same thing.
- Join means there is one set of pleadings, one set of questioning, one judgment, and one order for costs.

Scheidl v. Southam Inc. pg. 114

- Wagner was a snitch and gave a police officer Whitehead information re: drugs. He also called the Calgary Herald and told them they should come watch the raid → the first time doesn't work, but the second time they are, and Scheidl and Whitehead end up in the paper
- Scheidl wasn't aware of the deal with Wagner, but Whitehead was charged with break and enter. Wagner was also charged and convicted of mischief, the Herald was acquitted for mischief.
- Then Scheidl and Whitehead sue the Herald for defamation and conspiracy → therefore there are 2 separate actions. Should they be consolidated?
- The Court had to decide if the questions of fact common questions between the two officers? And, for the purposes of costs and convenience, should they be tried together?
 - The court found that the facts between the two officers was different and therefore the actions should be tried separately.
 - NOTE – the ABCA reversed this finding.

NOTE - 3.73 → Incorrect Parties not Fatal to an action

7. PARTICULARS

Chapter 12

First pleadings are filed → then a person who is served may request particulars

Rule 3.61 - request for particulars

- the requesting party makes a request
- sends it out to other party
- if you don't receive a response in 10 days, you can apply to the court for an order
- (13.5)-may be amenable to extend))
- The obligation to file and serve pleadings continues even though particulars have been requested

Rule 3.68- court options to deal with significant deficiencies

- reasons court can strike
- Want to avoid your claim being struck

Purpose and application:

Riske v. Kittlitz (p.154)

-partnership was dissolved

- **4 reasons why particulars be ordered:**
 - In order to enable a party to frame his pleadings
 - To prevent surprise at trial
 - To define the issues
 - To facilitate the hearing
- It is manifest that the particulars are not required for the purpose of enabling the preparation of the defense, but putting in a defense is not necessarily, however, a waiver of the right to particulars, at least to particulars for the purpose of trial. (*Sachs v. Spielman*)

Tomkow v. Oldale (p.154)

Facts: alleged negligence against seven registered nurses and two registered nursing aids who were employed by the Athabasca municipal hospital at the time the plaintiff was giving birth to her son.

- The defendant was requesting particulars from the plaintiff. Particulars are ordered primarily to have a pleading made sufficiently clear to enable the applicant to frame his answer thereto properly; the secondary purpose is to prevent surprise at the trial (*Fairburn v. Sage*)
 - In this situation, where the D has more info than the P, the Court would first require the defendant to look at the hospital records; if that didn't provide the defendant with the particulars needed, the court may then order that particulars will be provided after the defendant has been examined for discovery by the plaintiff.
- **It is good practice and good sense that where the defendant knows the facts and the plaintiff does not, the defendant should give discovery before the plaintiff delivers particulars.**

NOTE - defendant would say ok, but I want an order that gives me more time to file statement of defense.

Adjourning sine die:

- Without picking a particular day to bring back (for example: discoveries could take months)

8. PROCEDURE ON DEFAULT

Chapter 13

After the SoC has been served, and you can prove service (i.e. affidavit of service)

Time for the D to reply

3.31(3) – The applicable time for the D to file and serve the SoD

- 20 days if in AB
- 1 month if outside AB, but in Canada
- 2 months if outside Canada

3.34(3) – Demand for notice by defendant

- If the D admits liability, but is unsure of the quantum of damages, they would file a demand for notice
- Timeline for filing and serving is the same as the SoD
- 13.5 also applies to filing the SoD → they can request to extend the time period

Defendant's Failure to Reply

What if Defendant does nothing:

- **3.36 (1)**-if the D has not filed an SoD, or a demand for notice, or their SoD has been struck. Two options if service of the SoC has been proven:
 - (a) Enter a **judgment** against the defendant under rule 3.38 or 3.39 (judgment for recovery of *property*, or judgment for *debt* or *liquidated demand*) [i.e. liquidated], or
 - (b) Require the court clerk to **note the defendant in default**
 - Note– if a person has a litigation rep. you can't get a judgment against them, or note them in default, without Court consent (**3.36(2)**)
- **3.36 (3)** – plaintiff can add costs on claim if the D has filed an SoD or demand, but has not served it
- **3.37- Default judgment** → application for judgment against defendant noted in default (or if SoD struck)
 - (a) Plaintiff can apply for a default judgment, if they can prove their claim; no notice required
- **3.38**-Judgment for recovery of property
- **3.39**-Judgement for debt or liquidated demand
 - (a) Interest and costs included
 - (b) Defines "liquidated demand" → specific amount payable as per a contract, a calculation, etc.

Liquidated Demand:

Standard Oil Company of BC. Ltd. v. Wood (p.161)

An application by the defendant for an order setting aside a default judgment.

Debt or liquidated demand: a liquidated demand in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract.

- If the plaintiff in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set judgment aside but to reduce it to the proper

sum; but unless the party who hold the judgment elects to have it put right, then upon the authority of *Hughes v. Justin*, it seems to that the defendant is entitled to say “this is a wrong judgment, set it aside.” -defendant is hereby allowed the cost of the application, in any event, upon the condition that the defendant shall not bring any action in respect of entry of the default judgment to anything done there under. (*McCoy v. Laberge*)

Claiborne v. T. Eaton Co. (p.163)

-the claim was for damages resulting to a motor car left by the plaintiff on the parking lot of the defendant.

- The words “debt or liquidated demand” do not extend to unliquidated damages, whether in tort or in contract, even though the measure of such damages be named as a definite figure. (*Knight v. Abbott*)

Rule 3.40: if judgment is entered against some but not all the defendants, the plaintiff may continue the action in respect of any defendant against whom default judgment is not entered.

Setting aside default judgment → Discretionary order

9.15(3): the court may vary, discharge, or set side a judgment in default of defense on any terms the court considers just.

Don Reid Upholstery Ltd. v. Patrie (p.165)

Facts: Default judgment set aside. The plaintiff/appellant argued that the 1987 judgment was properly obtained and that the defendant did not move promptly enough, after he became aware of the judgment against himself, to have to judgment set aside.

- **Rule: the court must do what is fair** – decision of the Master was upheld
 - the master clearly took into account both the apparent defense on the merits available to Patrie and the fact that Patrie may not have been in a physical condition to understand the attempts at execution in 1989 when he designed a remedy that would both allow Patrie to defend the action and would, until that action has been decided, protect any interest that the plaintiff may have acquired in the property as a result of the default judgment.

→ 3 questions the court is going to ask in setting aside judgment:

1. Was the default intentional?
 - He was sick, was in an accident → no intent
2. Was the application to set aside the judgment made soon as the party was made aware of it?
 - yes
3. Is there a good defense on the merits?
 - Yes; it wasn't the upholstery company that had a contract with the plaintiff, it was a sub-contractor)

Held: default judgment was set aside

Notice in default	v.	Demand for Notice
AFTER plaintiff proves service of SoC (i.e. affidavit of service) 1) Enter judgment to recover property or for debt or liquidated demand OR		AFTER Defendant files and serves Demand for Notice Defendant cannot contest liability But may contest amount of judgment 1) Defendant must be served with <i>notice</i> of any application

<p>2) Note in Default</p> <p>If (2) used the plaintiff may then apply for judgment <i>without notice</i> to any other party (3.37(3))</p> <ul style="list-style-type: none"> → plaintiff must still prove damages → judgment given right away if amount of debt can be calculated, or property is identifiable 	<p>2) Plaintiff must apply to Court for judgment</p>
--	--

NOTE – after a demand for notice is filed, the D can still choose to file an SoD → likely need permission from the other party, and a court order

- Must show that the D didn't understand the implications

If a plaintiff amends their SoC, it's likely that the Court will allow the D to file an SoD, even though they filed a demand for the original SoC

3.34(5) – Demand of Notice by Defendant

- If the file, the must get permission from the court to file an SoD

Bell v. Grande Mountain Apartments (p.172)

- The defendant Woolsey, who initially filed demands of notice now wish to withdraw the demands for notice and to file statements of defense.
- An analogy can be drawn to an application to set aside a noting in default and to permit the filing of a defense. The procedure applicable thereto can also be applied to this application.

Test:

- Must show that failing to defend wasn't intentional
- -must act promptly (did not here)
- -must show good defense on the merits (did not here)

→ Defendants did not have a good defence on the merits; appeal dismissed

9. PLEADINGS AFTER A STATEMENT OF CLAIM

Chapter 14 and 15

Pleadings of the Defendant:

13.6(2)– the pleading must state any of the following matters that are relevant

- (b) A matter that defeats, raises a defence to, a claim of another party

13.12 – Every fact in a pleading is denied if the fact is not admitted in another pleading filed by a party opposite in interest

- **Silence is denial by the defendant**

Admissions - A defendant must admit to allegations that are true → if they are admitted, they are deemed to be true, and they don't have to be proven at trial.

- If you admit something, it's harder to take it back

Denials – a defendant will deny the truth of an allegation if it's not true, or if the defendant is not sure about its truth.

- If you deny a truth, you can admit it at a later date → no penalty generally

Affirmative Defences –

Alternatives – i.e. if you find that there was a contract, in the alternative, I argue I never received the goods

New Allegations – if the D raises new claims in the SoD, the plaintiff has an opportunity to reply

- Once the time for the plaintiff to reply has expired, the pleadings are closed

Particulars

1. Set aside serve (11.31)
2. Strike claim(3.68)
3. Statement of defence or demand of notice

Other options:

4. Co-defendant claim (3.34)
5. Third party claim (3.44)
6. Counterclaim (3.56)

Counterclaims - 3.56

- The D could also file a separate SoC, but if the plaintiff receives a judgement, that becomes payable right away, regardless of the D's claim
- **3.56** - The D can file a counterclaim against the plaintiff, or the plaintiff and another person whether the other person was included in the plaintiff's claim.
 - Same service requirements as an SoC
- Counterclaim is still considered a separate and independent action → i.e. if the plaintiff's SoC is discontinued, the counterclaim is still valid
- Set-off
 - **Set-off at law:** operates as a defence → requires the fulfillment of two conditions:
 - (1) both obligations must be debts
 - (2) both debts must be mutual cross obligations
 - **Set-off in equity:** it can apply where mutuality is lost or never existed. It can apply where the cross obligations are not debts. It is available where there has been an assignment.
 - Need to show that the debt arose from the same contract, or an interrelated contract which gave rise to the assignment.

Holt v. Telford (p.175)

- The appeal concerned a series of transactions entered into by three parties, the Telfords, the Holts, and Canadian Stanley Development Ltd involving contracts for the sale of land and mortgages. The appeal arises out of an action commenced by the Holts alleging default to the payment on a mortgage made by the Telfords to Canadian Stanley (The Telford Mortgage).
- Canadian Stanley assigned the Telford mortgage to the Holts.
- Canadian Stanley is the one lending the money to the Telfords
 - The Telfords claimed that they had made payments to Canadian Stanley, which should reduce their debt to Holts

Set-off in law – assignment destroys mutuality

Set-off in equity – is there a sufficient connection between the contracts? Yes, equitable set-off applies

Co-Defendant Claim – 3.43

- If a defendant claims a contribution or indemnity, or both, against a co-defendant, they can serve the co-defendant with a notice
- The *Tortfeasors Act* or the *Contributory Negligence Act* must apply
 - makes tortfeasors jointly liable
 - full amount of judgement can be executed against one defendant
 - saving provision is that they can seek the contribution from other wrong doer
- It must be filed and served on the co-defendant within 20 days of the SoD being filed
- Makes the co-defendants jointly and severally liable → the plaintiff must be paid, and then the co-defendants can go after each other

Indemnity: if third party is liable; pays full amount, plus cost in the action, plus defendant's cost.

Contribution: significantly less. Part of the amount of the judgement

Leopky v. McWilliams (p.191)

- Two separate accidents that occurred on two separate days. What can the plaintiff claim from each of these tortfeasors?
- The issue on this appeal is whether damages arising from 2 separate motor vehicle accidents are the same damages for the purpose of the Tort Feasors Act.
- **Damage has to be the same**

Options for the co-defendant

- File SoD, or ask for an extension
 - Admissions, denials, etc.
- Challenge service, or
- Strike the claim – not enough particulars, or wrong cause of action
- Are there third parties that should be involved?

Or....

Third party Notice - 3.44

- A defendant or third party defendant may file a 3rd party claim against another person who might be liable for the original claim against the D1, or might be liable for an independent claim that resulted from the action between the plaintiff and the D1
- Third party claim (all the pleading rules apply)
- Not completely unrelated – they become a party to the action
- Where the 3rd party wasn't related to the original contract, but owed a responsibility to the defendant
- Example on Twen
- The same SoC is used, and the same judgement → within the judgement, the Court will lay out liability between plaintiff and D1, and D2 and D1
- D2 can defend against the plaintiff's claim, as well as against D1's claim against them (also, if D1 is successful, D2 is off the hook).
- **3.45** – the third party must be served with the claim within **6 months** after the date on which the defendant files their SoD
- **3.47** – D2 can apply to set aside service; have the claim struck (plaintiff's and D1;s); file an SoD or demand notice
 - If D2 doesn't file an SoD, they are admitting liability between the plaintiff and D1 (and admits the validity of any judgment), as well as their own liability to D1
- Judgment against D1 must be satisfied first before being enforced against D2.
- The Court can give judgment against the D2 if they did not file an SoD

-Third party procedure, liability doesn't arise until the defendant is found liable to the plaintiff.

INTERLOCUTORY APPLICATIONS

- Applications
 - Striking the claim, or challenging service
- Affidavits
 - Cross-examining on the affidavit
- Questioning Non-parties

Applications

- i.e. interlocutory applications like striking the claim, or challenging service etc.
- **6.1**
- **6.3(3)** – 5 days notice must be given to those affected (file and serve 5 days before the application is heard)
- Done by affidavit
- NOTE – our code of conduct requires more of us than the rules
 - Pg. 203 - Although the rules say that notice might not be necessary, our code says that as a matter of courtesy, lawyers need to provide a notice of motion to the other side
- **6.4** – applications without notice → if it's not necessary (i.e. when you are applying for substitutional service), or it would cause undue prejudice (i.e. hiding assets)
 - Code of conduct -
- Generally brought to **Masters Chambers**
 - **6.14** – appeal from master's judgment or order can be made to a judge
 - New evidence may be presented if it is significant enough that it could have affected the master's decision.

Affidavits

- ***Bartle v. Gibson***
 - Final Judgment sought - The person who writes the affidavit must have personal knowledge
- Sworn document
- **6.7** - You can be examined on an affidavit
- **6.16** - – notice of appointment for questioning (must be given to the person who is being questioned on their affidavit); need to be pay allowance; proper notice must be given
- **6.20** – questioning takes the form of cross-examination
 - Transcript must be taken, and questioning party must file the transcript
- Rules, etc. will say when a affidavit is needed
 - Statutory declarations are used when it's not specified in the enactment

Sandford

- A person who has made an affidavit, including an affidavit of documents, field in any action or proceeding. May be cross-examined on the affidavit without order.

Ed Miller Service

- Witness refused to answer questions based on their affidavit
- The court found that questioning can be thorough, but it must be relevant and material to the issues arising from the affidavit – not from the entire action

CRC-Evans Pipeline Int.

- Can non-parties be cross-examined on their affidavits? i.e. a process server
- Yes, but they can only be questioned on the truth of their statements, or their credibility – not outside facts

6.8 – allows you to question a party before the trial so that you can obtain a transcript and use it at the hearing of an application.

- The questioning party must file the transcript

5.13 – obtaining records from non-parties

- This rule cannot be used against the crown

Ray v. Rural Municipality of Meota

- Person can be questioned to ensure that truthfulness of their statement

Notary Public Act

- Commissioners – can only sign documents that are used in AB
- Notary Publics – can sign documents that will be used all over the world
 - Can't be appointed → only lawyers, or students at law
 - Have seals

SUMMARY

3 Options for the Defendant

1. Challenge service
2. Strike the SoC for deficiencies
 - i.e. if not enough details
3. File SoD or Demand of Notice
 - SoD – defending liability and quantum
 - Demand of Notice – defending quantum

Offensive Options for the Defendant

1. Counterclaim
2. 3rd Party Claims
 - a. Bringing a third party into the action and claiming they are contributory liable or completely liable
3. Co-Defendant
 - a. Only applies when there is a tort

10. DISCOVERY OF RECORDS

- ✓ The Discovery Process – General Principles
- ✓ Discovery of Records
- ✓ Legal Privilege

Discovery

1. **Discovery of Records**
 - a. Examining and reviewing the records of ALL the parties
2. **Discovery of Persons**
 - a. (Questioning not Examining anymore)

Steps in Discovery Process:

- **Affidavit of Records**
 - a. Not filed, they are to facilitate the understanding of what each parties case is

- b. Record – the representation of any information data or thing that is capable of being represented or reproduced visually or by sound (*Lazin* and *Leduc*)
 - o Questioning of parties adverse in interest

***Leduc* – pg. 309**

- o Can a Facebook profile be a record? Can the plaintiff be compelled to produce their profile
- o The plaintiff claimed that after his accident, he could not longer play sports, but on his FB, there was info that he was still playing sports

→ If you aren't sure if something should be disclosed, look to the purpose of disclosure of information in Chapter 5 of the Rules

1. Purpose of Disclosure – Rule 5.1(1)

- o To obtain evidence that will be relied on in the action
- o To narrow and define the issues – i.e. find out what is actually in dispute
- o To encourage early disclosure of facts and records
- o To facilitate evaluation of the parties' positions – to facilitate a resolution
- o To discourage unnecessary delays

5.1(2) The Court may make any order necessary to achieve the purpose of this Part

2. What to Disclose → When something is relevant and material

Exception → Privileged Information

5.2(1) A question or record is relevant and material only if the answer to the questions, or record, could reasonably be expected:

- a) to significantly help determine one or more of the issues raised in the pleadings, or,
- b) to ascertain evidence that could reasonably be expected to significantly determine one or more of the issues

***Lazin* – pg. 307**

Facts: Plaintiff claimed against her doctor for prescribing a certain drug and causing mental health issues; the doctors claimed that her condition was caused by her own psychological makeup. The trial judge ordered that her diary should be produced.

Issue: The plaintiff did not produce her diary in her affidavit of documents, but she referred to it in discoveries. Is the diary relevant and material?

The CA found that only the part of the diary that is necessary needs to be produced (i.e. blank out those pages that aren't relevant). The CA also finds that a blanket order for producing a document shouldn't be ordered. The duty of determining what is relevant and material is on the party producing the record

Disclosure does not equal admitting

5.2(2) – even though you are disclosing material, that doesn't not mean you're admitting to its admissibility, or relevancy → it can't be held against you. Disclosing documents shouldn't hurt your case.

Costs

5.3(1) – the Court can order costs or increase or decrease interest if a person in discoveries is threatening or delays complying with the rules.

Legal Privilege

- These principles developed from the CL so that a lawyer wouldn't have to testify against their client
- Privilege is an exception to disclosure requirements
- Rationale:
 - The client must be able to tell the lawyer everything, no matter how damning or negligent; without that trust, the lawyer is unable to properly represent that client
 - A right to privacy
- The Test
 - The *Wigmore* test (applies to all individuals like doctors, spouses, etc.):
 - Communications must originate in confidence
 - Element of confidentiality must be essential to the relationship between the parties
 - Relationship must be one which ought to be fostered
 - Injury by the disclosure of the communication must be greater than the benefit gained from the correct disposal of litigation (see *Ryan*)
- The Test for Solicitor-Client Privilege (*Solosky v. The Queen* SCC)
 1. A communication between solicitor and client
 2. Which entails the seeking or giving of legal advice, and
 3. Which is intended to be confidential by the parties
 - Note – if a 3rd party is in the meeting (like a parent) this last step may fail
- What does it apply to?
 - Legal advice, communications relating to the purpose, made in confidence → unless the protection is waived by the client.
 - Code of Professional Conduct – Chapter 7

***Ryan* SCC – pg. 303**

- Plaintiff brought civil action against doctor for sexual harassment
- Were the notes and records of the psychiatrist visits of the plaintiff, relevant to the action? Should they be disclosed or were they privileged records?
- The SCC applied the Wigmore test and found that although they were private, they were so relevant that they should be disclosed and privilege couldn't protect them (the last step)
- s. 8 and s. 15 of the Charter should be considered

Exceptions to Privilege

- Communications which are in themselves criminal or which counsel a criminal act (eg. where a lawyer advises a client to conceal evidence)
- Information that is not a communication but is rather evidence of an act done by counsel or a statement of fact

Other Types of Privilege

1. Litigation Privilege
 - If the dominant purpose for which the communication or record was created was litigation, then it is privileged (*Moseley* – pg. 300)
 - i.e. if you hire someone to conduct an accident reconstruction for the purposes of understanding what happened, even before litigation has started
2. Settlement Privilege
 - Any communication written for the purpose of attempting to reach a settlement are privileged (i.e. where you letter says “without privilege”); parties can also contract that certain information

can't be disclosed; the information cannot be disclosed without consent of both parties (*Phillips* – pg. 304)

Can Privilege be waived?

- Only the client can waive privilege, usually by express intention. However, the client could inadvertently waive privilege by relying on privileged information in a pleading, or referring to it in an affidavit

Disclosing Relevant Materials

5.5 – Affidavit of Records must be served on every other party

5.6(1) – All relevant and material records that are under the control of the party making the affidavit

- Note – not just records that are in possession of the party → i.e. you may need to produce doctor records, bank records, etc.

5.6(2) – the party must specify which records are under their control, and which of those records the party objects to produce and the grounds for the objection.

- You must state which records will be produced, and the time and place they can be inspected (must be within 10 days of the affidavit being served)
- You must also say which records used to be under your control, when they ceased being under your control and the location of the records if known
- If there are no relevant or material records in the party's control, they must swear to it

***Western Union* – pg. 314**

- Does someone who was in an accident, and gave blood at the hospital, have to produce the results of their blood test in the affidavit?
- The Court says that the respondent had the power to obtain the record with written consent, therefore he had control of it.
- The party who has control over the records must make a reasonable effort to get the record

5.5(2) – Trigger for service

- The plaintiff must serve the Affidavit of records within **3 months of receiving the SoD** (note, as per Rule 13, you can ask the other side for an extension)
- **(3)** The defendant must serve their affidavit of records within **1 month** of receiving the plaintiff's records
- A third party defendant has 3 months to file their records after they file their SoD

5.7 – Records must be organised (records where privilege is not claimed)

5.8 – Records that your reject to produce must also be organised

- Identification can't be ambiguous, the other party must be able to identify if a record has been disclosed or not
- But don't describe them so much that you waive the privilege

5.9 – Who makes the affidavit

- Must be signed by the party, a corporate representative if necessary, or the litigation representative
- Pg. 295 – Omissions from Production of Documents
- **(2)** A suitable person, other than a lawyer, may swear the affidavit of records if it's more convenient, and the parties agree or the Court orders it

5.10 – Subsequent discovery of new records must be disclosed to the other side

5.13 - obtaining records from others

- The Court can order the records be produced from someone who is not a party to the action
- Cannot order the Crown to produce records

Ed Miller Sales – pg. 317

- A bank was involved in the day to day operations of the company for the six years before the company went into receivership.
- 5.13 was used to argue that the records should be produced from the bank
- The Court had to decide if the records were relevant and material
 - The Court will also consider if the party is just going on a fishing expedition
 - The documents don't need to be admissible, but they do need to be adequately describe the documents
 - The objections of the person who has the records must be considered by the Court, but their objection is not determinative

5.15 – Admission of authenticity of records

- When you produce the affidavit of records, you aren't admitting to admissibility, but you are admitting that the record has not be altered → but see subrule (4)
 - But admitting to authenticity does not mean the party is admitting that the evidence is relevant, or that it's admissible
- **(4)** If, within 1 month of receiving the record, the receiving party disputes that a record is not authentic, the maker of the affidavit will have to prove it at trial and is not presumed to make the submission under (2)

5.16 – undisclosed records

- If it's discovered that a record wasn't produced, the party cannot rely on the record as evidence unless the Court orders otherwise, or the parties agree

FOIP

Practical considerations when dealing with Alberta Government departments respecting the freedom of Information and Privacy Act (p.321)

- The paper is intended to assist legal counsel involved in making requests to an Alberta Government Department (“Government Department”) in respect of *Alberta's Freedom of Information and Protection of Privacy Act* (FOIP).

Purposes of this Act

2 The purposes of this Act are

- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act

Slides online

- Last resort
- Can be used as a parallel tracking system along with the rule
- It can also be used for a pre-discovery

2 Parts

- Applies to public bodies (municipality, hospitals, universities and law societies, etc.)
- Applies to records in control of the public bodies (not just custody)

What does the Act apply to?

Details:

- Court files do not fall under FOIP; Land Title records are open to the public
- The public body doesn't need to make any statements, it just needs to produce records
- Documents can be severed so that only the applicable parts are shown
- Third party commercial information can't be accessed
- Can't obtain 3rd party personal information
- Can't obtain law enforcement information
- Cabinet or Treasury Board confidences
- Information subject to legal privilege that relates to a person other than a public body
- There is a discretion for the public body to deny access if it would be unsafe to do so
- If there are other ways to obtain the information, you won't be able to get it under FOIP
- Individuals can apply to obtain their own person information → therefore that information is in their control, and should be put into a affidavit of records if relevant
 - Note – opinions of others about you are your own personal information (i.e. reference letters)

Protection of Privacy

- The Act creates rules for the collection, use and disclosure of 3rd party personal information that apply at all times
- Personal information means recorded information about an identifiable individual including such things as race, religion, marital status, fingerprints, genetic information or educational history.
- Anyone else's opinions about the individual are the individual's personal information (reference letter).
- Individual views or opinions are the individual's unless they are about someone else.

When can personal information be collected?

- Collection is expressly authorized by an enactment of Alberta or Canada
- Information is collected for law enforcement purposes
- Information relates directly to and is necessary for an operating program or activity of a public body

How can personal information be used?

- For the purpose for which it was collected or for a consistent use (as defined in the Act)
- If the individual identifies the information and consents to the use
- For a purpose for which the information may be disclosed

How can personal information be disclosed?

- Personal information may be disclosed in specific listed circumstances such as to comply with a subpoena, warrant or order; to collect a fine; to a law enforcement agency for an investigation; for use in a proceeding before a court or quasi-judicial body; to the family or friend of an injured, ill or deceased individual and so on.

The Information and Privacy Commissioner (IPC)

- IPC can review or investigate anything under the Act related to access to information or privacy of personal information.

11. DISCOVERY OF PERSONS

Chapter 20

What questions may be asked?

Not the same as a trial → i.e. hearsay may be allowed

5.17(1) – People who may be questioned → those adverse in interest, employees, auditors, etc.

Alberta Evidence Act → ss. 6(1) and 6(2)

- A witness cannot refuse to answer questions because the answer will incriminate them
- A witness who testifies in any proceeding has a right not to have the incriminating evidence used against them in any other proceeding except for prosecution for perjury, or giving contradictory evidence.

Turta v. CPR and Imperial Oil

- The rule for questioning is that parties must be adverse in interest. Imperial Oil wanted to question CPR, but they were not adverse in interest → they were only adverse to Turta.
- CPR was only a co-defendant and therefore Imperial had no right to compel answers from them

5.17(1) – 7 groups who can be questioned

1. party who is adverse in interest
2. is adverse party is corp. officers or corp representatives
3. litigation rep
 - a. i.e. minors (*Strehlke*)
4. former employees (*Tremco*)
5. auditor or former auditor
6. partners
 - a. partners in an LLP can be questioned. The info might not be admissible, but info can be gathered from them
7. assignors for negotiable instruments

Cana Construction

- Unpaid volunteer → he was required to attend discoveries because he was connected with the centre, and was informed of the issue
- Test: seems to be whether the person sought to be examined can be regarded as an officer or servant in any permissible sense if he is the one person connected with the company best informed of matters which may define and narrow the issues between the parties at the trial.

Strehlke

- Children gave unsworn evidence at a discovery
- At trial the Plaintiff wanted to read in some of their unsworn evidence
- The test is that a child can give unsworn evidence if they understand the duty of speaking the truth, if they are too young to take an oath and they have sufficient intelligence.
- The court found that the unsworn evidence could not be used because the test was not used at the questioning.

Tremco

- Relevant information can be questioned, even if the former EE became aware of the info outside their employment

5.18 – persons providing services to corporation

- i.e. private contractors

Process

3. Requirements to meet prior to questioning

5.20 – when questioning is to take place

- after service of affidavit of records
- Questioning by plaintiff – any time after SoD has been served (and an AoR has been served on the other side) – note plaintiff has 3 months
- Questioning by defendant – any time after SoD has been served and the AoR has been served – notes the D has 1 month after the plaintiff serves their AoR

4. What is the process for questioning

5.21 – appointment for questioning

- The person who is being questioned must be sent a notice 20 days in advance before the date
- Witnesses must be paid a fee to attend and also will need travel paid

5. How is questioning conducted

5.22 – questioning options

- Oral or written questions can be used
- Written – responses must be in a sworn affidavit (5.28)
- If more than one party has a right to question the witness, the questioning must be oral

5.23 – a witness must be reasonably prepared and bring any records required

- Also note that a transcript must be prepared

6. What are the grounds for a witness to object to answering questions?

5.25(1) – questions must be relevant and material

5.25(2) – 4 grounds to object

- Privilege
- Question not relevant or material
- Question is unreasonable or unnecessary
- Other grounds recognised at law

Czuy v. Mitchell

- Doctor refused to answer questions re: his knowledge of the care of infant children → Court ordered him to because without it the respondent would lose their cause of action

Wright v. Schultz

- Plaintiff suffered brain damage and could not remember the accident that he was in. Should he have to answer questions?
- The court says yes, he has to answer questions about what he was told about the accident, and other people's opinions. He doesn't have to agree with what he was told, or form the opinion that what he was told was correct. The evidence may be hearsay, but it will allow the other side to gather information.

Can-Air Services Ltd.

- Can you ask a party for the facts on which they rely in their pleadings → the court says they can only be asked about blank facts, and not the law or legal opinion that has been relied on.
- i.e. you can't ask the plaintiff why they think they have a case for negligence, that is a law interpretation question.

5.25(5)

- After a witness has been questioned by the adverse party, they may be questioned by the party for whom they are a witness to explain, elaborate or provide context for the answer.

5.27

- What happens when, after the questioning has ended, the witness realises they answered a question wrong?
- They have to sign an affidavit and serve it

5.30 - Undertakings

- If a witness doesn't know an answer, they must undertake to inform themselves and provide the record to the other side in a reasonable amount of time.
- If you say you can get info, you must produce it and can't just tell the other party that the info couldn't be found → if it actually can't be obtained, the court has to assess if the other side will be prejudiced or not.

Psychologists Association of Alberta v. Schepanovich

- An undertaking can't be removed unilaterally (you need permission from the other side, or the Court)

9. How are answers used?

5.31 – your evidence against a party adverse in interest are the questions asked and the answers given

- Questioning party can use responses to questions they asked, and only against the party who was questioned

5.32 – answers are not filed

- May be put before the Court for applications or at trial
- Only the evidence of the questioning can be put in front of the Court – i.e. only your questions and answers are your evidence (not the responses of your client)

Guarantee Co. of North America v. Beasse

- When transcripts from questioning can be read-in at trial → If you are challenging the credibility of a witness

Note – you are not bound by the evidence provided in questioning, you can provide contradictory evidence at trial (i.e. the weather on the date in question).

Pacquin v. Gainers

- Plaintiff died before the trial, and the lawyer wanted to use the evidence of their witness that was given at questioning
- The Court finds that as per rule 5.31, that evidence can't be presented by the plaintiff's lawyer.

5.33 – Confidentiality and use of information

- the transcript can only be used for the purpose of carrying on the action for which the person was questioned

- Exceptions: if the court orders otherwise; if the parties agree; or as required by law

Juman v. Doucette

- 16 mo. child suffered a brain injury after attending daycare; daycare operator was sued
- The daycare operator argued that the baby suffered from brain injuries after a bike accident with her father.
- The civil action was settled and no further disclosure of evidence from the defendant, but at the time of the action the police were also investigating the defendant.
- The defendant refused to answer the police questions, and so the police bring an application to have her answers from the civil action disclosed to them.
- The Court finds that the questioning transcript can't be produced, but notes that there might be statutory requirements that provide an exception (i.e. it becomes clear that children are in danger) and that info must be disclosed.
- In this case, the parties didn't come forward with info that a child is in danger, or that there is serious and imminent danger.
- Note – the undertaking only binds the parties, and the answers themselves are not privileged and therefore they are no exempt from seizure. Therefore, the police could seize them using a search warrant, and use that info to build their case (but they can't use the info seized at trial)

12. ADMISSIONS

Chapter 21 -

6.37 – Notice to Admit

- Where one party asks the other to agree to a certain fact or written opinion
- Every matter for which an admission is requested is presumed to be admitted unless, within 20 days, the party who was asked to admit, objects or denies the admission (**6.37(3)**) → rebuttable presumption
 - i.e. it's privileged or irrelevant
- Omits the need to produce evidence at trial – used to get the parties to agree
- Not designed to discover the truth

Canada Southern Petroleum

- Columbia hadn't questioned the plaintiff yet, but had sent them a notice to admit
- How far should the court go in compelling a response to the notice to admit, when the questioning party is unhappy with the response
- The court has to do a cost analysis – would the admission be in the interest of efficiency.

10.33(2)(b) – When a court is deciding costs, they can consider the fact that a party denied, or refused to admit facts that should have been admitted.

6.37(6) – a party may amend or withdraw an admission

- Must have the Court's permission, or by agreement of the parties

Dwyer v. Fox

- Even if an admission is deliberately made, the admission should be allowed to be withdrawn if the person can show the Court that the fact in question is the only way to settle the truth of that issue (i.e. by withdrawing the issue, is the Court going to get to the truth).

6.37(7) – admissions can only be used for the specific purpose for which it was admitted (and not in favour of any other person). You need the agreement of the other party to disclose it to another party.

Guest Presentation

- Tips for questioning witnesses during discoveries (Questioning)

13. EXPERTS

Chapter 27

→ Form 25

Who is an expert?

How is the expert report served? **Rule 5.35**

- Party who bears primary onus must serve every other party
- Other parties serve their expert's rebuttal report
 - They can raise new issues, it's not only a response
- Initial party may serve surrebuttal report
 - This can only respond to new issues raised in the rebuttal report

Pertesen v. Shepard

A party must object to an expert report prior to trial → as per 5.35 everyone is aware of the report well beforehand

5.36(1) – must object before trial with reasons

5.35(2) – if you don't object before trial, you can't object at trial unless you have given the other side reasonable notice, or the court allows the objection

5.37 – questioning the expert before trial → must be a party adverse in interest (similar to any other witness)

- However you can only question them on things in their report → i.e. their qualifications, etc.
- 5.37(4) – they are to be treated as an employee

5.38 – if an expert changes their opinion, they must put it in writing, and must serve it on all the parties.

5.39 – Use of expert's report at trial without expert

- May serve notice of Intention to have the report entered as evidence without calling the expert (**5.39(1)**)
- If N of I served, other party may not object to it at trial unless, within 2 months of receiving the notice, they serve statement as to why they object or requesting the expert attend the trial (**5.39(2)**)
- Agreeing to allow the expert report to be entered as evidence is not an admission of the truth or correctness (**5.39(3)**)

What happens if the entire expert report is entered at trial?

5.40 – If the entire expert report is entered at trial, they must not give oral evidence unless the party adverse in interest has asked to cross-x them, or the Court permits their testimony.

- If the expert is requested for cross-x, the party proposing to enter the report may question them.

5.41 – 5.44 – a health care professional can conduct a medical examination

- Health care professional is defined – not just a doctor (chiropractor, psychologist, RN, etc.)
- The health of a party must be at issue

6.40 – 6.43 – The court may appoint a person as a court expert to give evidence

14. OTHER EVIDENCE

Chapter 28

8.17 – the general rule for proving facts at trial

- Must be proven by questioning a witness in court
- Unless a rule or enactment permits otherwise; or the parties agree otherwise; or the court orders otherwise

(2) Affidavit evidence can be used at trial

- May be used for uncontroversial matters where no cross examination is needed and there is good reason why witness cannot attend
- But note, if evidence is not controversial why not use an admission?

Alberta Evidence Act s. 26(2)

- Evidence taken in any other action may be presented at trial, but only if notice is given to every party 5 days before trial and the court permits it.
- i.e. if someone is found guilty of an offense anywhere in Canada, and that conviction is connected to the action that you brought, you can use that conviction to prove that the person committed the offense.

Preserving Evidence Outside Court

6.21 – generally evidence is taken outside of court in Alberta to prevent the loss of evidence through the death of a witness or the absence of a witness

- “outside of court” means preserved

6.21(2) – if person may be unable to give evidence in court due to accident, ill health, disability or likelihood they may die before trial

- Person is now in Alberta but will be outside Alberta when required to give evidence
- The expense and inconvenience of giving evidence is not warranted
- Any other purpose

6.22-6.23 – why is evidence taken outside of Alberta?

- Evidence is taken outside Alberta to preserve evidence (if person is ill, or may die before application or trial); if person will be outside the jurisdiction of the court when needed to give evidence; if unwarranted expense and inconvenience of bringing person to give in evidence in Alberta; if person is needed to give evidence in person, etc.
- Evidence taken before an examiner or person authorized to take evidence; rules of the law of evidence in Alberta apply
- See **Form 31**

Heritage Freehold Specialists – pg. 460

- One witness was very ill, and one was dead
- The ill witness was allowed to give evidence by statutory declaration (in BC) and then it could be used in Alberta.
- The Court notes that although it is admissible, the weight given to the evidence is discretionary

15. INTERLOCUTORY STEPS

Chapter 25 – Contempt

Examples:

- If a witness lies
- Breaching a court order
- The legal concept is much broader than the common meaning
- Not just parties to the action
- Any action which hinders justice, or is disrespectful to the court
- Courts have inherent jurisdiction to find someone in contempt
- They can be found in contempt in the face of the court, or not (and then can be brought before the court)
- We are generally talking about civil contempt (disobeying court orders)
- You can go to jail

10.51 – the court can order someone to appear before them to prove why they shouldn't be held in contempt.

10.49 – 10.50 – a lawyer can also be found in contempt

Client must follow an order, even if it's not a good order, or they disagree with it. You must apply to vary the order before your client chooses not to follow it.

Zelazo v. Masson

- Chartered Accountant was ordered not to remove a file from his office, but he ignored the order.
- He consented to the order, but did it anyway
- Went to prison for 5 days and costs were ordered
- The court found deliberate contempt to ignore the order

Court Options:

- Prison, or a fine
- Strike your action
- Prohibit evidence that is related to the contempt
- They can issue a cost award against you

Michel Lafrentz

- Doctor and his brother were found liable and ordered to pay a money judgment against them.
- They sought a stay of the execution of the judgment because they were appealing, but the court refused to stay the judgment
- The Doctor didn't comply with court orders to disclose their available assets
- The court says that intent to disobey the Court is not necessary → when the court makes an order, a person has to use a significant degree of diligence to follow the order (reasonable care in responding, or asking someone else to answer).
- There will be distinctions between deliberate acts, and unintentional acts of defiance (i.e. negligence)

16. Striking Out Pleadings

Plaintiff or defendant can strike out a claim or a defense

- Can be used to have an action stayed

3.68 – when will a court strike out a pleading?

- If court has no jurisdiction
- If there is no reasonable claim or defence to the claim
- If the claim is frivolous, irrelevant or improper
- Abuse of process (*res judicata*, improper collateral purpose, two or more actions)
- Irregularity so prejudicial it defeats claim

Grounds

- Non-existent party (unincorporated entity, dissolved company, deceased person)
- Unauthorized action of defence (where a company or association does not authorise the action by resolution)
- Statutory prohibition or lack of jurisdiction (WCB or LRB)
- Contempt of court
- No cause of action or ground of defence (cause of action must be clear and free from doubt although it may be novel)

Joly v. Pelletier

- Plaintiff was bringing actions against doctors, and government officials, for conspiracy against a him because he's a martian
- The judge finds that there were no valid causes of action and also that martians cannot bring actions in front of the Court in Alberta.

Hunt v. Carey Canada Inc.

- Conspiracy claim
- Even if the facts might be true, if it exposes no reasonable claim, then no action can be brought
- In this case, was it obvious that there was no proof a conspiracy?
- Just because it's novel doesn't mean it should be struck
- The claim wasn't struck

German v. Major

- Plaintiff was acquitted on accusations of tax evasions
- He brought a claim against the prosecution for malicious prosecution and negligence.
- The QB Court found that the cause of action was hopeless, and was an abuse of process
- At the CA German argued that his entire claim should not have been struck – but the CA agrees with the QB

Therefore, **3.68** (significant deficiencies) can be used to strike out parts of an application, or the entire action (*German*)

Chapter 22 - Summary Judgment

It's a circumstance where facts are admitted, and the only evidence are records, or affidavits → therefore the court doesn't need anymore evidence to make their determination. Then you apply for summary judgment

- It prevents claims or defences that have no chance of success from proceeding to trial

→ interlocutory proceeding – but could be a final determination (i.e. if there is no merit, the action ends)

Grounds

- No defence to a claim or party of it (i.e. the limitation period has expired)
- No merit to a claim
- Only real issue is to the amount to be awarded (quantum) **(7.3)**

Test – the person seeking an SJ has the burden of showing that there is “no genuine issue to be tried”

Court Orders

- Dismiss one or more claims or give judgment for all or party of a claim
- Determine the amount if that is the only issue, or refer it to a referee to determine
- If judgment for party of a claim the rest can be referred to a trial or a referee

→ can be appealed

Leeds v. Alberta

- Plaintiff owned land that became part of a restricted development area – essentially an expropriation
- The Crown claimed the land was only worth 1M, but the plaintiff said it was worth 12M
- Crown applies for summary judgment
- Is there a genuine issue to be tried? The court finds yes, and no SJ was given
- Note - the threshold is pretty low (i.e. the burden for an SJ is high)

Espey v. Chapters Inc.

- Espey worked for Chapters for 12 years; she was let go b/c the store closed
- She was given 4 weeks notice and 4 weeks salary → she was required to mitigate her damages
- Espey applied for SJ → court awards SJ because the law and the facts are clear re: when someone is laid off without cause.

Lameman

- Is an aboriginal land claim was subject to the limitations period?
- If there is no chance of success, an SJ should be given
- The Alberta Crown was held to a high standard to prove that the band was subject to the *Limitations Act*
- The Court found that the Act did apply to Aborigines and gave SJ to the Crown
- Pg. 248

Summary Trial

Rule 7.5

In STs, you provide affidavits, discovery transcripts, answers to written questions, pleadings, etc. → there is no oral evidence unless the Court allows it. You can cross-examine on affidavits, but it occurs before the summary trial.

→ Final determination is made

Form 36 – explain why a summary trial is needed, set the date

7.6 – Response to application

7.8 – objection to the ST

- i.e. if oral evidence should be heard

Compton Petroleum v. Alberta Power

- In an ST, the court actually weighs the issues and the evidence in the affidavits. A party asserting a fact has to prove on a balance of probabilities that their evidence rules
- In an SJ, the court doesn't look at the merits of the claim
- Factors the courts looks at under an ST:
 - Amount of money involved
 - Complexity of the issues

- How urgent is the matter
- Is there any prejudice that can arise in the delaying the matter
- Costs of a conventional trial in relation to the amount involved
- Whether all the witnesses, or some of them should be examined in court

2 stages (The Test)

- Is this case suitable for summary trial?
- What will the decision be on summary trial?

Determination on Points of Law

7.1 – On application, the Court may order a question or issue to be heard or tried before, at or after a trial for the purpose of:

- The Court will consider this if they think it will shorten the claim;
- The Court may dispose the claim, shorten trial, save expenses
- The order may define the question or issues, or modify the issue

7.1(2) – If the question is a question of law, the parties may agree on the question the Court must decide; on the remedy resulting from the Court’s decision, or on the facts

7.1(3) – the Court may:

- Strike the claim
- Give judgment on all or part of a claim
- Make a determination on a question of law, or
- Make a finding of act

What the Court will consider:

1. Is it going to end the suit?
2. Is it going to save time or money
3. If we determine this question, will it result in some sort of injustice
4. Whether the issue itself is complex or difficult, can it be decided without a trial
5. Is it going to delay the matter.

***Canadian Cancer Society v. BMO* – page 255**

- Society sued BMO because cheques were incorrectly charged against their account
- BMO filed their SoD and denied that the Society even had an account with them
- Here there was an issue re: whether or not the plaintiff could even bring the action

Bailey v. Guaranty Trust Co.

- QB Court had decided a finding of fact, therefore the CA could not address it again (i.e. that the Bailey’s were not liable for the mortgage)

Summary

Summary Judgment – not triable, genuine issue, no merit

- Interlocutory

Summary Trial – trial without oral evidence needed

- Final decision

Determination point of law or fact – disposes of part of a claim

- Interlocutory, continues to trial

- May lead to amending a statement

17. MANAGING LITIGATION

Discontinuance of Action

Chapter 16: Page 260

4.36 – the plaintiff can discontinue the Action

- (1) Before the trial date is set – the P can discontinue all or part of the action against one or more defendants
 - (2) After the trial date is set – the P can discontinue the action with permission from all the parties, or with the Court's permission
 - (3) After the Trial starts – the P can only discontinue the claim with the Court's permission
 - (5) The discontinuance of the action may not be raised as a defence to any subsequent action for the same claim
- 4.36(4) – the D is entitled to costs because they've defended the action

4.37 – Discontinuance of Defence

- The D can file a discontinuance, and then they are at default
- The P is entitled to costs

Delay

Chapter 22

4.31 – Application to deal with delay

- If there has been a delay, the court may dismiss all or part of the claim if there has been significant prejudice to a party, or
- The Court can make a procedural order to deal with the delay

4.32 – Agreement about delay

- If the parties agree to a delay, and if they agree, it avoids the dismissal for delay rule (the “drop dead rule”)

4.33 – Dismissal for long delay (“drop dead rule”)

- If 2 or more years have passed since the last thing done significantly advanced the action, the Court must dismiss the action based on the delay
- Prejudice doesn't matter
- NOTE – The D does not have to take steps to advance the claim, but they do have to take steps required by them. The D can't intentionally try to delay the claim

→ the CBA has a reform paper on this issue

How to avoid the drop dead rule (4.33) → exceptions

- Make an agreement with the other party
- Apply for a stay; apply for an extension order, or have a litigation plan

- If the D did not reply to a written proposal by the P stating that there may be a 2 year delay
- If a filed application, or a proceeding has been taken since the delay, and the Court is satisfied that the claim should continue.

***Appleyard v. Reed* – 383**

- Were actions taken to continue the claim?
- Parties agreed to exchange expert reports → satisfied s 4.33

What are “things that advance the claim”

- Procedural steps required by the rules – i.e. serving affidavit of records
- Any acquiescence or action taken on behalf of the party to try and have the action dismissed
- Procedural steps that are contemplated, but not required by the rules
- A consent order is a thing (*Bishop v. Grotian*)
- Not a thing - Responding to undertakings is not a thing; setting dates for questioning is not a thing

Security for Costs

Chapter 23: Page 406-415

4.22 – The Court may order security for costs via a bond, or money paid into court

→ not a final decision, but the action can be stopped if security not provided

→ Applicant must apply early, and must have an arguable defense

4 Factors to consider:

1. Will the applicant be able to enforce the judgment against assets in Alberta
 - i.e. is the party out of province
2. The ability of the respondent to pay the costs award
3. The merits of the action
4. Whether the security of costs would prejudice the respondent’s ability to continue the action

4.23 - What the order must include

- The nature of the security
- The security must be provided within two months of the order
- The action is stayed until the security is provided
- Consequences for not providing the security

***Crothers v. Simpson Sears* - 406**

- Out of town plaintiff sued in AB → QB ordered them to pay security for costs
- Is this valid under the *Charter*?
- Pg. 410 – Residents may be required to post security for costs as well → situations where residents of AB will be required to post security for costs:
 - Companies who can’t pay costs
 - Plaintiffs with repeated costs
 - An adult who lacks capacity
 - Infants
 - Plaintiffs with frivolous or vexatious claims

- Non-resident was ordered to pay costs

Sprung Enviroponics Ltd v. Calgary and Imperial Oil

- What evidence is needed to get a security for costs order?
 - i.e. an affidavit of belief, or affidavit of personal information
- Imperial Oil claimed that the action was not based on personal information, and therefore security should be given → Plaintiff says that they need affidavits of personal information because this could be a final order
- The Court says no because just because security is given, that doesn't end the trial
- The Court also notes that a D should bring an application for security as soon as possible (i.e. don't wait)
- The D must also show they have an arguable defence

Keller v. Penkoske

- Plaintiff was an infant
- The Court notes that the P is on welfare, and if she had to give security, she wouldn't be able to continue with the action
- Plus, the doctor brought the application very late
- The Plaintiff had a good case, therefore it should be able to go to trial (an order for security would mean no trial)

Compromise –Litigation Plans (Settlement)

Chapter 24

3 ways you can settle:

1. An informal settlement agreement or offer
 - Basically contract law (offer, acceptance)
 - Need compromise
2. Formal rules of settlement
 - Different process from contract law (no CL)
 - There must be a genuine offer
3. (Dispute Resolution)

Jones v. Trans America Life Insurance

- The plaintiff sued and won → D appeal and plaintiff offered a settlement under the rules
- The settlement was not a compromise, it was for the full amount
- Overridden by *Allen*

Allen v. University Hospitals Board

- There must be compromise to make it a genuine offer
 - i.e. reduce cost award, etc.

Formal Offer Rules

4.24 – formal offers to settle can be made anytime after SoC has been filed; but only 10 days or more before a summary trial, a trial, or an application is set to be heard.

- BUT! An informal offer can be made at any time

4.24(2) – information needed for the formal offer

- The name of the party making the offer
- The name of the party to whom the offer is made
- What the offer is, and the conditions attached
- See the act...

4.24(3) – expiry of the offer

- Unless withdrawn, an offer expires after 2 months, or any longer time that is specified, or
- The start of the trial or hearing for the application (whichever comes first)

4.24(4) – withdrawing the offer

- Can only be withdrawn if the Court gives permission and the party who made the offer serves written notice on every party who received the offer

Collins v. National Assurance Company of Canada

- The CL rules that apply to informal offers do not apply equally to formal offers under the rules

NOTE – these rules apply to ABCA too

Dispute Resolution Processes

- Now built into the new rules
- **1.2 – purpose and intention of the rules**

4.16 – processes that parties must try to resolve their disputes

- ADR with an impartial 3rd party
- Court annexed ADR
- JDR
- Any program designated by the Court
- **(2) Court can waive the requirement under particular circumstances**

JDRs

4.17

- Parties can agree to allow a judge to look at their claim
- Both parties must agree

4.18 – the JDR process

- The parties must agree on the subject matter
- The rules
- The role of the judge
- Expectations
- Participants

4.20 – Confidentiality

- Unless the parties agree otherwise, all documents and discussions are confidential and completely without prejudice
- The judge cannot hear further applications from the parties (unless the parties agree)
- Information from the JDR can't be used as evidence in a trial
- Consent order must be filed, but everything else is confidential

4.21 – all records must be returned or destroyed

The judge can give their opinion on what the outcome would be in a trial; they can act as a mediator and help the parties come to an agreement.

How to choose your process:

- Stage of litigation – have you done questions? Are you ready to get an opinion on the strength of your case?

- Have you filed an SoC or an SoD? Then you might be ready for mediation
- What is the relationship between the parties? Do you want it to be salvaged? Then you probably want facilitative mediation – then the parties are deciding the outcome (vs. a JDR)
- Do the parties need to hear the decision from a judge?
- Is cost an issue? JDRs are free, mediators are not

Settlement Offers

- If you have an agreed settlement, apply for a discontinuance
 - Note the discontinuance can't be used by the defense, but they can sue if you violate the agreement
- File a memorandum of settlement
- Get a consent judgment – final order

** Code says you can only provide a settlement offer with your client's instructions

- Also, every offer received MUST be presented to your client (even if it's not reasonable, or outside agreed upon terms)

18. TRIAL AND JUDGMENT

19. ADMINISTRATIVE LAW RULES AND PRACTICE

Admin Agencies, Boards and Commissions

Who's your client?

- Counsel for the ABC; legal advisor to the decision-maker
- Prosecutor for an ABC such as at a professional discipline hearing
- Private party who is required to participate in or wishes to appear before an ABC (i.e act to defend a party in a professional discipline hearing)
- Public interest group that has standing to intervene in an ABC hearing

Jurisdiction and Statutory Compliance

- General rule is ABCs are creatures of statute and therefore have no inherent jurisdiction. Any powers they possess must be found in some enactment (see *Bell Canada*).

However, they do have implied powers

- Those powers which are reasonably necessary for the accomplishment of the object intended to be secured
- The CL approach has been codified in the *Interpretation Act*
- See **R. v. Van Straten** – Judge has implied power to receive oral evidence under the *Provincial Offences Procedures Act*
- **Re Osinchuk** – Alberta Hospital's power to care and treat patients includes power to do so without their consent.
- And even if the tribunal lacks the power in question, it may be possible for a superior court to make orders in aid
 - i.e. *Police Act* – if a person fails to appear or answer questions, the person conducting the hearing can apply to QB for an order for contempt against that person

Relevant Statutes

- Specific statutes governing the board or subject matter in question

- General statutes such as the *Administrative Procedures Act* (applies to certain entities) and *Interpretation Act*.
- Also consider: Regulations; Orders-in-Council; Ministerial Orders; or written rules, policies or procedures by the tribunal

Distinct Characteristics of ABCs

1. No uniform set of rules that apply to all tribunals
2. A tribunal may also have investigative powers
3. Procedural efficiency is highly valued
4. Intervention by the public

Concepts that apply to all ABC

- Admin law principle of natural justice has developed by the courts through the judicial review process
- Rules of natural justice generally follow a court process but are less formal and less rigid than that followed by a court
- General rule of thumb is the more court-like a tribunal is, the more important it is that the rules of natural justice apply
- Natural justice and procedural fairness refer to things like:
 - i. Notice, adjournments, right to counsel, right to cross-x, knowing the case against you, right to adduce evidence on your own behalf, right to make submissions, those who hear decide

Consider 3 factors when defining the duty to act fairly (*Knight*)

1. the nature of the decision to be made by the admin body
2. the relationship existing between that body and the individual
3. the effect of that decision on the individual's rights

Procedure/Evidence

- enabling legislation and general rules may say nothing about how a hearing should be conducted
- Most statute say if a hearing is open or held in camera
- Enabling legislation will generally indicated who can call evidence, and who has the burden of proof
- Rules for admissibility of evidence are more lax than for a court of law; must is left to the discretion of the decision-maker
- Many enabling statutes prohibit the use of any evidence given by a witness in any other trial or proceeding taking place (except perjury proceedings)

ABC vs. Courts

ABCs	Courts
○ Relaxed rules of evidence	○ Rules of Evidence Apply
○ Minimal advance notice of evidence	○ Complete discovery prior to trial
○ Not bound by previous decisions <ul style="list-style-type: none"> • But you can use past decision for persuasion 	○ State decisis applies
○ Informal process; less adversarial	○ Formal process; adversarial
○ Written or oral submissions	○ Primarily oral
○ No constitutional questions	○ Constitutional questions
○ Self-representation common	○ Self-rep is less common
○ Intervention by public	○ Usually private disputes where only parties participate

Guest Speaker – Admin law practitioner

- Look to regulations, by-laws, codes of ethics (etc.)
- Look at past decisions - if you know your panel members, look at their written decisions particularly
- If there is no rule addressing evidence, then collaborate with the other lawyer to see if there is a way to present the evidence → present that to the tribunal as a united plan
- Internal appeals – look at the act to know the time limits, and what documents need to be prepared
- Good service – i.e. registered mail
- Costs – the college can be required to provide costs (but only if there is a not guilty finding and if it's allowed in the legislation)