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Part I: Fundamentals

Chapter 1: Introduction

Purpose and Intention of These Rules

General Terms

Civil procedure: process for resolving civil claims via litigation. Rules are about getting you to trial!

Contemporary considerations - expense (cost), time (delay), and access to justice.

Rules designed to make the case focussed as narrowly as possible by the time it gets to trial.

Pleadings: to set out what the case is about, what you want and give notice about it – also lets the party you are suing to respond and give notice. Pleadings narrow the case.

Gathering of evidence: this step allows you to know the evidence the other party is going to bring. This can also narrow the issues going to trial as the other party may admit something if they see you have evidence and they don't.

Chambers applications: enforce the procedures via the court. Only available until the trial starts.

Final order: ends the lawsuit (may be a summary judgement - A judgment granted on a claim/defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law. The court considers the contents of the pleadings, motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law. Allows the speedy disposition of a controversy without trial.)

Pleadings Terms

Plaintiff (π) – party advancing a lawsuit; Defendant (Δ) – party being sued.

Third party – parties brought into the lawsuit after a plaintiff has advanced a suit against a Δ (3^{rd} parties brought in by the Δ). Δ is claiming they are only liable because of the 3^{rd} party. Δ then advances a claim against the 3^{rd} party (it is a separate claim but part of the same original lawsuit). For this new claim the Δ is the 3^{rd} party π and the 3^{rd} party is the 3^{rd} party Δ . The 3^{rd} party Δ can bring in another claim against another party and be both a 3^{rd} party Δ and a 4^{th} party π .

Style of Cause: name of the lawsuit, ex. *Jones v Smith*.

Cause of action: the reason you sue someone. The legal claim you are making. Ex. negligence, breach of contract, ect.

Remedy (Relief): what you are asking the court for in your lawsuit. Ex. damages, specific performance, to drop the suit

Court File number: unique number assigned to a lawsuit. Every document is put in the same file so given a number

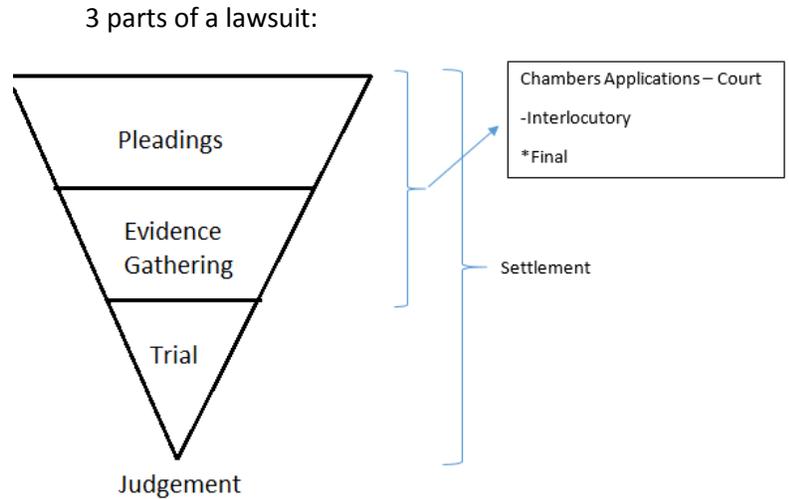
Court clerk: A civil servant, a designate of the court. Assistants to help with court processes. Ex. record notes, pass docs.

Service: official way to give notice in a lawsuit.

Evidence Gathering Terms

Affidavit of Record: written sworn testimony. Replaces examination in chief.

Affidavit of Records: signed document saying these are all the documents the party has. Not just hard copy docs but video recordings, website postings, ect. Any information in the form of some sort of document or recording.



Questioning (formerly Examination for Discovery): Before trial asking the other party Qs. To eliminate surprises at trial.

Expert Report: given to the other side before trial so they are not surprised.

Chambers Terms

Interlocutory: does not end a lawsuit, it is to move things along procedurally so you can continue to litigate.

Application: going to see a judge/Master to get a ruling over the procedures of a lawsuit.

Chambers: designated courtroom time where a judge/master decides on procedural issues.

Justice: Justice of the Court of Queen's Bench of Alberta. Their decisions can be appealed to the ABCA, even on procedural matters.

Master: a designate of the court. Can only hear procedural matters. Their decisions can be appealed to a justice of the ABQB, which can be appealed to the ABCA.

Ex Parte – in chambers applications only where you are going to chambers without giving the other party notice.

Order – result of Chambers. Requires you to do something procedural, does not have to do with the merits.

Judgement: a decision that ends the lawsuit because the court weighed the substance (merits) of the lawsuit

Costs: one of the enforcement mechanisms under the rules. If you go to Chambers asking for a procedural ruling and you win, the other party should pay some of the legal costs you expended for having to take them to Chambers in order to get them to comply with the rules. Like costs in a trial.

Legal Status of the Alberta Rules of Court [Rules]:

- provincial jurisdiction (*Constitution Act, 1867*, s. 92(14): The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.)
- Rules are a regulation enacted under s. 25 of Alberta's *Judicature Act* (Act that governs AB's court procedures)
- Rules of Court committee (as per s. 28.2 of *Judicature Act*) recommends rules to Minister of Justice – it includes judges, lay people, lawyers, members of gov't, ect. Committee constantly looks at rules and reviews the process of litigation and recommends changes.

C(L) v Alberta, 2011 ABQB 12

R: 1.2

- 1.2 is the guiding principle of the rules – the lens through which all Rules must be interpreted
- 1.2(1) - the purpose of these rules is to provide a means by which claims can be **fairly and justly** resolved in or by a **court process** in a **timely and cost-effective way**.
- 1.2(3) contemplates that both substantive and procedural matters be addressed. Defence required to disclose their position and state their defences early. Allows a party to bring a stand-alone application to promote resolution by a Court process as timely and as cost-effectively as possible.

Hryniak v Mauldin, [2014] SCC 727

- "Interestingly, there is recognition that a **culture shift** is required in order to create an environment promoting **timely and affordable access to the civil justice system**. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."
- SCC wants parties to be realistic about whether the case needs to go to trial and asks courts to consider this too.
- Can have litigation that is best resolved without a trial – want focus on whatever is effective and cost-efficient. Don't need to read all the rules as if going to trial.

Nafie v Badawy, (2015) ABCA 36

- Courts mustn't cast aside procedures/practices expressly prescribed by the rules for the sake of expediency.
- Efficiency isn't everything, don't want to lose just and fair outcomes – need to balance.

Chapter 2: Jurisdiction

ABQB, ABPC, Specialized Tribunals and Judicial Review

Primus actus iudicii est iudicis approbatorius – 1st step in a trial is acceptance of the jurisdiction of the court.

Jurisdiction raises 3 issues: topic, territory and *forum conveniens* (the court most suitable for the action).

Provincial Court Act – lays out subjects the prov court can hear (s. 9.6). Prov court can only deal with claims < \$50,000.

Federal Courts Act – creates Federal Trial Court and the FCA, and the topics you can sue on.

Tribunals always created by statute.

Supreme Court of Canada Act – SCC is a statutory court, purely hears appeals, no trials.

Court of Queen's Bench Act and *Court of Appeal Act* – in AB these Acts create their respective courts, but these acts just talk about structure, not jurisdiction like the Acts above.

Superior court in a province has plenary jurisdiction (can hear anything!) w/in a territory (ABQB is given plenary jurisdiction by the *Judicature Act*), subject to what is taken away by the exclusive original jurisdiction of tribunals such as the Fed Ct or specialty tribunals (ex. s. 18 of *Federal Courts Act*, *Board v Board* (1919)).

Parris v Reber (1994), 168 AR 79

- the monetary limit set out in the Provincial Court Civil Division Regulation applies separately to each of the causes of action itemized in the jurisdiction section of the Provincial Court Act

Chapter 3: Costs and Fees

Solicitor's Fees

Rules Part 10, Division 1 (reasonable compensation permitted; contingency agreement allowed; lawyer's bills, retainer/contingency agreements can be reviewed by a Review Officer within 6 months from the date the bill was sent, and their findings can be appealed to the ABQB)

Costs between Parties

Rules Part 10, Division 2

Lawyer ↔ Client {solicitor's fees & disbursements – both paid by client regardless of outcome (even with contingency arrangements the client will usually still have to pay disbursements)}

π v Δ {court costs/party-party costs; recoverable costs} – COSTS BETWEEN PARTIES

Solicitor's fees: A lawyer is entitled to **reasonable compensation** under the *Rules* and the Law Society Code of Conduct

Contingency fee: lawyer just gets the money once the π gets paid (is contingent on π winning their case).

Flat rate fees: very rare in litigation because don't know how the case is going to go. For lawyers who do predictable things, like drafting a will.

Court Structure in Canada:

Supreme Court of Canada	
Alberta Court of Appeal	Federal Court of Appeal
Alberta Court of Queen's Bench	Federal Trial Court
Alberta Provincial Court	
(Provincial Tribunals)	(Federal tribunals)

Disbursements: out of pocket expenses for the client. Not the fee for the lawyer's time, but expenditures that had to be made to move the litigation forward (ex. filing fees for SOC, photocopying, stamps, travel costs, ect.)

Court costs/party-party costs

Recoverable costs of litigation. Winner should recover SOME of the expenses of litigation (partial indemnity).

Solicitor-client costs: everything you paid the lawyer, not just partial indemnity. Rare but happens.

Self-reps still entitled to costs if they win.

Principles of awarding costs between parties:

1. Awarding of costs is ALWAYS in the discretion of the court. Court decides whether to award, to whom and for what steps
2. Presumption is costs to the winner
3. Presumption is partial indemnity
4. Solicitor-client costs if conduct is egregious.

See Schedule C of *Rules* – costs are approx. 60% of what an average lawyer would charge. If judge doesn't mention costs the presumption is the winner gets costs according to Schedule C. You can ask the judge to speak to costs if you have an argument for why Schedule C should not be followed.

If it is a questionable/new point of law where no one was being unreasonable in advancing the lawsuit or defending it, the court will often not award costs and everyone pays their own.

The Court can award costs payable by the lawyer involved in exceptional circumstances (lawyer acted very egregiously).

Start of Schedule C explains how much the lawsuit is worth, depending on what stage of the lawsuit it is in.

Trial Lawyers Association v British Columbia, 2014 SCC 59

- the authority of provincial governments to impose court fees is not unlimited: provinces have an obligation to ensure that fees are not so high as to impede reasonable access to justice.
- It is constitutional for courts to charge court fees, they have to be reasonable however and the judge has to be able to waive court fees when it would be a barrier to justice.

Chapter 4: Professional Responsibilities

Change of Solicitors or Withdrawal

Rules Part 2, Division 4

Lawyer of record: Part 2, Division 4, 2.24(1) – The lawyer or firm whose name appears on a commencement doc, pleading, affidavit or other doc filed and served in an action as acting for a party. Filing any court document on behalf of your client makes you the solicitor of record (FOR THAT LAWSUIT ONLY).

Notice of Withdrawal: filed by the lawyer to get off the record. Form 4 of the *Rules*. 10 day grace period after it is filed and served. Can only be filed before trial is scheduled, after you need court permission. See Rule 2.29.

Notice of Change: filed by the client to get lawyer off the record. No grace period and can be filed ANYTIME.

Undertakings

Undertaking (by a lawyer): a legally/professionally enforceable promise. Can be written, verbal, implied, express, ect.

Trust condition: akin to an undertaking. A Δ 's lawyer can get a cheque from their client and draft a release and send it to the π 's lawyer with a letter saying their client will only get the cheque (there is a trust condition), if their client signs the release (ie. never to sue the Δ again).

B & J Petroleum Ltd v Rhim, 2015 ABQB 1

- Where a solicitor, who is acting professionally for a client, gives an undertaking, that undertaking may be enforced summarily upon application to the court.

Code of Conduct

- In all phases of civil litigation and in all dealing with a client, the public, other members of the profession, tribunals and courts, lawyers and students-at-law in Alberta are required to act in accordance with the Law Society of Alberta's Code of Conduct.
- you can withdrawal as lawyer of record but Code of Conduct says only if you have good cause and give notice.
- Must withdrawal if incompetent to that specific area of law

Part II: Pleadings

Chapter 5: Commencement of Action

Limitation Periods

Rules Part 3, Divisions 1 and 3; Limitations Act, s. 2, 3, 4, 5, 7

Formal commencement of a lawsuit is the FILING of the document (usually SOC), don't need to have served it.

Decision to commence involves 3 types of questions:

1. Substantive Law Questions – is there a cause of action? Is cause of action enforceable (barred by limitations?)
 - can file claim even if limitations passed – looked at later by court only if raised & proved by Δ

Boyd v Cook, 2013 ABCA 27

F: π suing Δ for fraud, > 2 years after knowing he would lose his money, but did not yet know how much he would lose.

- limitations periods exist for certainty in the lives of those who may be sued and to make it so people are sued before they have lost their former ability to defend themselves
 - limitations clock starts running even if you don't know the total damages \$ amount yet
 - under *Limitations Act*, liability is assumed and liability doesn't have to be known to start the limitation period
 - test to begin the limitation period is largely objective, whether π knew or ought to have known that the injury because of the Δ warranted suing. Does not require π actually knowing, just that a reasonable person in the same circumstances would have known.
 - Appeal allowed and the suit dismissed based on the expiration of the limitation period
2. Practical Consideration Questions – economics, time, emotions
 3. Procedural Questions – where (jurisdiction and court), and how (SOC or Originating Application)
 - Commencing action by wrong document is not fatal – R. 3.2(6) allows substitution for correct document.
 - Put on form 10 (SOC) or 7 (OA) the relief you are requesting: declaration, specific performance, damages

Forms of financial compensation/heads of damages:

1. Compensatory damages - \$ to put π back in the position they were before they were wronged.
 - a. Pecuniary loss/"special" damages: out of pocket expenses (you have receipts). Money you would not have spent (or potential money you would have now not gained) but for the injury.
 - i. Past & Future – ex. loss of income, cost of care, medication, installing wheelchair ramps, taxi ride to hospital, ect. Future damages still compensatory, even though just estimates.
 - b. General damages – pain & suffering.
 - proved through π testimony, not receipts. π describes pain, how it has affected relationships, ect. Awarded based on precedent.
 - c. Aggravated damages - Δ conduct is egregious AND π proves they have suffered psychological injury b/c of it.
2. Punitive damages – not to compensate π , but to punish terrible Δ conduct.
 - π just receives the money by virtue of advancing the claim, not for compensating π 's loss

- there has to be an actionable loss in the claim AND egregious conduct.
- to deter this Δ and others from acting in this matter. To punish Δ.

Statement of Claim (SOC)

Rules Part 3, Division 1, and Division 3, Subdivisions 1 and 2

SOC: more detail, gives time period to file SOD or lose default, no specific court date set yet, designed to go to trial (oral evidence, cross-examination, ect.)

Originating Application

Rules Part 3, Division 2

Originating Application: less detail, court hearing (not trial – no oral testimony) on assigned date, only certain types of claims (R. 3.2) – facts not disputed, declaring someone dead, admin review, by statute.

Dash Distributors Inc v Powlik, 2012 ABQB 770

F: application made by Originating Application. Respondent says that a Statement of Claim should have been used.

R: 3.2

- *Rules* allow the procedure to be converted (from commencing document that was a Originating Application to SOC or vice versa) if wrong choice made – court allowed the substitution
- there was a substantial factual dispute in this case so the matter could not be determined summarily and the procedure had to be converted to a SOC pursuant to R. 3.2(6)

Chapter 6: Parties

Persons Lacking Legal Capacity

Rules Part 2, Division 2; R. 2.11

Party: any legal entity claiming or defending a legal position in a lawsuit (π & Δ)

Capacity: necessary to natural justice.

- competence to understand the nature of the proceedings so as to be able to instruct counsel
- competence to be responsible for costs involved in litigation
- Natural adult persons with full mental capabilities can be named as a party to a lawsuit without special accommodations – use full name or alias (legal name they use) or can say “also known as” if relevant to suit
- incapacity is overcome by attaching the incapacitated party to a “litigation representative” (regardless if π or Δ)
 - incompetence only matters on the day the action is commenced – NOT the date the injury started (ie. if you were 17 at time of injury but 18 when lawsuit starts you do not need a litigation representative).

1. Deceased Persons

Survival of Actions Act (ss. 2, 3, 4)

- any cause of action for or against an individual, arising before or after their death, survives REGARDLESS OF THE CAUSE OF DEATH
- damages claims brought by the estate limited to actual PECUNIARY losses (s. 5) – expenses up to trial

Fatal Accidents Act (s. 2, 3)

- if death CAUSED BY THE WRONGFUL ACT OF ANOTHER, this act gives estate of deceased a cause of action - allows damages to relatives of deceased. Funeral and grief compensated based on this statute.
 - Pecuniary damages related to the death (ss. 3 & 7)

- Compensation for bereavement (s. 8 - \$82,000 to spouse/parents of deceased; \$49,000 to children)
- Dependents also have a derivative claim – can claim damages for loss of support.
- All of these claims can be brought by the estate; if estate doesn't then the individuals entitled to bereavement/loss of financial can bring the claim.

NAMING:

Hugh Jelbo as Litigation Representative for the Estate of Ima Goner

Or

The Estate of Ima Goner by her Litigation Representative, Hugh Jelbo

2. Infants

Minors' Property Act (s. 4)

- no settlement of minor's claim without court consent, even if litigation rep consents. Extra protection.

Public Trustee Act (s. 23)

- appoints litigation rep for the minor if s. 5.1 of the *Limitations Act* is invoked by a claimant to trigger the case

NAMING:

Hugh Jelbo, as Litigation Representative for Ima Kidd, an infant

Or

Ima Kidd, an infant, by her Litigation Representative, Hugh Jelbo

3. Persons of Unsound Mind

Public Trustee Act (s. 30)

- If public trustee is the trustee of the estate of a person of an unsound mind, need leave to the court to commence or continue litigation.
 - Only if public trustee involved, if there is another guardian then they can act as their litigation representative as per the *Adult Guardianship & Trustee Act* (provides for the appointment of a Guardian for a mentally unsound mind)

NAMING:

Severus Snape as Litigation Representative for Tom Riddle, a person of unsound mind

Or

Tom Riddle, a person of unsound mind, by his Litigation Representative, Severus Snape

4. Appointment of a Litigation Representative

3 types of Litigation Representatives (R. 2.12):

1. Automatic (R. 2.13): authority already exists by another legally recognized means (by court order or statutory provision). [note, however: not all guardianships give authority to be their litigation representative].
2. Self-Appointed: self-selected litigation rep files an affidavit (form 1) with required info (R. 2.14)
3. Court-Appointed: application by interested party or opposing party (Rs. 2.15-2.17).

Unless specifically authorized to settle/discontinue – need court's approval (R. 2.19). Litigation rep for π is liable for costs, but litigation rep for Δ is only liable if litigation rep is engaged in serious misconduct and court orders it (R. 10.47)

Main function of the litigation rep is to give instructions to counsel regarding the lawsuit AND to be responsible for costs.

Lawyer CANNOT be the litigation rep and litigation rep is NOT counsel for that person.

Champagne v Sidorsky, 2012 ABQB 522

F: π suing Δ for breach of terms of a restrictive covenant and other contract provisions. π gave daughters power of attorney and wanted them to continue his litigation. One daughter sought to be characterized as an automatic litigation representative. π 's daughters also co-owners of the lands are co- π s to the action.

R: 2.11, 2.13, 2.16, 2.21

- CANNOT be a litigation representative and counsel (lit rep cannot commence or continue an action)
- when a litigation representative is appointed, they must operate through counsel (even in class proceeding).
- as per s. 106(1) of the *Legal Profession Act*, lay people cannot represent another in court, must be a lawyer (unless an express exception in s. 106(2))
- not appropriate for a π in the action to be another π 's litigation representative – potential conflict of interest
- litigation rep ONLY applies when dealing with an incapacitated party (not automatically if have power of attorney)

LC v Alberta (Metis Settlements Child & Family Services, Region 10), 2011 ABQB 42

F: LC commences lawsuit on her behalf and on the behalf of her 3 children. Over the course of the lawsuit, one kid dies and one grows to adulthood. LC's lawyer wants to replace LC as the litigation rep for the remaining child.

R: 2.11(a), 2.14(1)

- can be a named party and a litigation representative for another incapacitated party in the same lawsuit
- litigation representative for a minor does not have to be their parent/guardian; avoids conflicts of interest
- opposing party cannot decide/complain about who the litigation rep is for the other party, unless exceptional circumstances such as a conflict of interest.
- lawyer representing a party cannot assume the role of litigation representative of one of the other parties

Trust and Estate Proceedings

R: 2.1 - Use the name of the trustee, not the name of the beneficiaries, just note they are being used as trustee.

Business Entities

1. Corporations

Business Corporations Act (ss. 208, 210, 227, 295).

Registered corporation is a "legal person" so has capacity can be sued in corporate name. Don't identify individual directors unless suing the individuals. If registration lapses, can be revived to sue or be sued (*Business Corporations Act*)

NAMING: (whatever is listed in corporate registry) – ex. Sony Entertainment Ltd.

2. Partnerships

R: 2.2-2.4

Can sue as a partnership. Can be sued as partnership or as individuals (or both) and can defend individually even if sued as partnership.

NAMING:

TIC Associates

Or

Tom Cat, Ingrid Bear and Candice Frog carrying on business under the firm name of TIC Associates, and TIC Associates

3. Sole Proprietorships

R: 2.5

Sole proprietorship: an individual carrying on business but not as a corporation

Can sue and be sued in individual name (R. 2.5). Generally you want to include business name and as much information as possible in addition to individual's name assuming it is not a registered corporation.

NAMING:

Milton Middleton, carrying on business under the firm name and style of Milton's Printing Service

The Crown

In the context of suing the Crown not as a private entity, but because you have a private right against them.

Interpretation Act (AB; s. 14) – no enactment binds the Crown unless it specifically says so

Proceedings Against the Crown Act (AB; ss. 8-14, 17, 23, 25) – All civil rules of procedure apply to the Crown unless specified otherwise in statute.

Crown Liability and Proceedings Act (Federal; s.21, s. 23) – Provincial court rules apply to the federal Crown.

Crown Liability and Proceedings (Provincial Court) Regulations (s. 7)

NAMING:

Provincial Crown:

Her Majesty the Queen in Right of Alberta

Federal Crown:

Attorney General of Canada

Canada Deposit Insurance Corp v Prisco, (1997) 206 AR 283 (CA)

F: Appellants appeal order directing former Minister of State for Finance attend the examination for discovery.

- Crown agent cannot be compelled without statutory authority to submit to discovery.
- *Crown Liability and Proceedings (Provincial Court) Regulations*, s. 7 state that when provincial rules allow an officer of a corporation to be examined for discovery, the Deputy Attorney General may designate an officer to fulfil the discovery requirement
- provincial rules of Court apply to the federal crown, but the rules don't apply in any greater extent than they would to any other party – have to supply an individual to answer questioning but other party can't specify who they want to answer the questions

Class Proceedings & Representative Actions

R: 2.6-2.9;

Alberta's Class Proceedings Act – class proceedings statute takes precedent over the rules of Court if in conflict.

R. 2.6: if numerous people have common interests in the subject of the claim, one or more of those people can make the claim on behalf of all others. Not a class action – is a group of people who have suffered a particular kind of loss ex. an unincorporated association (club or Aboriginal band).

Representation Before the Court

R: 2.22-2.23

R. 2.22: allows for self-representation

R. 2.23: allows for an "assistant" in making representations to the court –NOT as a lawyer (*Legal Professions Act* requires you to act for yourself or hire a member of the law society) but for assistance ie. like a family member to translate.

Lameman v Alberta, 2012 ABCA 59

F: Asked judge to override the *Legal Profession Act's* prohibition of acting as a barrister in court without being a member of the Law Society of Alberta so that they could be represented by their lawyer's from the UK.

R: 1.2, 2.23

- no exception to the *LPA* for unpaid legal work.
- proposing a breach of statute, which is a quasi-criminal offence under the *LPA*, so no exception granted
- R. 2.23 is about giving you practical help, not representation. Even if the legal services are free they are not authorized.

Chapman Estate v Ramjohn, 2015 ABCA 34

F: Prior to death, Chapman won a civil action against Δ , but died with the judgement still outstanding. Estate's self-appointed litigation representative is trying to enforce the judgment on behalf of the estate without counsel.

R: 2.14; 2.22

- only individuals can self-represent themselves, an estate is not an individual but a separate legal entity that requires counsel to appear in court (R. 2.22).
- litigation representative can give instructions to counsel but cannot appear in court

908077 Alberta Ltd v 1313608 Alberta Ltd, 2015 ABCA 117

F: Director of corporation wanted to represent the corporation in a lawsuit

R: 2.22

- corporations must be represented by counsel

Chapter 7: Pleadings - General

Rules Part 13, Divisions 3 and 4

Pleadings: documents providing written statement of a party's position re: the issues in a lawsuit. Define the scope of the lawsuit. Include all the documents involved with this: SOC, SOD, ect.

SOC filed and served first, followed by SOD. If Δ thinks they have a claim against the π they can counter claim (not in SOD, in a separate pleading). Δ can bring in a 3rd party claim in a separate pleading document.

Purpose of pleadings is natural justice – give notice to court and to all parties of the issues and the position of each party in relation to each issue. In Canada our pleadings state the material facts (and any allegations presumed) that give rise to a claim. Also include the damages/relief claimed and the name of all the parties.

Not just natural justice principle, has practical implications because you will be limited in what you can litigate and argue in court based on what is set out in the pleadings.

Lax Kw'alaams Indian Band v AG Canada, [2011] SCJ No 56

F: π argued before a court can characterize a claimed aboriginal right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group

- pleadings have to characterize the claim, the court is not to use a commission of inquiry approach
- pleadings are to define what is in issue – give the opposing party notice of the case to meet – not for the Court to figure out.

Paniccia Estate v Toal, 2012 ABCA 397

F: Defence tried to raise extra legal arguments (no claim by dependants for shortening life and no special damages as purpose too broad) after the close of evidence at trial. SOD merely contained denial of liability.

R: 13.6, 13.12

- have to include any issues/legal argument in the pleadings
- it is possible to make an application to amend pleadings, but if never put in it is against the rules of natural justice to make a ruling on an issue the other party was not prepared for. Would be an error of law.

Mazepa v Embree, 2014 ABCA 438

F: Spousal support was not included in the pleadings which disputed ownership of home but trial judge awarded it because all parties agreed to spousal support in lieu at trial. Later didn't want to pay spousal support so argued award outside of court's jurisdiction because was not in the pleadings.

R: 1.5, 3.65

- should use strict definition of jurisdiction – court has jurisdiction over the subject matter and procedural shortcomings should be viewed as mere irregularities, not jurisdictional
- the court can amend the pleadings at any time, and parties can always consent to matters of procedure
- relief can be granted with conditions set by the court
- generally speaking, the Court does not have authority to issue something not in the pleadings, but if there is consent it is an exception.

Part 13 of *Rules* have technical rules. Key pleadings requirements: concise statement of material facts. Material = not every single detail, just relevant ones. Material FACTS = only facts, not evidence. May have to mention statements of a point of law (there was a contract breach, ect.) but include the related material facts. Also include anything that may take the other party by surprise (you are going to rely on limitation period or estoppel, ect.) [R. 13.6 – is there is a possibility you may be relying on it you should mention it]. Specifically plead the relief/remedy you want – type of damages, if you want interest and the basis you are claiming it (ex. statute, contract, ect.), if you want costs, ect.

Silence = deemed denial (s. 13.12). But have to meet the point of substance, specify what it is you are denying.

Must include address for service.

Chapter 8: Interest

Rules 13.6(2)(c)(iii); Judgement Interest Act; Judgement Interest Regulation

Prejudgment interest: interest from the date of loss and the date of judgement. Claim in SOC.

Post-judgement interest: interest from the date of judgement until date of full payment. Can't ask for in SOC.

Judgement Interest Act – your default go to if no contractual interest agreement.

- s. 2 - sounds like Court has to award interest, but s. 2(3) explains that court has discretion when and how to award interest if appropriate. Presumptively will award interest but have discretion not to if circumstances warrant it.
- no interest on future pecuniary damages or on punitive damages
- no compound interest under statute, only get that if some contract.
- s. 4 - says non-pecuniary damages interest is 4% per year (because in regulations)
- s. 6 – you get post-judgement interest from the date of the judgement whether filed or not, up until the judgement is paid – interest rate is as per the regulations

Aetna Insurance Co v Canadian Surety Co, (1994) 157 AR 162 (CA)

- *Prima facie* interest is awarded, can be modified based on the circumstances
- In the absence of an error in principle, the appeal court does not interfere with the discretion of the trial judge in making an order regarding interest.
- If the appeal court alters the judgement, then they are free to reconsider what should be awarded for interest

321665 Alberta Ltd v ExxonMobil Canada Ltd, 2012 ABQB 76

F: Plaintiff requested compound interest at trial but in ASOC just mentioned pre-judgement interest

- s. 2(b) *Judgement Interest Act* precludes an award of compound interest, though court has discretion under common law/equity if facts permit
- trial judge restricted to relief claimed in the pleadings
- compound interest usually limited to cases where it has been contractually agreed to

- plaintiff delayed the action a bit, but most delays were justifiable, so pre-judgement interest just applies for 12.5 years not the total 14.5 years.

Chapter 9: Venue

Rules Part 3, Division 1. R. 3.3-3.7.

Venue: location where a lawsuit will take place; relates to which courthouse governs (where are we filing documents, going to Chambers, trial, ect.)

11 judicial centres in AB.

R. 3.3 – you must commence the lawsuit which is closest by road to the residence or business address of the parties. It is all about location. If the parties are not residing in the same area, then you commence it closer to one party, or where the parties agree to have it, or where the court orders.

R. 3.4 – allows the court to move judicial centre if not closest to the land in dispute in the claim or to the Δ

R. 3.5 – allows the court to move the venue if they think the chosen venue is unreasonable – or if the parties want it changed (ie. they move)

R. 3.6 – discusses what choosing a venue means. Usually means the whole lawsuit is there but a Court can order an element of a lawsuit to happen elsewhere (usually trial).

R. 3.7 – you can enter an enforcement document in any judicial centre.

Siver v Siver, 2010 ABQB 755

F: π wants proceedings moved from Edmonton to Fort McMurray, where both parties currently live. Δ opposes as she has a lawyer in Edmonton and she may be moving to Edmonton

R: 3.3, 3.5

- application denied; not unreasonable for the proceedings to be in Edmonton
 - TEST: would it be **unreasonable** for the action to be carried on in its current judicial centre
 - there is no logical grounding to have it at its current location – not necessarily the best, smartest or cheapest decision – it is a decision that doesn't make any sense

Chapter 10: Joinder of Parties and Causes of Action

Joinder: the combination of multiple parties and/or causes of action in a single lawsuit.

- procedural questions: HOW to join parties/causes of action
- substantive questions: WHO or WHAT causes of actions can be joined

Joining Parties and Claims

Rules 3.69, 3.7

Basic policy: joinder of parties and/or causes of action should be allowed to increase the efficiency of litigation (R. 1.2)

R. 3.69 – can join more than one claim in a single lawsuit (ie. can sue same person for breach of contract and negligence in the same suit)

R. 3.70 – can join more than one π and more than one Δ if claims (1) arise from same event OR (2) raise common questions of law or fact OR (3) the court permits.

Restrictions on joinder- res judicata: cause of action estoppel, issue estoppel, abuse of process.

Res judicata: “a matter already judged” – can't use joinder to raise issues that have been previously decided by a Court.

1. Res Judicata – Cause of Action Estoppel

One judgement per cause of action, cannot re-litigate if:

1. same parties
2. same legal right
3. same loss

[same loss NOT same damages – ie. if sue Δ for personal injuries suffered in a car accident, cannot later sue them for car damage from the same accident; also can't return and sue for loss of future wages if didn't plead it at trial because didn't know would never be able to work again]

Cahoon v Franks, [1967] SCR 455

F: Car accident, negligence case dealt with in court, with the only initial item of damage claimed being the damage to the car. Court allowed to be amended > 12 months after accident to include special damages for medical expenses and loss of wages. *Vehicle and Highway Traffic Act* has a 12 month limitation period.

- New head of damages ≠ a new cause of action; just adding damages to a cause of action that was properly brought within the limitation period so amendments permitted.

2. Res Judicata – Issue Estoppel

3 requirements of issue estoppel (from *Angle*)– cannot re-litigate:

1. the same question/issue
2. which has been decided with finality
3. as between the same parties

Issue estoppel applies even if the question was decided as part of a different cause of action.

Angle v Minister of Natural Resources, 1975 SCC

- 3rd requirement between parties not strictly required, can be the parties' privies – or anything where the rights have defined that relationship between those parties (ie. consumer vs manufacturer) even though not specifically consumer A and consumer B separately.

Penner v Niagara, [2013] SCJ No 19

F: Court struck claims from SOC alleging police misconduct because the issues had been dealt with by a police disciplinary tribunal.

- public policy does not affect whether issue estoppel applies to police disciplinary proceedings
- unfair to the appellant to not get a chance at their legal right just because Chief of Police decided if the police officers were to be punished – appeal allowed, issue estoppel did not apply.
- Yes, need three requirements at minimum for issue estoppel, but sometimes the court will require more if an unfairness results. Court has discretion not to apply issue estoppel if injustice would arise.

3. Res Judicata – Abuse of Process

Court has inherent jurisdiction to make sure its processes are obeyed.

Cameco Corp v Insurance Co of State of Pennsylvania, 2010 SKCA 95

- abuse of process is broad and includes cause of action estoppel and issue estoppel
- focus of abuse of process is less on the interest of the parties and more so concentrates on the integrity of the adjudicative process. Court won't allow joinder if it abuses court process to protect the integrity of the court.
- Not prejudging the merits of the lawsuit, just that it abuses judicial resources even if the other res judicata categories not met.
- Court may exercise this discretion to protect resources, for fairness, to protect principle of finality, ect. Expanding on the idea that the court has discretion to make decision outside of cause of action or issue estoppel

Sears Canada Inc v C & S Interior Designs Ltd, 2011 ABQB 471

F: Identical claims filed in Alberta and Ontario.

R: 3.68

- parallel proceedings do not result in an automatic stay (is not an abuse of process). Court decides whether the AB action should be stayed or allowed to proceed.

Amendment of Pleadings

Rules 3.62-3.67, 3.74; Limitations Act, s. 6

The process that applies to amend a pleading depends on the TIMING of the amendment relative to:

1. the stage of the litigation (procedural); and
2. the limitation period if adding a party or claim (procedural and effects substantive rights)

Stage of the litigation:

1. Before filing the pleading – “Amend” as of right (R 1.2, 3.69, 3.7) - lawsuit hasn’t started so can change anything
2. After filing the pleadings – Amend as of right, UNLESS pleadings have closed (R 3.62(1)(a)) – even if filed and served can amend and file and serve w/out anyone’s permission, just have to communicate the change and title it ASOC, ect.
3. After pleadings have closed – Amend by agreement of the parties (R 3.62(1)(c)) OR amend by court order (R 3.62(1)(b)).

Pleadings close (R 3.67) when a reply is filed and served or when the time expires for filing and serving a reply (10 days after service of the SOD (R 3.33) or earlier if reply filed < 10 after SOD filed/served). Timelines can be extended by party agreement.

Two different rules apply for Court orders approving amendments depending on subject matter:

1. To add parties (R 3.74 – 3.74(2)):
 - a. if adding a π , require that person’s consent.
 - b. if adding a Δ or 3rd party, an existing party has to make an application to add them and the court has to be satisfied that order should be made – does not consider the merits, but considers whether the addition/change of a party would result in prejudice to any party that could not be remedied by costs or an adjournment (R 3.74(3)). Incompensable prejudice are things that affect evidence (only witness of new claim has died – rare circumstances, most prejudices compensated by costs or time).
2. Other amendments (R 3.65) – Amendment relates to content other than the parties and other party doesn’t consent and pleadings have closed, a court order is required. May include adding or changing the cause of action or changing the nature of the allegations. Court sets time for making the amendment.

Court order is obtained by application, supported by an affidavit (sworn written testimony) stating WHY the amendments are necessary

- affidavit should be sworn by the parties themselves, not the lawyer.

Costs arising from the amendment are borne by the party seeking the amendment (R 3.66) but costs of an amendment application are presumptively awarded to the party that “wins” the application.

Parties served with an amended pleading have 10 days to amend its responding pleading or else is deemed to rely on its original pleading (R 3.62). Parties can agree to extend the timeline or go to court if no agreement.

Attila Dogan Construction and Installation Co Inc v Amec Americans Ltd, 2014 ABCA 74

F: Joint venture agreement for contracting construction. After issues with the project agreed to release delay claims. SOC alleged breaches in performance of design and duties and misrepresentation led to agreement. Appellant wanted to amend SOC to include breach of fiduciary duties for not reporting conflict of interest and duress for the agreement.

- after pleadings close, amendments are possible but require consent from other party or permission of the court, which requires amending party to produce evidence in support of the amendment.
- assuming evidence is provided in support, pleadings may be amended unless:
 - would cause prejudice to opposing party not compensable by costs/time
 - amendment is hopeless (doesn't include cause of action or is very inconsistent with the record)
 - adding a new party or new cause of action after expiry of limitation period (unless permitted by statute)
 - element of bad faith associated with failure to plead the amendment initially

Poff Great Northern Data Supplies (AB) Ltd, 2015 ABQB 173

F: SOC amended to add defendant that they initially misnamed. Master allowed without prejudice to new defendant's right to raise a limitations defence.

R: 3.74

- *Limitations Act* allows adding a defendant after the limitation period has expired if the added defendant had sufficient knowledge of the claim (s 6(4)(b)). Claimant must prove added claim is related to events in original SOC and if so, defendant must prove that s. 6(4)(b) requirement was not satisfied (s. 6(5)(a)(b)).
- Because new defendant and prior defendant had the same director, sufficient knowledge within the limitation period was determined. New defendant has not established prejudice.
- Once s. 6(4) applies, the defendant loses limitations defence (s. 6(1)).
- Court has 3 options when dealing with an amendment outside of the limitation period:
 1. find the limitation period has not passed (discoverability principle applies so 10 years not 2) so amendment allowed
 2. find the limitation period has passed and look at s. 6 of *Limitation Act* to see if exception applies, if so allow the amendment, if not don't allow the amendment.
 3. if the court can't tell is the limitation applies and needs a trial to determine that, allow the amendment and allow the limitation defence to be raised at trial (can't be raised after #1 and #2).

Joining and Separating Parties

Rules Part 3, Division 6, Subdivision 1

Δ can bring application to separate causes of actions/parties (R 3.71). Court looks at the appropriateness of the joinder and if there are any undue prejudices, what they look at initially with joinder. Court looks at the appropriateness of the joinder and if there are any undue prejudices, what they look at initially with joinder. Will usually only sever actions if there is a real likelihood of saving time and money.

Can consolidate actions or actions tied together (R 3.72)

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

F: SOC alleged expropriation, then amended to include various tort claims. Δ wants amendments struck, claiming tort claim and expropriation claims differed fundamentally and it would unduly complicate the action to hear both together.

R: 3.71-3.72

- these tort claims not causally connected to the expropriation. However there is overlap in the factual circumstances of the claims, deal with the same parties, land and inter-related dealing with the lake water level. Two separate trials with consume more resources than if they are resolved together. No real prejudice either.

Parties Added on Own Motion/Intervenors

R: 2.10 – allows intervenors added at trial with Court permission. Make arguments for those likely affected by outcome.

University of Alberta v Alberta (Information & Privacy Commissioner), 2011 ABQB 389

R: 2.10

- lack of opposition to intervenor application is not determinative, Court has discretion to refuse application
- Common law principles (*R v Hirsekorn*, 2011 ABQB 156):

- intervention may be allowed where intervenor is specially affected by the decision OR has special expertise/insight to bring on the issues
- intervenor in appellate court cannot argue new issues which require introducing new evidence
- intervenor status may be granted where their interest may not be fully protected or argued by a party
- Courts should take 2-step approach to determine if allowing intervenor application:
 1. determine subject matter of the proceeding
 2. determine the proposed Intervenor's interest in the subject matter

Chapter 11: Service

Service = official delivery of court documents to opposing party/parties

Purpose of Service

Purpose of service is to (1) give notice to opposing party, and (2) give court jurisdiction to give a remedy (natural justice)

Butkovsky v Donahue, 1984 CarswellBC 83

- if the π has properly served the Δ , the π is *prima facie* entitled to continue the proceedings
- service allows court to give a ruling – natural justice requires service because it is fair to know there may be a ruling against them

Service of Commencement Documents on Parties in Alberta

R: 2.12(2); *Rules* Part 11, Division 1-2, 4-5

Two methods of service:

1. personal service (“in hand”) – give the document physically to the person who is to receive it (or get it to them by recorded mail with their signature- more tricky)
 - required for commencement documents (SOC, 3rd party claim, anything starting litigation on a party)
2. ordinary service – give notice but not as direct, like mailed to the address you have for them.
 - for everything but commencement documents, including chambers application (can be served by personal service too but not necessary)

Effect of service: (1) it starts the time running for a response, and (2) permits the court to provide the remedy you seek

Timing is important for service because there are rules for when a document must be served and service starts the time running for a response.

Have to provide evidence that service has been effected within the required time frame. Two ways to prove service:

1. Affidavit by process server/whoever served it (can't be lawyer because may need to testify if service challenged).
2. acknowledgement by other party (usually only if lawyers already involved or if non-commencement document)

1. On Individuals

R: 2.12(2), 11.5-11.8, 11.12, 11.18

2. On Corporations

R: 11.4, 11.9, 11.13; *Business Corporations Act*, s. 256; *Interpretation Act*

Serve it to a person who appears to be in the position of management control. Or can be done by recorded mail and ANYONE who works there can sign it and service is effective.

Business Corporations Act, s. 256 allows service to their registered office or to their registered mail of an AB Corporation. Does not have to be given to a person in the position of management control

3. On Firms/Partnerships

R: 11.4, 11.10, 11.11

Service on a partnership can be to a general partner or a person in management or control or by mail addressed to the limited partnership to the principle place of business.

For a sole proprietorship, you have to serve the sole proprietor or a person with management control at the place of business or by recorded mail at the principle place of business. With respect to partnership, if you intend to enforce a judgment on an individual partner you must individually have given notice.

4. On Statutory/Other Entities

R: 11.14

Generally for a statutory entity if service is not laid out in the statute you can get service by leaving the document with a person with management control or you can send it by recorded mail to that entity's personal place of business.

5. Special Circumstances

- a. Address for Service - R: 11.15 – if an address for service has been provided can achieve service of a commencement document by leaving it at that address addressed to that person, or mailing it to them there
- b. Lawyer - R: 11.16-11.17 – known lawyers for party can accept service if their client gives them consent
- c. Business Representative of Absent Party – R: 11.19 – can serve an business entity within the province if a business representative is out of the province
- d. Agreement - R: 11.3 – can achieve service however parties agree to (ex. in a contract)

Service of Commencement Documents outside of Alberta (“Ex Juris”)

R: 11.25-11.26

Need a real and substantial connection to AB, and then you can serve a person outside of AB who is in Canada without a court order (need court order if outside of Canada). Facts in commencement document should demonstrate why there is a real and substantial connection to AB between them and that lawsuit (R. 11.25(1)).

To get a court order to serve someone outside of Canada you have to demonstrate to the court that there is a real and substantial connection based on the allegations in the commencement document between that person and AB, may need an affidavit to support too (R. 11.25(2)).

R. 11.25(3) gives examples of circumstances where a real and substantial connection is presumed to exist.

Serving someone outside of AB you can follow AB service rules, the rules of that jurisdiction, or the Hague Convention (for international service). Date depends on the method of service used.

jurisdiction *simpliciter* – whether a court has jurisdiction

doctrine of *forum non conveniens* – principles governing a court's decision to decline to exercise jurisdiction

Metcalfe v Yamaha Power Motor Products, 2012 ABCA 240

R: 11.26

- R. 11.26 is different than other service rules because of additional considerations with service *ex juris*. Not solely concerned with whether a document was brought or likely to be brought to the attention of a foreign Δ, service *ex juris* is founded upon decision to extend court's jurisdiction beyond its own territory. Have to establish a real and substantial connection.

Club Resorts Ltd v Van Breda, [2012] SCJ No 17

F:

- a. Berg to provide tennis lessons each day in exchange for free stay for him and his wife at a Club Resorts' resort in Cuba, organized by ON travel agent Denis. Berg's spouse, Van Breda, suffered injuries while doing exercises on a metal structure on the beach that collapsed. Once back in Canada sued Club Resorts, Denis, et al. in ON Ct.

- b. Charron booked vacation including scuba diving at a Club Resorts' resort through ON Bel Air Travel Group. Charron drowned on his second scuba dive. Family sued Club Resorts, Bel Air, et al. serving the foreign Δ outside of ON.
 - In both cases parties served outside of ON moved to dismiss the action for lack of jurisdiction or asked the Court to decline jurisdiction on the basis of *forum non conveniens*.
- Were the ON courts right to assume jurisdiction over these claims? Objective presumptive connecting factors: (presence of π in jurisdiction alone not enough), Δ is domiciled or a resident there, Δ carries on business there, tort occurred there, contract connected with the dispute made there. New factors can be added if considers similarity to the recognized factors, treatment of the connecting factor in case law, statute or in private international law of other legal systems. If no recognized presumptive connecting factor applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. Can be rebutted.
 - Van Breda case correctly in ON because of contract connected with dispute made there
 - Charron showed Club Resorts conducted business in ON beyond advertising
- Were the ON courts right to exercise that jurisdiction and dismiss application for stay based on *forum non conveniens*? Court cannot decline to exercise its jurisdiction unless Δ raises *forum non conveniens*. Can be exercised to assure fairness to the parties and the efficient resolution of the dispute. Δ must show why an alternate jurisdiction is clearly more appropriate.
 - Δ in both Van Breda and Charron did not show Cuba would be more appropriate – burden on π greater

Service of Non-Commencement Documents in Alberta

Rules Part 11, Division 1, 3

Non-commencement document is anything that is not a SOC, a counterclaim or a 3rd party claim. Ex. SOD, affidavits, notice to co-defendant, ect.

Non-commencement documents can be served 4 ways:

1. personally
2. electronically (R. 11.21). Can serve someone electronically (ex. e-mail) with these requirements:
 - a. the party had to have given you that e-mail
 - b. they had to have received the e-mail in a readable form
 - c. party acknowledges they received it
3. recorded mail (this is a method of personal service).
 - Can prove service with recorded mail either by their signature or by the passage of time (ex. 7 days)
4. by an agreed upon method

Harder v Harder, [1975] 4 WWR 765 (ABCA)

- Notice of Appeal \neq commencement doc so it may be served on solicitor of record (doesn't need personal service)

Don't need personal service with SOD.

Overcoming Service Problems

Rules Part 11, Division 1, 6

1. Substitutional Service

R: 11.28

Asking for a court order (via ex parte Chambers Application) to not require personal service. Need affidavit that states:

1. why service according to the rules is impractical.
2. an alternative service method

3. why the alternative method is likely to bring the document to the attention of the person to be served

R v Goodhart, 2012 ABQB 712

F: Crown had an ex parte Order for Substitutional Service of Notice of Appeal based on Cst who tried to serve the Notice's affidavit. AC asking to set it aside. (Where the appellant is a prosecutor the Notice of Appeal has to be served personally so *Harder* does not apply).

R: 11.28

- misinformation and misleading info led to the original grant of the Substitutional Service Order. Did not meet the full and frank disclosure requirement (high standard) of ex parte applications. Also 30 days still remaining in the appeal period. Court expects more when the substitutional service applicant is the Crown. Order set aside.

2. Validating Service

R: 11.27

Didn't technically follow the rules but have reason to believe the party has seen it so requesting order validating service.

Date of service is the date specified on the order.

226911 Alberta Ltd v Redecopp, [2012] ABQB

F: SOC filed, and gave SOC to Δ with statement it "does not in any way constitute service of the claim". SOC and limitation has since expired so π asking court to validate the initial "service".

R: 11.27

- defective service can be found sufficient if proved it came to the knowledge of the Δ and Δ received knowledge of the general nature of the claim against them – however, documents must be conveyed in a context that makes it clear objectively that rights are being engaged.
- R 11.27 has two requirements: 1. a method of service; 2. must have brought or have been likely to bring the claim to the attention of the person being served. In this case the 2nd requirement is met but the 1st one was not.
- Application to validate service is denied.

3. Dispensing with Service

R: 11.28-11.29

Have to show service was impossible. Court has to be convinced the risk of not giving notice is very small.

4. Setting Aside Service

R: 11.31

Application must be made complaining about the service before they defend that claim.

Chapter 12: Renewal of Statement of Claim

Rules Part 3, Division 3, Subdivision 2

Filing a SOC must be done to satisfy the requirements of the *Limitations Act*

Serving a SOC must be done to satisfy the requirements of the *Rules of Court*.

BASIC RULE (R. 3.26): must be served within 1 year of filing or the SOC is invalid as against the unserved Defendant

Exception: π obtains court order extending time for service of SOC. Can bring application:

1. before the 1 year service period expires (R. 3.26)- discretionary, but not a super high standard so long as you have a valid reason it is usually granted
2. after the 1 year expiry date (R. 3.27) – rule lists reasons the court may grant an extension. Circumstances demonstrate the π had good reason for thinking the 1 year service period was not an issue.

Failing to serve does not stop the action, but it cannot be continued. The action just stays in limbo, is not an open or closed litigation.

Brousseau v Janz Estate, 2014 ABQB 136

F: Car accident, driver at fault died. Insurance told plaintiffs they would be covering the accident but only 2 of 3 SOC's settled without service, no settlement reached on 3rd so insurer challenged service.

R: 3.27

- just barely fits into 3.27(1)(a)(ii) or (iii) because insurer said they would cover it – renewal of SOC allowed

McGowan v Lang, [2015] ABCA 217

F: Car accident. SOC filed and sent to insurance adjuster (not Δ) with note saying SOD not required at this time.

Extension of time granted to serve SOC set aside, decision being appealed.

R: 3.27(1)(c)

- R 3.27(1)(c) is a two-step process: 1. π must bring itself within the requirement that special or extraordinary circumstances exist resulting solely from the Δ's conduct or from the conduct of a person who is not a party to the action & the special/extraordinary circumstances are connected to the lack of service; 2. after step 1 confirmed, court considers whether it is appropriate to exercise its discretion to extend time for service (considers policy considerations of the limitations act and prejudice here).
- mere negotiating a settlement is not going to be considered an extraordinary circumstance
- No special/extraordinary circumstances, extension not valid, appeal dismissed.

Other Points to Note regarding Renewals:

- Usually is an *ex parte* application
 - R. 3.26 time limits cannot be extended – there is a general provision in the rules s. 9 that says the parties can agree to extend any time limit under the rules unless the rule says otherwise, R. 3.26 says otherwise.
 - R. 3.27 can only be used ONCE (unless new R. 3.27(1) circumstances arise) – if you have applied to extend the SOC after the one year has expired you can't go back and ask for a further extension.
 - The Court Order authorizing the extension must be served on the Defendant along with the Statement of Claim (R. 3.29) – court order extending the statement of claim must be included with the service of the SOC so they are aware they aren't getting an expired SOC.
 - Failure to serve the SOC on one Defendant does not make the SOC invalid as against another Defendant who was properly served (R. 3.28) – failing to serve one does not mean your action dies against all of the defendants. After being served, Δ can apply to set aside the extension if the Δ has grounds for concluding that the extension should not have been granted (R. 9.15) - If an application made *ex parte* the Δ can apply to set aside the order

Chapter 13: Particulars

R. 3.61

Request for particulars: asking for more details, can be done by Δ or π (R 3.61). NOT to get evidence or see what evidence the other party has. Particulars are a procedural option to help make the decision as to how to respond or to help make the response more meaningful. If the party that was served with the pleading makes a request for particulars then if no response within 10 days of service of the request, can apply for a Court Order directing particulars.

*A request for particulars does NOT automatically extend the time period for responding to the SOC (or whatever document the request is in relation to).

Alberta v Atria Group, 2015 ABQB 390

F: Δ argue particulars required to both allow them to plead and to narrow the scope of doc production and questioning. Crown argues particulars should be strictly focused on whether the defendants can plead.

- Particulars function to limit the generality of allegations and to define the issues to be tried
- Each party is entitled to know the case intended to be made at trial and particulars help ensure litigation is conducted fairly, openly, and without surprise.
- Request for particulars ≠ Examination for discovery. Particulars limit the generality of allegations and define the issues to be tried whereas discovery is to learn the knowledge of the other party
- Court determines whether allegations are so vague to allow an order for particulars

1021018 Alberta Ltd v Bazinet, 2015 ABQB 15

F: Request for particulars requested after π asked for more detail and responded with “ Δ knows”, and listed some allegations as “including but not limited to”

- while Δ knows what their actions were, they don’t know what the π believes those actions were. Unacceptable.

Chapter 14: Procedure on Default

Time for Defending

Rs: 3.30, 3.31 and 3.34

Also Rule 6.02 of the Code of Conduct – counsel must be courteous to opposing parties & counsel (this includes agreeing to reasonable requests where there is no material prejudice to client’s position).

R. 3.36(3) says if you file it but don’t serve it the other party can ask for costs against you if not served in time

3 Options for Δ once served with SOC:

1. Do nothing
2. Object to/challenge the process (normally applying to strike SOC because something procedurally wrong with it)
3. respond to the action on the merits (limitations defence fits in here). A response on the merits (SOD or a Demand for Notice) must be filed and served on the π :
 - a. within 20 days if the SOC was served on the Δ in AB (don’t count the day from which it started – ie. if SOC served on 1st then SOD or Demand for Notice has to be filed and served on or by 21st)
 - b. Within one month if the SOC was served on the Δ outside of AB but in Canada
 - c. Within two months if the SOC was served on the Δ outside of Canada (ie. if served May 15th have to reply on or by July 15th)

Default Judgement

Rules Part 3, Division 3, Subdivision 4

Rs. 3.36-3.42

Default judgment → potential consequence of a Δ purposely or unintentionally missing the deadline for responding to the commencement document.

Characteristics of Default Judgment:

- judgment in the action in favour of the π
- a judgement based on PROCEDURAL defect, NOT on the merits of the claim
- CANNOT be obtained where the Δ has filed an application to set aside service of SOC or to remedy a deficiency in the SOC (ex. strike out the SOC)
- CAN be obtained despite a request for particulars being outstanding
- where multiple Δ s exist, can be obtained against one, some, or all

- is NOT automatic: π must prove service (with affidavit of service) of the originating document (ie. SOC) and elapse of time w/o response
- NO NOTICE to the opposing party is required BUT after default judgment is issued the defaulting Δ can apply to have the judgement set aside (R. 9.15(3)).
- Δ can still file their defence after 20 days (or 1 month if outside of AB, ect.) if the π hasn't gone for default judgment (may result in race to court house after the 20 day time period is up).

Two Possible Methods of Obtaining Default Judgment:

1. Single-step process (R. 3.39)
 - Default judgment is entered immediately by the clerk of the court upon proof of service of claim and expiry of time to respond.
 - applies only if the claim is for recovery of property or for a debt/liquidated demand (ie. amount that is definable and does not require judicial assessment [R. 3.39(2)]).
 - Need court permission to use one step if incapacitated Δ (has a litigation rep) so may as well just use two step.
 - achieved by filling a default judgment with the Court
 - CANNOT be used if the non-responding Δ is represented by a litigation representative unless the court permits (R. 3.36(2)).
2. Two-step process (R. 3.36 & 3.37)
 - applies where Court assessment of the judgment is needed (ie. NOT property or a debt/liquidated demand)
 - Step 1: file a request to Note in Default – prevents π from being able to file a response document
 - Step 2: apply to the court for default judgment – appear in Chambers and ask for damages that they assess.

1. Liquidated Demand

TLA Food Services v 11144707, 2011 ABQB 550

R: 3.36, 3.37

- Rule 3.36 allows for a default judgement when Δ has been noted in default. Requires assessment under R. 3.37.
- Default Judgements for a debt or liquidated demand (3.39) or “recovery of property” (R. 3.38) does not require a Δ be noted in default and does not require an application to the court. These judgements are entered by π .
 - only when an exact or easily calculable amount is sued for, or the property is easily ascertainable

2. Noting in Default

R. 3.36

Argent v Gray, 2015 ABQB 292

F: Δ did not file a SOD and was noted in default.

R: 3.37

- In itself, being noted in default is not equivalent to judgement being rendered against him. Noting in default cannot be enforced. Once Δ noted in default, the π can apply to the court for default judgement but not guaranteed.
- Once noted in default the Δ cannot use the limitations defence.

Toerper v Hoard, 2011 ABQB 85

- Once noted in default, Δ is deemed to have admitted allegations of fact in the SOC. However, Court must be satisfied π has a cause of action to enter judgment, may call a hearing to determine if a cause of action exists. (In one step process clerk doesn't look for a cause of action but the court does in two-step).

Setting Aside Default Judgement

R. 9.15

Δ can apply to set aside a default judgment. Re-opens the action against defaulting Δ in order to decide the action on the merits. Discretionary – Court grants upon such terms as it thinks just. Δ usually argues one or both of: (1) default judgment is procedurally flawed; (2) default judgment is substantively unfair

To demonstrate default judgment is substantively unfair, need to demonstrate in an affidavit ALL of these elements (R. 9.15(3)):

1. Δ has prima facie good defence on the merits
2. Δ had reasonable excuse for not responding: ie. did not deliberately ignore the claim
3. Δ has brought this application with reasonable promptness (R. 9.15(2) does not apply)

Palin v Duxbury

F: Δ applying to set aside a default judgment issued in favour of the π

R: 9.15

- Court may set aside, vary or discharge a judgement in default of defence on any terms the Court considers just.
- To set aside a default judgment the Δ must show all of:
 - they have an arguable defence
 - they did not deliberately let judgment go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and
 - after learning of the default judgment, they moved promptly to open it up
- Mere delay will not be a bar to the application unless an irreparable injury will be done to the π , or the delay has been wilful

Chapter 15: Pleadings Subsequent to Statement of Claim

Defendant's Procedure

Rules Part 3, Division 5, Subdivision 3

Three inter-related strategies which may be employed once a Δ decides to defend the claim on the merits:

1. Deny π 's allegations
 - a. Δ didn't commit the alleged wrong (ie. deny liability)
 - b. the π 's loss was not caused by the Δ 's wrongful act (ie. deny liability)
 - c. the π did not suffer any damage or did not suffer the extent of the damage claimed (deny damages)
2. Reduce the amount payable to the π
3. Blame someone else (another named Δ or a 3rd Party)

1. Demand for Notice

R. 3.34

Demand for Notice – restricts you to a denial of the amount of damages. Not contesting liability and just forcing π to prove $\$$ s. Δ should only use a Demand for Notice if satisfied with having an assessment hearing rather than a trial on the issue of damages.

Need Court Order to substitute a SOD for a Demand for Notice (R. 3.34(5)).

- will be granted only if the Δ can demonstrate:
 1. a good reason for not filing a SOD initially
 2. the application to replace is brought within a reasonable time; and
 3. the Δ has prima facie good defence on the merits.

Bell v Grande Mountain Apartments, (1984) 50 AR 372 (QB)

F: Δ filed Demand for Notice on November 29th and an application for leave to withdraw August 23rd the next year (so that they could file a SOD???)

- π to proceed as if failed to defend except that π must give notice to the Δ of subsequent motions and judgment can only be obtained on motion with notice to the Δ.
- Δ must also show they have a good defence on the merits.

2. Statements of Defence

R. 3.31, 13.6 (& other regular pleading ones), 13.8, 13.12 Form 11 and Part 13, Division 3

Rule 4.01(2) of the Code of Conduct – must not abuse the process of the Court, cause delays, ect.

SOD: can be used to deny or partly deny liability and deny damages, blame the π or others (but only to reduce liability of the Δ, it does not advance any claim of indemnity or contribution – need Notice to co-Δ or 3rd party for that). Entitled to plead matters that arise after the SOC is filed. It is in real time (is. if sent cheque to π the day after SOC was filed you can mention it). Mention limitation defence, waiver, anything that may surprise the π (also allowed to plead alternative allegations (R. 13.8)).

R. 13.12 – anything not expressly admitted in SOD is deemed to be denied, but denial of fact must meet the point of substance.

C(L) v Alberta, 2011 ABQB 12

R: 1.2(3); (also implicitly considers 13.12).

- pleadings can no longer just say “the Δ denies all allegations in the SOC”
- Δ will be required to disclose their position and state their defences sooner rather than later

Filing and serving a Demand of Notice or a SOD prevents π from entering default judgment against the Δ - though if just filed default judgment still cannot be entered but π can seek costs for anything arising from failure to serve (R. 3.36(3)).

Barcellona v Einarson, [2012] AJ No 82

F: π sent Δ money to transfer a mortgage but Δ refused and kept the money. π sued. Δ filed SOD but service failed. Sent letter to π asking them not to take any steps without notice. Application to strike for long delay.

R: 3.31, 3.36, 3.39

- filing a SOD materially advances an action. Filing SOD alone acts as a bar to Noting in Default or taking Default Judgment

Counterclaim

R. 3.32, 3.34, 3.56, 11.15, 11.17 (serving counterclaim) Form 21, *Rules* Part 3, Division 3, Subdivision 7

Counterclaim used to reduce the amount payable to the π – argue π owes Δ money (NOT contributory negligence), could be a separate action but joined for efficiency and as a defence strategy. Original Δ becomes plaintiff-by-counterclaim and original π becomes defendant-by-counterclaim.

1. Set Off

Set off may be claimed by counterclaim. If successful, the judgment owed by the Δ to the π is reduced by the judgment owed by the defendant-by-counterclaim to the plaintiff-by-counterclaim.

Not all counterclaims are set offs. Other counterclaims may be a completely different action, just want it all decided in the same lawsuit (ie. could have a case for specific performance). Set offs when parties have mutual debts or liquidated demands such that it is fair or equitable for the debt of one party to be reduced by the debt of the other.

Holt v Telford, [1987] 2 SCR 193

F: Holts alleged default of payment on a mortgage made by the Telfords to Canadian Stanley. The Holts had been assigned the Telford mortgage (without the Telford's being notified) by Canadian Stanley to secure the balance of the purchase price of a piece of land the Holts had sold to Canadian Stanley.

- Δ can set-off by way of counterclaim, any right or claim and the Court can pronounce a final judgement in the same action. Court can refuse to hear the counterclaim at the same time as the original action if it cannot be done conveniently.
- Two requirements for statutory set-off:
 - both obligations must be debts
 - debts must be mutual cross obligations
- if mutuality does not exist, or cross obligations are not debts, may qualify for a set-off in equity. Available when there has been an assignment (sum has to arise out of the same contract or interrelated contract).

2. Counterclaims Generally

Limitations Act, ss. 6(2) and 6(4) – counterclaim can be advanced outside of the limitation period so long as related to the original claim and they had notice the claim may be coming).

Counterclaim must be filed and served within the time frame for filing a SOD. Is an independent action.

Counterclaim can be filed against existing π or anyone else (can add another Δ by counterclaim so long as original π included by counterclaim). Cannot add a plaintiff-by-counterclaim that was not one of the original Δ s.

Regular rules between π & Δ apply to plaintiff-by-counterclaim and defendant-by-counterclaim EXCEPT for default judgment must give notice of the application for judgment to the defendant-by-counterclaim.

Lil Dude Ranch Ltd v 1229122 Alberta Inc, 2014 ABQB 39

F: Plaintiff-by-counterclaim (Δ) applies to add a non- Δ as a plaintiff-by-counterclaim. Plaintiff-by-counterclaim also wants to amend to make alternative please regarding amounts already claimed as damages.

R: 1.2, 3.56, 3.73 and 3.74(2)(a)

- cannot add a non-party as a plaintiff-by-counterclaim

Third Party Claims and Notices to Co-Defendant(s)

Rules Part 3, Division 3, Subdivision 5 and 6

3rd Party Claim and Notice to Co-defendant: Δ argues that if Δ is liable another 3rd Party or existing co-defendant must pay all or part of the damages payable by the Δ to the π .

1. Basis of the Claim

Contributory Negligence Act, RSA 2002, c C-27, ss. 2, 6.; *Tort-Feasors Act*, RSA 2000, c T-5, s 3.

3rd Party Claim – use this document if not sure whether using this one or Notice to Co-Defendant because 3rd Party Claim document covers everything. Must be filed and served on the 3rd Party and the π within 6 months of the date on which the Δ filed the SOD or Demand for Notice and before judgment is entered against the Δ . Must serve 3rd party with 3rd Party Notice and original SOC.

Same rules apply between Δ (3rd Party π) and 3rd Party Δ as between π & Δ , EXCEPT if 3rd Party Δ wants to dispute the claim against the 3rd Party π or the Δ s liability to the π they have to expressly deny it, otherwise deemed to admit it.

Legal grounds/right to bring the claim:

- Statutory contribution (claim in tort) – *Contributory Negligence Act* or *Tort-feasors Act*.
 - based on the duty each owed to the π (NOT for what the Δ s may have owed each other).
- Indemnity – common law tort
 - obligations of the Δ s to each other

- Ex. if π gets rear-ended by Δ but Δ only rear-ended them because the 3rd party rear-ended them.
- Contractual obligation
 - 3rd Party/Co- Δ breached a contract w/ Δ that caused Δ to breach duty of care/contract to the π
- Separate duty – claim Δ has against 3rd party/co- Δ independent of π 's claim.

Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman S.A., 2012 ABQB 679

R: 3. 44

- A claim for contribution under the common law arises when a 3rd party breaches a duty in contract, a common law duty of care or a statutory obligation owed by the 3rd party to the Δ .
- Because it is a claim for contribution, the 3rd party claim stands or falls based on the outcome of the π 's claim against the Δ . (even if it is a common law claim or a claim under *Tort-Feasors Act*). However if it is an independent claim for contribution arising from unrelated matters then it does not fall if the π 's claim fails.

O'Connor Associates Environmental Inc v MEC OP LLC, 2014 ABCA 140

F: NEP closed a sale involving oil and gas assets. The respondents, Merit group, were the vendors. The appellants (3rd party in the main action) were retained by the π to advise on the value of the assets. Appellants appeal a decision declining to strike out 3rd Party Notices. π alleges that after the sale closed it discovered inaccuracies in the description of the assets and sued the respondents. Respondents issued a 3rd party claim against the advisors, claiming the π 's damage was due to them not properly evaluating the assets. Also that the 3rd Party owed the respondents a separate duty to adequately disclose the information to the π .

R: 3.44, 3.68

- the 3rd party were retained by the π , had not proximity to respondent. 3rd Party Notice struck.

Claim against Co- Δ : Rs. 3.32, 3.43 & Form 15.

Notice to Co-Defendant is a "short form" 3rd Party claim – don't need to plead anything like in 3rd Party Notice. Just say I am making a claim against the co- Δ . Must be against an existing Δ . MUST be based on *Tort-feasors Act* or *Contributory Negligence Act* (based on duty/contract to original π). Cannot use Notice to Co-Defendant if claiming breach of duty/contract between Δ s, have to use 3rd Party Notice. Must be filed and served on the co- Δ within 20 days after the Δ has filed a SOD or Demand for Notice (if in AB). [though timing can be extended under R. 13.5].

2. Limitations

Limitations Act, ss. 3(1.1) & 3(1.2) –adds an extra 2 yrs to date of loss for limitation period required to bring a 3rdP claim

Reply

R. 3.33 & Form 12 for π 's Reply to SOD, must be filed and served 10 days after service of SOD on π .

R. 3.54 & Form 20 for π or 3rd Party to Reply to a SOD of a 3rd Party Δ . Must be filed and served w/in 10 days after service of the SOD to 3rd Party claim.

Reply: NOT a reiteration of something in SOC. Gives π a chance to respond to something new Δ included. Pleadings close when reply has been filed and served or if 10 day deadline has passed.

Part III: Pre-Trial Evidence Gathering and Disclosure

Chapter 16: Disclosure of Records

Rules Part 5, Division 1, Subdivisions 1-2 – [Note: *Rules* Part 5 doesn't ordinarily apply to an action commenced by Originating Application (R 3.10).

3 Types of Evidence Entered at Trial:

1. Records and oral testimony of "ordinary" (non-party) witness
2. Records and oral testimony of a party
3. Reports and oral testimony of an expert

No property in a witness, they are independent – can talk to (or not talk to) either party

Purpose of Disclosure Rules in Part 5:

- to avoid surprise at trial (natural justice & avoids costs/delay)

- to identify the issues for trial
- facilitate resolution

2 Steps to Disclosure of Records:

1. Each party makes a sworn Affidavit of Records (AOR; Form 26) listing the records it has (or previously had) in its possession that are relevant and material to the lawsuit and identifying which records it will produce for opposing parties to examine and which are privileged; also include description of document (even privileged)
2. Each party makes its producible records available for examination by the opposing parties (time and location to be listed in the Affidavit) (R. 514)

AOR Obligations (R. 5.5):

- Each party MUST serve an AOR on every other party (positive obligation)
- π must serve AOR within 3 months after being served with a SOD
- Δ must serve AOR within 2 months of being served with π 's AOR
- a 3rd Party Δ must serve AOR within 3 months after filing a SOD
- must update if new records are found (R. 5.10)

AOR is NOT filed with the Court unless for the purposes of a court application or trial (R. 5.32)

Who Swears the AOR (R. 5.9):

- the party (not the lawyer)
- if a corporation, the corporate representative (R. 5.4)
- the litigation representative
- if inconvenient for any of the above, another "suitable" person if agreed to by parties or order by the court

Records Under a Party's Control

"Control" is fact dependent but generally means within physical control of the party, looked at case by case.

Western Union Insurance Company v Nihill, [1972] 6 WWR 241 (Alta SCTD)

F: Insurance company trying to recover amounts paid on behalf of their insured because they had reason to believe the driver was impaired. Believed they went to the hospital and had a blood alcohol level test but test wasn't on AOR.

- Blood alcohol test found to be in possession of the party because the *Hospital's Act* states if a patient requests the records they can have them. Sufficient to say it was in their control/possession.

McInerney v MacDonald, [1992] 2 SCR 138

- Unless legislation says otherwise, a patient is entitled to their doctor's files so still considered within your possession/control because within your ability to access – even if you have to pay a reasonable fee for them

Records Which are Relevant and Material

R. 5.2

A record is relevant and material if it could be reasonably be expected to significantly help determine an issue raised in the pleadings OR if it could reasonably be expected to ascertain evidence that could reasonably be expected to determine an issue raised in the pleadings.

1400467 Alberta Ltd v Adderley, 2013 ABQB 656

F: Co- Δ s filed word for word same AOR without specifying which record related to which Δ . π requested better AOR.

- Court has general jurisdiction under Part 5 of the *Rules* to make sure disclosure isn't done strategically
- Court ordered Δ s to serve individualized AORs.

Leduc v Roman, [2009] OJ No 681

F: Δ wanted Court to order π to produce a better AOR that included their facebook page so they could see if their allegations that they couldn't participate in sport after the car accident were true.

- Δ able to question π on facebook page to determine if there may be anything relevant that they would have to give them access to.

Kaddoura v Hanson, 2015 ABCA 154

- Cannot limit disclosure by saying it is not the best evidence or you don't want to rely on it, have to give everything that is relevant or material
- Cannot narrow your AOR by claiming the other party already has it
- Duty to disclose cannot be narrowed by arguing the other party's request relates to material the other party is not sure of
- Cannot leave something off of the AOR because the other party can access it
- Can limit disclosure where the cost of production is GROSSLY disproportionate to the probative value
- No obligation to produce records if they would only help an unrealistic or hopeless line of argument

The Exception for Privileged Records

Types of Privilege:

1. Solicitor/Client Privilege – any communication between the client and the solicitor for the purpose of advice in the lawsuit is clothed by privilege.
2. Litigation Privilege – any record created for the dominant purpose of litigation (or anticipated litigation).
 - a. ingathered documents (gathered, not created) will normally be covered by privilege if there was some legal skill applied to gathering it
3. Without Prejudice Communications – communications btw parties with the intention of pursuing settlement
4. Other – case by case determination using Wigmore's elements

Wigmore's 4 basic elements of a privilege claim:

1. communication arose in confidence
2. confidence essential to maintain relationship between the parties
3. the relationship between the parties is one the community has an interest in fostering
4. the injury to that relationship from disclosing the document has to be greater than what would be gained in the litigation from disclosing it

Canadian Natural Resources v ShawCor Ltd, 2014 ABCA 289

F: CNR using extra hot bitumen in pipeline. Concerned with whether pipeline could handle the extra heat so start testing pipeline. A month later calls lawyer, who says to continue testing. 1 year later there is a lawsuit involving this pipeline. CNR claimed litigation privilege over testing documents.

- Court ordered a better AOR saying CNR has to list and number all documents, including privileged documents
- Court said testing documents were not made for the dominant purpose of litigation
- modernized privilege, disclosure should not be done strategically
- 4 basic principles with respect to disclosure:
 - presumption every record is *prima facie* producible
 - claiming of privilege is an exception and should be treated as an exception
 - numbering and describing applies to privileged and non-privileged documents
 - grounds for privilege for that specific document have to be stated

Bellatrix Exploration Ltd v Penn West Petroleum Ltd, 2013 ABCA 10

F: Before lawsuit discussed settlement, with all correspondence listed without prejudice. Δ said limitation period passed. π claimed settlement discussions show Δ was not going to rely on limitations, so π wanted to disclose settlement discussions. Δ brought an application requesting those documents not be disclosed.

- Court said they should not disclose the settlement discussions
- Exceptions to without prejudice privilege: to prevent double recovery, if communications are unlawful, if it is relevant to costs, to prove a settlement was reached

- Court said privilege does not normally give way to a limitations defence

Syncrude Canada Ltd v Babcock & Wilcox Canada Ltd, (1992) 135 AR 21 (CA)

F: Δ says π can't claim privilege over a document because Δ already has it.

- Court said privilege not waived just because other party has it.
- Waiver of privilege has to be an active decision

AM v Ryan, [1997] 1 SCR 157

- Court applies Wigmore elements to see if psychiatrists notes protected by privilege

Enforcement

R. 5.11

Parties can apply for a Court order for a better AOR if they believe something is lacking. Court may inspect the record or permit the party to cross-examine the affiant on the AOR.

A relevant and material record that is not produced (not in AOR) cannot be entered at trial unless parties agree or the court order (R. 5.16)

Court can assign costs penalty for failure to serve AOR or produce a record (R. 5.12)

Court can strike out pleadings for failure to serve AOR without sufficient cause (R. 3.68)

Sun Life Assurance Company of Canada v Tom 2003-1 Limited Partnership #2, 2010 ABQB 815

- When deciding whether to issue costs for forgetting to include a document on your AOR, the court is going to assess whether you have sufficient cause for not including. Court looking to see if you were reasonably diligent in looking for documents. If there was an exceptional circumstance that happened later that lead it to be missed you will likely not be punished by missing it.

Chevalier v Sunshine Village Corp, 2011 ABQB 295

- A pending application to strike SOC is a good reason to extend deadline for AOR

Related Issue – Documents in Possession of a Non-Party

Two methods to get non-party records (once you have tried asking and failed):

- public body: *Freedom of Information & Privacy Act*
- private party: Court order under R. 5.13 - Not punitive to get a court order, it is protective so they aren't breaking any confidentiality laws governing their work
 - must give notice to the party affected that you are making an application for this order
 - must prove that the record sought is under the non-party's control; good reason exists for believing the record is relevant and material; the non-party could be required to produce at trial

Party requesting the record must pay for it, with the amount determined by the court

University of Calgary v JR, 2015 ABCA 118

F: Uni withheld docs based on sol-client privilege. FOIP said records have to be produced "despite any other privilege"

- Court said this provision in the FOIP statute was not specific enough to override solicitor-client privilege
- Reiterated the fundamental importance of solicitor-client privilege

Chapter 17: Questioning

Rules Part 5, Division 1, Subdivision 3;

Code of Conduct Rule 4.04

4.04 (1) A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.
Communication with Witnesses Giving Evidence

- 4.04 (2) A lawyer must observe the following rules respecting communication with witnesses giving evidence:
- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;
 - (b) during cross-examination of the lawyer's own witness, the lawyer must not, without the direction of the tribunal, discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
 - (c) upon the conclusion of cross-examination and during any re-examination, the lawyer may, unless the tribunal directs otherwise, discuss with the witness any matter.

Prerequisites: R. 5.20

Arranging Attendance: R. 5.21, 6.15-6.18, 6.38, Form 29

Manner of Questioning: R. 5.22, 5.24, 5.28

Record of Questioning: R. 5.26 – word for word transcript must be created

Questioning: opportunity to obtain sworn evidence from opposing party. Purpose includes to assess the strength of the case, to assess credibility of the opposing party as a witness, to avoid surprise at trial and to obtain evidence for trial

Don't have to answer questions that are not relevant to the lawsuit or that contain privileged information or that requires an opinion they are not qualified to give.

Undertaking = promise to obtain an answer not currently available

Can take a Q under advisement. Allows them not to answer right now, but figure out if they have an objection to it later.

Language for ending questioning is important. "Completing" means questioning is done. "Adjourning" means questioning is done for the day but will continue later. "Complete, subject to undertakings" means that you are done unless new information comes up when the undertaking is complete that you will want to question on later. There may be a situation where the trial is far in the future so may end with something like "questioning complete, subject to the right to question the plaintiff again about the status of her injury prior to trial".

Questioning does not have a time limit in AB, just have to be completed within a reasonable period of time.

You are not entitled to ask questions unless you have served your AOR (unless parties agree or court orders) [R. 5.20]. Questioning by the π can occur any time after SOD has been served on the π or the time for serving the SOD has expired. Questioning by the Δ and every other party can happen at any time after a SOD has been served.

Two steps to force an uncooperative party to show up to questioning:

1. Issue a Notice of Appointment for Questioning (R. 5.21, Form 29). – past asking them to show up, now telling them where, when and what documents they have to bring.
 - a. Have to serve money with the Notice of Appointment for Questioning (Schedule B gives \$50 a day for attending, plus travel expenses and meal allowances).
 - b. Must give at least 20 days notice before they are required to appear at questioning
2. Apply for court order. Need to have issued a Notice of Appointment first

Rules allow oral or written questioning, can't have both. If multiple parties and more than one party is going to be questioning a particular witness, it has to be done orally. The only party that can use the transcript at trial is the party asking the questions, unless an agreement I made for multiple party situations. A witness cannot use their answers from opposing party in trial because they are their own witness, they could testify if they want.

The party asking the questions hires the court reporter from a private court reporting service and pays for the transcript.

Who can Question Whom

1. Parties Adverse in Interest

R. 5.17 – entitled to question any party adverse in interest.

Notice to co- Δ enough to make parties adverse in interest, or anytime a defence is filed.

Turta v CPR, (1951) 2 WWR (NS) 628 (Alta SCTD)

F: Turta was π. CPR and Imperial Oil were Δs. CPR brought 3rd Party claim against Montreal Trust. Imperial Oil wanted to question Montreal Trust.

- Court did not allow Imperial Oil to question Montreal Trust because they were not adverse in interest because there was no pleading between those parties.

Golden Estate v Neilson, 2011 ABCA 338

F: *Fatal Accidents Act* allows estate to claim bereavement on behalf of family so they don't have to sue on their own

- family claiming bereavement allowed to question Δ even though not named party because statute allows estate to sue on their behalf.

2. Employees and Officers

Corporation can pick a corporate representative to complete questioning so long as they have sufficient knowledge relating to the lawsuit.

You can choose which officer or employee you want to question so long as you can show that individual has relevant and material info based on their work w/ the company that relates to the lawsuit. Can be former employees.

You can't argue that the evidence of an employee is the evidence of the corporation unless the corporate rep adopts it.

R. 5.18 – allows you to question an independent contractor (or similar) of the corporation. You need evidence to demonstrate this person is like an employee of the corporation, they have been hired by the corporation. Requires written agreement of the parties or Court's permission.

Cogent Group Inc v EnCana Leasehold Ltd Partnership, 2011 ABQB 335

F: Cogent Group had separate contracts with EnCana Power and another EnCana entity, EnCana Leasehold. EnCana leasehold terminated the contract after objecting to a news interview by Cogent's principal, Ms. Athaide. EnCana Power terminated its contract with Cogent the next day. CEO of EnCana Power told Ms. Athaide that he was asked to terminate their contract because the EnCana Leasehold contract had been terminated. Cogent settled with EnCana Power but commenced action against EnCana Leasehold for wrongful termination of contract and for wrongful interference with the EnCana Power contract. Cogent wants to question EnCana Power CEO, notwithstanding that he is not an employee of EnCana Leasehold, but as a service provider to EnCana Leasehold.

R: 5.18

- Court found him not to be a service provider of EnCana Leasehold
- Knowledge sought to be elicited by the questioning under Rule 5.18 must have been acquired by virtue of the services provided to the corporate party, and the services provided must be related to the issues in the action. Service providers who may have acquired relevant and material knowledge outside of the service relationship, cannot be questioned prior to trial in the same fashion as an employee of a party.
- TEST for determining whether a person can be questioned as an employee of a party is whether the person is involved in a relationship with the party akin to employment and whether the person has relevant knowledge.
- Non-party witness are not subject to pre-trial examination.

Tremco Inc v Glenow Building Products Ltd, (2000) 255 AR 273 (CA)

- you can ask an employee about information they have even if they gained it after they left the corporation, just has to be relevant and material to the lawsuit.

3. Infants, Persons of Unsound Mind

Alberta Evidence Act, RSA 2000, c A-18, s 19 – standards for whether a witness is fit to stand trial applies to if they are fit to participate in questioning. If the individual has sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.

R. 5.17 – you can question a litigation representative

4. The Crown

Proceedings Against the Crown Act, RSA 2000, c P-25, s 11. – Crown provides a representative to be the witness at questioning. Cannot ask questions against public interest (ie. national security, ect.).

5. Even If No Defence

Rule 5.19, 5.20

You have the right to question a Δ who you have a default judgment against or who you have noted in default (ie. a Δ that did not file a defence) because their info may help with other parties in the lawsuit.

R. 5.19 – Court oversight rule. Court can limit the # of ppl questioned or cancel questioning if it's unnecessary/improper.

Relevance and Materiality

R. 5.17, 5.25 – opposing counsel can object to questions not relevant and material.

Rozak Estate v Demas, 2011 ABQB 239

- Questions not just touching on the lawsuit, has to be relevant and material to the cause of action. Has to be evidence on issues raised in the pleadings or point to evidence on issues raised in the pleading.

Kwok v Canada (Natural Sciences and Engineering Council), 2013 ABQB 395

- broad, interpretive approach to what is relevant and material. Cannot have excessive unnecessary questioning.

Scope

Rules 5.23, 5.4, 5.25

R. 5.23- witness has to bring with them any relevant and material documents. If in the course of questioning more docs come up the witness will have to bring them.

R. 5.25(2) – gives the grounds for objecting to questions. If not relevant material, if privileged, if unreasonable or unnecessary, and “any other ground recognized at law” (ie. opinion evidence). CAN'T object by saying client doesn't understand the question, up to the client to say that.

R. 5.23(3) – a corporate representative can object to overly onerous undertakings.

Wesley First Nation v Alberta, 2013 ABQB 344, 2015 ABCA 76

F: Aboriginal claim for unextinguished title and rights to land in Southern AB. During questioning to the federal Crown officer there were objections to questions relating to historical factual information. The basis for the objection was that anything that is not within the living memory of the witness are historical facts and require an expert.

- Courts rejected the objection. Said witness can testify as to how they view historical facts, in the context of aboriginal litigation it is required.
- Simply questioning outside of the living memory of the witness does not mean it is an invalid question, though it will depend on the context.

Undertakings

R. 5.30

Undertaking = a promise to produce information later.

Psychologist Association of Alberta v Schepanovich, (1991) 45 CPC (2d) 108 (Alta CA)

F: Doctors questioned and agreed to undertakings to produce documents. But afterwards they realized they were privileged and tried to cancel the undertakings.

- You are bound by undertakings you give and you cannot unilaterally revoke an undertaking, require permission from the Court.
- Court will only give permission to cancel an undertaking if: inadvertently agreed to an undertaking, it shouldn't be given (is actually privileged) and there would be no prejudice to the other party (could be remedied by costs).

Discovery Abuse

Code of Professional Conduct – professional obligation not to coach the witness but also have an obligation to prepare the witness, explain the process and what is expected of them.

R. 5.2 – broad rule that applies to the overall conduct of a lawyer during questioning. Abuse includes badgering the witness (asking same question repeatedly), making editorial comments about the answers to intimidate, obstructing answers from your own witness.

Holowaychuk v Lopishinsky, 2015 ABQB 63

F: Questioning on an affidavit included belittling questioning, unnecessary questions, editorial comments, counsel cuts off witness' answers, repeated questioning of the same topics.

- Questioning not an opportunity to break the witness down.
- Court found questioning to be abusive even though not calling the witness names, realistic example

Landes v Royal Bank of Canada, [1997] AJ No 1312 (QB)

- counsel should only object where the question falls afowl of one of the basis in the rules, otherwise the other party is entitled to question without interruption
- transcript should be primarily question, answer, question, answer, question, answer
- Cannot object on the basis that the witness did not understand the question, that is up to the witness to do.

Use of Questioning

Rs. 5.29, 5.31, 5.32

Transcript NOT usually filed except as permitted by the rules and only as necessary for a court application or at trial.

Ordinarily only useable at trial or in an application by the party asking the questions, but can be used by the answering party to correct a misleading use of the transcript.

Two uses at trial (by the party that owns the transcript):

1. As evidence of prior inconsistent statement (ie. to challenge credibility of witness on the stand)
2. Read in as admissions (evidence of corporate witness cannot be read in unless acknowledge by the corporate representative as evidence of the corporation (R. 5.29).

1. Procedure to Read In

410675 Alberta Inc v Trail South Developments Inc, 2011 ABQB 151

F: Δ wanted to read in portions of their questioning the π to substitute cross-examination. Should Δ cross-examine using the questioning transcript or say nothing and then wait until it is time for their case to read in the answers given at questioning?

- Depends what is happening at trial.
 - If witness does not address the matter in examination in chief then it can't be referred to in cross and will have to be read in later.
 - If it comes up in direct then it depends what you want to use it for
 - if it is a prior inconsistent statement you should use it in cross-examination
 - if it is just to add to their information then you should probably just read it in later

2. Improper or Collateral Purpose

Any sworn evidence used prior to trial (questioning transcript, affidavits, ect.) are not to be used for any other purpose besides the lawsuit, unless parties agree otherwise or the law requires you to.

R. 5.33: “Implied Undertaking Rule”: a party will only use the information they receive from another party for the lawsuit. → reason for this rule is that if it could be used for another purpose then it may restrict the answers they give. Implied undertaking rule can be waived by party agreement or court order.

Juman v Doucette, 2008 SCC 8

F: Attorney General was not a party in the lawsuit, but applied to have access to evidence given in this action because one of the individuals involved was suspect of criminal activity. Argued implied undertaking rule does not apply to disclosure of criminal conduct.

- SCC refused to waive the implied undertaking. Can’t use civil action as a way around their silence in a criminal investigation.
- Implied undertaking rule:
 1. outlasts the litigation (lasts forever, not just confidential for the purposes of the lawsuit)
 2. can be relieved in exceptional circumstances, if ordered by the court but only if on a balance of probabilities the public interest in the disclosure of the information outweighs the privacy interest (case by case basis)
 3. can’t be waived as a way to get around other disclosure

Hall v Wilcox, 2011 ABQB 78

- implied undertaking rule does NOT apply to a cross-examination on an affidavit because the transcript gets filed with the court so it is public knowledge (regular questioning transcript is not filed with the court so there is an implied undertaking rule)

Edmonton (Police Service) v AB, 2014 ABCA 267

F: During a disciplinary proceeding the Chief of Police disclosed information he was required to. After the proceeding another individual wanted to use the information the Chief gave for his own complaint.

- implied undertaking rule only applies to civil litigation, so the info given by the Chief is not protected
- Theory behind the rule is that parties will provide better info if they don’t think it will be disclosed. Parties can ask anything that is relevant and material in questioning, so the only privacy you get is through this rule.
- Anything used in trial from the questioning transcript is no longer protected by this rule because it is now part of the public record.

Additional Questioning Matters

Interpreter: R. 6.19 – witness can raise the need for an interpreter, which can be used during questioning. Interpreter is paid for by the party doing the questioning.

Re-examination: R. 5.25 – only exception to the rule that as counsel for the witness you don’t have a right to question your own witness in questioning, as the transcript is owned by the other party. At the end of questioning you can ask for a right to re-examination under this rule, and go back to the parts of questioning you think illustrate that your client did not understand (because as counsel you cannot object to that, only the witness can). Only to be used to correct things you could not object to, often not used at all.

Continuing Duty to Disclose: R. 5.27 – if after the questioning, an answer given by your client becomes incorrect or misleading, you have to advise the other counsel of that as soon as possible via an affidavit.

Use of Transcript where Witness is Unavailable for Trial: R. 8.14 – if person questioned died, or otherwise becomes unable to attend, either party can use the entirety of the transcript as their evidence with permission of the court. Rule contains factors to consider: importance of the evidence, other ways the info could be proven, thoroughness of the questioning, other admissibility rules, ect.

Chapter 18: Admissions

Rules 6.37, 10.33(2)(b)

A party no longer needs to prove a relevant point of fact or law to meet its burden of proof if the point is admitted to by an opposing party. Done via: pleadings, agreements, affidavits, questioning, Notice to Admit.

Failure to admit anything you should have admitted early may lead to a costs award against you (R. 10.33(2)(b)). The idea is if you know something to be true, admit to it to make things more efficient and cheaper (R. 1.2).

Notice to Admit (R. 6.37 & Form 33) – A Notice to Admit is a document whereby a party asks any other party to admit, for the purposes of an application or for trial, a fact stated in the Notice or a written opinion attached to the Notice.

- If it is just facts, file and serve Form 33
- if it is an admission based on an opinion, attach the opinion to the Notice to Admit.
- Must be served on the party from whom admissions are requested and on each of the other parties

A party from whom the admissions are requested must respond within 20 days after the date of service of the Notice, by serving on the party issuing the notice and all other parties a statement either:

- admitting to it
- denying the fact/opinion and stating the reason for the denial
- objecting to the requested matter for admission on the grounds that it is privileged, irrelevant improper or unnecessary
 - Any denial must “meet the point of substance” of the requested admission and partial admissions must identify the portion of the fact/opinion which is admitted.
 - failure to respond is a deemed admission (but the 20 day deadline can be extended by agreement or court order: R. 13.5).
 - A party receiving the Notice can apply to set aside the Notice to Admit instead of responding to it
 - Amendment or withdrawal of an admission or denial is permitted only by agreement of the parties or by permission of the court.
 - Admissions are only made for the specific purpose for which they are made and can be used only by the person requesting the admission unless the other party making the admission agrees otherwise.
 - Answers given in a Notice to Admit are given with an implied undertaking

Dwyer v Fox, (1996) 181 AR 223 (CA)

- Deciding whether to withdraw an admission is a question of justice and fairness.
- Court inclined to pursue truth and justice over holding you to your mistake. But you have to establish it is something that will need to be established by a court at trial, you aren't going to show up to trial and admit it.
- By making an inadvertent admission you are increasing costs
- Be careful before admitting to something in a Notice to Admit because if you need to withdraw it then there can be costs, but also be sure to admit to things you know to be true because if you don't admit early then costs can be awarded.

Andriuk v Merrill Lynch Canada Inc, 2011 ABQB 59

F: Class proceeding, Notice to Admit was issued by the π before the SOD was filed and served, but the Δ had brought an application to strike the SOC. When during the course of litigation can you issue a Notice to Admit?

- Rules do not specify when you can issue a Notice to Admit so allow them to issue anytime, even immediately after you serve the SOC, or any time before or after questioning.
- In order to strike out a Notice to Admit brought by the opposing party, the standard you have to meet is that the Notice to Admit is abusive – it is going over matters already discussed or irrelevant.
- If the other parties has applied to strike your pleading, issuing a Notice to Admit is not abusive but the 20 day rule for replying to the Notice to Admit will not be enforced.

TS v Stazenski, 2011 ABQB 508

F: At trial, the π had not completed their case in the amount of time allotted for trial, so it was adjourned for a few weeks. During those few weeks the π issued a Notice to Admit. Δ applied to have the Notice to Admit struck on the

grounds that: 1. it was too late; or 2. what they are asking for should not be allowed because trying to repair problems the plaintiff have already dealt with at trial.

- Court says some of the requests in the Notice to Admit were proper, others weren't. Implicitly says not too late.
- Can't use a Notice to Admit to rectify failures at trial. In respect to other points going forward, Notice was valid.

Chapter 19: Experts

Rules Part 5, Division 2 and 3; Part 6, Division 6, Subdivision 1

Rs. 5.34-5.44, 8.4, 8.16

Expert: people or organizations hired by one of the litigants to provide opinion evidence that is relevant to the lawsuit. Admission of the opinion at trial depends on qualification of the expert.

Expert Reports

Expert reports [Form 25] require:

1. the expert's opinion
2. the information and/or assumptions relied upon for the opinion
3. the qualifications of the expert

Expert reports are privileged (litigation privilege) BUT to avoid surprise at trial, rules require expert reports to be disclosed in a reasonable amount of time prior to trial to all parties if they are to be used at trial (they do NOT get filed with the court). Upon receiving an expert report, a party must, within a reasonable time, notify the serving party of any objection (including reasons) to the admissibility of the expert's report (otherwise cannot object at trial unless permitted by the Court).

When serving an expert report, can serve a notice of intention to have the report entered at trial without calling the expert as a witness. Responding party must object, if at all, within 2 months (agreeing to have the report admitted is NOT agreeing to the content of it). Responding party can agree to have the report entered into evidence but still request the attendance of the expert at trial for cross-examination.

Expert reports must be served on all parties in the following sequence (unless parties agree or court orders otherwise):

1. Experts in Chief – Which ever party (π or Δ) has the burden of proof on a particular issue has the expert in chief report in relation to that issue.
2. Rebuttal Experts
3. Surrebuttal Experts – responds only to the new issues raised in the rebuttal report

With agreement of the parties or permission of the Court (exceptional), an expert may be questioned on their report prior to trial by a party adverse in interest to the party serving the expert's report (but usually done in trial).

Any change in the expert's opinion must be immediately disclosed by the expert in writing and served on all parties.

Expert reports are included in the AOR but in the privileged category so little detail given (not name of the expert).

Medical Examinations (Rs. 5.41-5.44):

- On application, where the mental or physical health of a person is an issue in the action, the Court may order that the person submit to a mental or physical medical examination and can appoint a health care professional to conduct the examination (expert the party making the application requests is granted). Only needed if parties don't agree, normally used to determine the extend of the examination.
- The person being examined must answer the health care professional's relevant questions but must provide samples undergo tests only if they agree or if the Court orders.

- Party being examined can have their own health care professional watch, can videotape the examination, can make a transcript of the examination.
- Cost of the examination is born by the party requesting it.

The party requesting the Medical Examination:

- must promptly deliver the written expert to all other parties
- The party requesting the Medical Examination is entitled to receive promptly from the person examined a report of every medical examination previously or subsequently made pertaining to the mental or physical condition that is in issue, regardless of if they intend to use it at trial
 - This may result in the reversing of the sequence of disclosure pertaining to these medical reports AND give rise to early disclosure.

To get a trial date, parties must identify the number of expert witnesses to attend and certify that expert reports have been exchanged (a reasonable time before trial to give expert reports is at latest when you are scheduling trial.

Only one expert opinion can be admitted per subject (unless Court approves otherwise).

Henderson (Estate) v Arnett, 2011 ABQB 198

F: One party filed their expert reports to the court and the opposing counsel made an application to have them removed

- Removal granted on the grounds the current rules do NOT permit the filing of an expert report with the Court unless the parties agree or Court permits.

Nystrom v Ranson, 2011 ABQB 116

F: π was going to be examined by a medical examiner of the Δ . π objected to the length of time the expert would have with the π and the tests involved. The occupational therapist wanted 9 hours of testing including psychological testing.

R: 5.42

- Court accepted that 9 hours was necessary and the psychological questioning was relevant and material to the lawsuit. Illustration of the court looking at the extent of the medical examination in light of the lawsuit.

Drapaka v Patel, 2013 ABQB 247

F: π argued they do not have to disclose any of their expert in chief reports until the Δ decides they are going to have a medical examination.

- Court said no, the purpose of disclosure is to avoid trial by ambush. It does not entitle you to know if the other party might want an expert by medical examination. No obligation for one party to see if they want to make the Medical Examination rule apply before expert in chief reports get submitted.

Adasci v Amin, 2013 ABCA 315

F: π had injuries allegedly caused by a fire caused by the Δ s. Δ s had experts saying the π 's injuries were consistent with Huntington's disease. Δ requested the π take a blood test to see if she had the gene to get the disease. π did not want to take the stressful test and did not want to know in advance if she was going to get Huntington's disease.

- Court ordered the test to be done. Court said given her injuries, it was relevant to know if these injuries could be due to Huntington's or if they were from the alleged fire.

Westerhof v Gee, 2015 ONCA 206

- Every person asked for their opinion do not have to provide an expert report.
- Expert reports must be supplied by any person hired by one of the parties to provide an expert report. If they went and saw a doctor to get their injuries taken care of after the accident, the doctor can be asked their opinion on the injuries without providing an expert report so long as not hired as an expert witness.
- You can give an opinion without having to give an expert report if:
 1. you are not hired by a party
 2. you are giving an opinion based on your own observations and experiences
 3. your opinion is based on your ordinary skills

Preservation and Inspection of Property

Rules Part 6, Divisions 2 and 3

Rs. 6.25-6.26 – A court may make an order preserving property or for the inspection or testing of property

Referees/Court Assistance

Rules Part 6, Division 6

Rs. 6.40 – 6.46

- A court may appoint a court expert to give independent evidence.
- A court may also refer a question or matter to a referee (ie. a master, a court clerk, another person appointed by the court, or a person appointed as a referee by the Lieutenant Governor in Council) to decide a discrete issue. Have them return with a report and they can decide to accept their determination or not. Rarely used.

Chapter 20: Other Evidence

Two alternatives to the usual situation of introducing evidence at trial via oral witness testimony:

1. Affidavit Evidence at Trial

Rule 8.17

Parties can agree or Court can order evidence at trial via Affidavit. Court cannot order so if a party wishes to cross-examine, then it has to be oral.

Toliver v Koepke, 2013 ABCA 304

- evidence at trial is assumed to be *viva voce* (oral).
- if you apply to have an alternative to the oral testimony you have to provide a good reason why. Court is not able to assess credibility as well without oral testimony.

Preserving Evidence for Future Use

Rules Part 6, Division 2

Rs. 6.21-6.24, 8.14

Court can order the questioning, under oath and prior to trial, of any witness in AB if the court has concerns about them attending trial (for good reason, like they are terminally ill) or of any witness outside of AB (including specifying who will ask the questions, where and when and including seeking the assistance of the Court in the relevant jurisdiction).

- It is like what you would see in trial (direct and cross examination [different than questioning] just on what they witnessed and their witnessing abilities, or their expert opinion, depending on the witness).
- It is videotaped (unlike regular questioning).
- A judge can be present to make judgements on whether objections are valid, ect.

R. 8.14 – questioning transcript can be read in at trial if there is a fact that has to be proven because it is important to the case. This is where there is no other way to get evidence before the court, all you have is the questioning transcript so may be able to get it read in (ex. the party is deceased).

Part IV: Litigation Management & Strategies

Chapter 21: Managing Litigation

Rs. 4.104.15 & 6.2

Responsibilities of the Parties

Rules Part 4, Division 1

Responsibility for managing the dispute consistently with the purpose and intent of the Rules lies with the parties. Required to plan the litigation appropriately (most efficiently and at lowest cost), applying to the court for planning direction when the case is especially complex, engaging in settlement (dispute resolution) processes.

Within 4 months of a SOD being filed, parties must classify the litigation as a standard or a complex case. If parties cannot agree, the Court can categorize. Categorization depends on various factors including: claim and issue complexity, number of issues and value of claim, number of parties, number of documents, number and type of experts anticipated, duration of questioning, third party proceedings.

If standard case parties must ensure that the following occur within a “reasonable time”:

- pleadings close
- pre-trial disclosure of info
- Dispute Resolution Process attempted (unless Court orders otherwise) – not currently enforced
- application is made for the setting of a trial date
- a party MAY (not required) to serve a litigation plan on another party

If complex case, parties must, within 4 months of categorizing the case:

- agree on a litigation plan
- π must file and serve the plan on all parties
- plan must ordinarily address: dates (and methods) for determining real issues, organizing and producing records, completing questioning, exchange expert reports, applying for a trial date
 - parties responsible for continuously monitoring litigation progress and adjusting expected completing dates as required.

Court Assistance in Managing Litigation

Rules Part 4, Division 2; R. 4.12

Where parties cannot agree/meet their responsibilities, the court can resolve the management issue(s). Court can:

- exercise its general authority to enforce a Rule (ie. issue a procedural order)
 - includes setting deadlines, categorizing/re-categorizing a case & creating/amending a litigation plan
- direct attendant of parties at, and conduct, a court conference.
- take over management of the litigation via case management
 - generally all of the above occur by application of the parties, but can also be a result of court initiative

Case management requires an order made by the Chief Justice (or associate Chief Justice if delegated). A case management judge hears all matters in the case except for summary and actual trial.

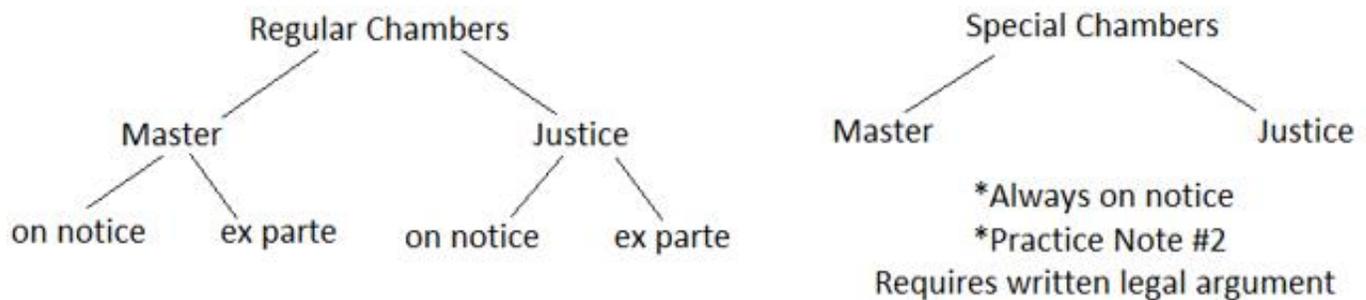
Dispute Resolution by Agreement

Rules Part 4, Division 3; Rs. 4.16-4.20, 8.4 & 8.5

Mediation or arbitration conducted by a judge, both parties explain their cases and tell judge what their experts would say and what evidence they have. All information provided is “without prejudice”. Judge can give a binding resolution [Consent Judgment] (if both parties agree to be bound by it). Often no binding decision but judge would say what they would likely decide in trial. Furthers settlement negotiations. If no settlement, judge cannot hear/decide any other matter in the lawsuit unless everyone agrees.

Notice to the Profession: requirement to engage in pre-trial 3rd party dispute resolution process will NOT be enforced.

Chapter 22: Chambers Practice – Interlocutory Application



Chambers: public courtroom, hearing of designated issues, usually based on affidavit evidence, need statute/Court rule/other authority to apply for a ruling [See also Practice Notes and Notices to the Profession]

Regular Chambers: matter can be dealt with in < 20 minutes, otherwise schedule Special Chambers.

Special Chambers: normally if you are making an application to end the lawsuit in some capacity go to special chambers. Special chambers dates are usually agreed upon by all parties and the courts. Special chambers is always on notice. Required to submit legal briefs 3 weeks in advance.

Regular chambers process:

1. Adjournments – moving it to another date by agreement
2. Ex parte applications – not on chambers list as no notice given to other party so stand up and let them know
3. Consent matters – matters parties have agreed to but want court to sign off (consent motion). May or may not be on the list (on the list if didn't know they were going to agree)
4. Matters on the list (contested) – based on order of when you applied to have it scheduled (you pick the day). Practice is to let more senior counsel go first.

Unless Court orders otherwise, costs of a Chambers application are payable “forthwith” by the party who loses the application. Meaning loser has to pay costs of the application immediately, not at the end of the trial (unless agreed to otherwise). Have to pay the partial indemnity under Schedule C. Court can get rid of the forthwith (immediacy) also.

Examples of ordering otherwise:

- no costs
- costs are payable in the cause – costs of this application will be paid by the loser of the entire lawsuit later
- costs to ___ in the cause – blank meaning one of the parties. Meaning if that party wins the lawsuit they get the costs of this application
- costs to ___ in any event of the cause – costs to that party no matter what happens in the lawsuit at the end of the day, meaning not payable now but at the end of the lawsuit
- costs to be determined at trial OR by the trial judge

If court is silent on costs, standard rule applies. If you want something different ask the court to speak to costs.

Procedure

Form 27; Everything from here on is in Regular Chambers.

1. On Motion (On Notice)

R. 6.3; Code of Conduct: R. 4.01(1)

Presumption is that all applications are on notice to all parties.

- Achieved by filing the Application (Form 27) & serving on ALL parties and persons affected by the application.

- Service (must be filed first) of Form 27 must be 5 days before the scheduled application date (the “returnable date) – R. 13.3 says not to count the hearing date [If you want the chambers application on Weds, the last day you can serve notice is Friday].
- Service does NOT need to be personal.
- Affidavits have to be filed and served with Form 27.
- Responding party does not need to officially “answer” the notice (other than serving the applicant with an evidence to be used at the application a reasonable time before the application date)
- Applications usually heard in person but can be heard electronically if all parties agree or court orders. Court can also consider on the basis of documents only.

2. Ex Parte

R. 6.4; Code of Conduct: R. 4.01(1)

Have to fall under R. 6.4 to be able to make an ex parte application. If no notice necessary (a statute says so) or if would unduly prejudice the application.

- Ex parte application permitted if an enactment or the court says that: (1) no notice is necessary; (2) notice would unduly prejudice the application – normally dealing with getting substitutional service or an injunction to prevent someone from moving their money or other property.
- Burden on applicant to satisfy court that the application should be heard ex parte.
- Duty on counsel to disclose ALL information (both sides of the issue)
- Applications must be recorded word for word.

Appearance in Masters’ Chambers

Masters are masters of procedure. They cannot hear trials, give orders for contempt nor decide disputes of fact.

The rule you are making your application under will tell you if you can apply to a court (master of justice) or judge/justice (justice only). Most summary judgement rules specify a justice.

When deciding where to go (Masters or Justice chambers):

1. Does rule say Court or Justice?
 2. Is there a question of fact in dispute (what is the evidence like)?
 3. What are you asking for? If contempt it requires a justice.
- Practice note says once you have answered these 3 questions, then if you can go to a Master you have to first.

1. Jurisdiction

Court of Queen’s Bench Act, RSA 2000, c C-31, ss 8-16 – a Master is authorized by this act.

South Side Woodwork (1979) Ltd v RC Contracting Ltd (1989), 95 AR 161 (Alta QB)

- A decision of a master can be appealed to a justice
- Masters are bound by decisions of justices

Schaffer v Lalonde, 2014 ABQB 222

- Masters can choose between two disputed pieces of evidence, unless one piece of evidence (usually affidavit) is rendered unreliable.
- A master can decide a disputed matter of fact if the parties agree

2. Appeals

R. 6.14

Court of Queen’s Bench Act, s. 12 - An appeal lies to a judge in chambers from a decision of a master in chambers.

Notice of Appeal of a Master's decision must be filed and served within 10 days after Order of Master is entered (filed).

Notice of Appeal must be returnable (day you intend to argue) within a reasonable period of time, but at the latest 2 months after the date the Notice of Appeal is filed.

Bahcheli v Yorkton Securities Inc, 2012 ABCA 166

- Rule is Appeal of a masters decision is supposed to be based on what is in the record, but this case sets it back basically to a hearing de novo, allows the appeal justice to hear new evidence that is relevant and material regardless if it was used in Masters chambers.
- Does not comment on standard of review, so justice owes no deference to Master's decision. If the standard is correctness, no deference owed so it is basically reduced back to a hearing de novo and the new rule has made no practical change.

Affidavits

You need to bring evidence for a chambers application (usually affidavit). Has to be signed by the witness, usually party to the lawsuit.

Ordinarily, evidence in Chambers takes written form: affidavit, transcript of questioning or questioning on affidavit, written interrogatories, admissible records disclosed in AOR.

Where a party filed affidavit evidence, the right of cross-examination still arises, called a "Questioning on Affidavit". Only allowed to ask questions about the affidavit and the transcript gets filed with the court (unlike regular questioning).

Presumption is evidence will be "filed" with the court before the application and served to the other parties.

Content

Rules Part 13, Division 4, Subdivision 2; Rs. 13.18-13.25 & Form 49; *Code of Conduct*: R. 4.02; *Evidence Act*, ss. 15-17

Affidavit must comply with formal requirements (R. 13.19). Must be sworn before a commissioner for oaths or a notary public. Facts only, no opinions. Records/exhibits attached must be identified in the affidavit and commissioned (anything not part of the sworn evidence has to be referenced in the affidavit). Cannot be relied upon if altered, unless alteration is initiated by the person administering the oath.

All or part of the affidavit can be struck out if the information provided is frivolous, irrelevant or improper (R. 3.68(4)).

Content (Rule 13.18):

- If affidavit in support of an interlocutory application, the contents of the affidavit can be based on personal knowledge of the deponent OR on the basis of information and belief.
 - if based on information and belief, source of the information must be stated {ex. "I am informed by my lawyer and do believe that..."}
- If affidavit in support of an application to dispose of all or some of the claim, MUST be based on personal knowledge only.

Byer's Transport v Terra Mining, [1972] 2 WWR 719 (NWTTTC)

- if affidavit is based on information and belief and you do not say who told you and that you believe them then the affidavit can't be relied on. Not a technicality, you have to state the source of the information and belief.

Barker v Budget Rent-A-Car of Edmonton Ltd, 2011 ABQB 123

- hearsay and belief evidence is permitted in support of an interlocutory application, such as to amend a pleading.

Questioning on Affidavit

Rs: 3.13, 6.7, 6.11, 6.15-6.20

A party has the right to cross-examine the deponent of an affidavit made in support of/in response to an application (R. 6.7)

Transcript from the Questioning on Affidavit is filed in its entirety with the court, and the transcript is useable by both parties at the application.

Saveva v Flight Centre, 2012 ABQB 477

F: π injured while on vacation, sued in AB but Δs located in Dominican Republic. All 5 Δs filed to have pleadings struck and filed an affidavit. π wanted to question them. Δ said sue, but you have to pay for us to come to AB.

- Court rules π did not have to pay the conduct money here, have to pay their own way b/c she is an individual and they are big companies, can afford it more. Court altered the court rule because not justified here.

Rozak Estate v Demas, 2011 ABQB 239

- can ask for undertaking in Questioning on Affidavit, but have to be relevant and material to the application.
- Undertakings from a Questioning on Affidavit cannot be overly onerous, court has to be convinced the answer to the undertaking will actually help the affidavit (can't use Questioning on Affidavit to get extra info you should've gotten earlier).

Smith v Coperstone Capital Inc, 2013 ABCA 17

- delay of lawsuit not good enough reason to escape questioning on an affidavit.

Medicine Shoppe Canada Inc v Devchand, 2012 ABQB 375

- At Questioning on Affidavit you can question on anything in the affidavit & anything relevant to the application

Kahara Budas Company, LLC v PLN (Persero), 2009 ABQB 482

- there is a right to test the evidence that is brought via affidavit, but only exists to the point of the application (can't question on the affidavit after that Chambers application is over)
- scope of questioning on the affidavit has to be relevant to the application
- can't avoid questioning by having a non-party sign the affidavit, whoever signs the affidavit can be questioned

Questioning Witnesses

Rs. 3.13, 6.8, 6.11, 6.15-6.20

Oral questioning of any person as a witness can be permitted for the purpose of obtaining evidence for use at an application. Transcript must be filed, in its entirety, with the court by the party asking the questions. (can be used as evidence at trial if someone dies).

Appearance in Chambers

Code of Conduct: R. 4.02 – lawyer cannot be a witness/give evidence in a case they are the advocate on

Court of Queen's Bench of Alberta Civil Practice Note 2: Special Applications [*Rules Vol 2, Division 2*] – special chambers application have specific procedures for exchanging written materials. Required written legal argument.

Electronic chambers application can be permitted if parties agree and court orders or if court permits.

Orders

Rules Part 9, Divisions 1 and 3; Rs. 9.1-9.8; 9.12-9.16

A court order takes effect upon pronouncement unless the court says otherwise, BUT cannot be enforced until the order is signed by the master/justice pronouncing the order AND the order is filed with the court.

- Order must be entered (filed) within 3 months of pronouncement (otherwise need leave of the court after giving all parties notice).

- Obligation to draft, file and serve the order on other parties falls to the successful party in the application (unless court orders otherwise).
- If you don't have the draft order with you at court for the master/justice to sign you have to send the draft order to the other party within 10 days of being in chambers and the other party has to sign it within 10 days of receiving it. If parties agree on content of the draft (agree it is what the master/justice ordered) then the clerk can sign it at the courthouse on behalf of the master/justice. If you do not agree you have to track down that master/justice to confirm what they said, sometimes have to hear the recording again.
- Can apply to have the Court dispense with approval of opposing party, which is helpful with SRL (R. 9.4(2)(c))
- Court can vary/change the order pronounced anytime before it is entered (filed) or can re-open the application for more evidence. After entry (filing), court can, on application, correct errors or make a further order as to implementation.
- If application was ex parte or without appearance of opposing party, court can set aside, vary or discharge order if, unless court orders otherwise, application is brought within 20 days of the order or the date when the applicant 1st learned of the order (whichever came first).
- Court can vary an interlocutory order if other information is discovered after the order was made, the parties agree, or the court otherwise considers it just to do so.
- Variations of an order must be made by the Master or Justice who pronounced the Order
- Open to the Master/Justice to reserve on making an order, frequently used in special chambers, can be used in regular chambers but rarely is.

Chapter 23: Civil Contempt of Court

Rules Part 10, Division 4, Subdivision 2; Rs. 10.51-10.55

Contempt: a judicial finding that a party has acted in blatant or malicious disregard of the Court or of Court processes.

Way of enforcing opposing party's obligations under the *Rules* or under a court order. Order can be made as a result of an application brought by a party or on its own initiative.

Application for contempt must be served personally on the party who is the subject of the order (but service can be accepted by that party's lawyer, who must then notify their client as soon as practical [R. 11.17]).

Civil contempt can be found on various grounds, including:

- fails to obey a court order
- engages in "contemptuous" conduct while appearing before the court – disrespectful, swears, ect.
- fails without excuse to obey a Notice to Attend as a witness or a questioning appointment or an order for production of documents
- fails to comply with an undertaking given to the court
- does anything a statute identifies as contemptuous

Punishment for being found in civil contempt:

- imprisonment up to 2 years or until the contempt is purged
- fine
- striking out/staying of the party's action, application, pleading, evidence or proceeding
- judgment entered against the party
- restriction of the party's evidence at trial
- costs/expenses

If contempt is purged, punishment may be varied.

Criminal contempt different because it is public defiance, civil contempt is more coercive than punitive

Cary v Laiken, 2015 SCC 17

F: π obtained a *Mareva* injunction to preserve Δ 's assets. Δ sends \$500,000 to their lawyer. Injunction allows lawyer to get paid, but otherwise Δ not allowed to move their money. Lawyer's bill was only \$100,000 so lawyer returned \$400,000 to Δ . Δ then got rid of the money. Was the lawyer acting contemptuously?

- To find a party in contempt of court, must establish 3 elements beyond a reasonable doubt:
 1. there was a court order that clearly stated what needed to be done
 2. party found in breach of their order had to have actual knowledge of the order
 3. party must have acted intentionally in a way that defied the order (no requirement they intended to disobey their order, just required knowledge).
- Here, lawyer found in contempt. [An individual party or lawyer can be found in contempt]

Chapter 24: Alternative Routes

If a rule says "a court may order" or "on application the court may" it is talking about chamber's application

Striking Out Pleadings

R. 3.68

Striking out pleadings: resolves action on a procedural basis, not merits. Abuse of process, pleadings waste court's time.

If successful, all or part of their pleading may be struck out and you are awarded costs. If you are unsuccessful the litigation continues and you have costs awarded against you.

A chambers application under s. 3.68 automatically suspends your time for filing and serving a defence – one of the few rules that does this automatically.

The "Court" (aka Master or Justice), at any stage of the proceeding, can strike out a pleading if [Affidavit evidence is required for all EXCEPT it's not permitted for**. Affidavit can be based on information and belief b/c procedural matter]:

- court has no jurisdiction over the cause of action
- pleading fails to disclose a cause of action or defence**
 - court will assume everything alleged in the pleading is true and then ask if everything alleged discloses a cause of action/defence. If multiple Δ s, π has to make out the cause of action against all Δ s
- pleading is frivolous, irrelevant or improper
- pleading constitutes an abuse of process – general catch all, ex. res judicata
- pleading's irregularity causes prejudice sufficient to defeat the claim – catch all for any prob w/ the pleadings

R v Imperial Tobacco Canada Ltd, 2011 SCC 42

R: 3.68(2)(b)

- if asking to strike the pleadings, no evidence is brought in. Court just looks at the pleading and assuming everything is true, asks if all the elements found for a cause of action/defence.
- Not for the court to strike out new or novel causes of action. If you are talking about a novel cause of action, court will not strike it out if you have plead everything you need unless the court finds it hopeless

Joly v Pelletier, [1999] OJ No 1728 (Sup Ct J)

F: π suing the president of the USA, the CIA, Canadian security agencies, Anne McLellan, ect. Alleged conspiracy between all of them that they were working together to prevent him from proving he was a Martian. Δ s brought an application to strike out his SOC on the grounds it does not disclose a cause of action.

- Assuming on the face of the pleadings that everything is true, he is an alien. ON rules say any person can bring a cause of action, not any aliens.
- Test is assume everything alleged is true and ask yourself if there is a cause of action. Court in this case also found it was frivolous.

Chutskoff v Bonora, 2014 ABQB 389

R: 3.68

- Describes situations the court may consider litigation vexatious: collateral attack (launching a lawsuit to attack something in a different way that has been decided somewhere else), proceeding is hopeless, bringing it for an improper purpose, it is someone else that was harmed, not obeying court orders, persistently engaging in inappropriate courtroom behaviour, “freeman on the land” type arguments .
- You can get a court order that a vexatious litigant is never able to sue someone again without court permission

Summary Judgement

Rules Part 7, Division 2; Rs. 7.2-7.4

Summary judgment is a finding by the court without trial, not based on procedure, but is not based on all the evidence as you would at a full blown trial. Finding on the merits but you don’t need a trial to figure it out, it is clear based on the affidavits. If successful, the action or issue subject to the summary judgment order is ended (judgment is issued), ends the litigation. If unsuccessful, the litigation carries on. In a state of development because of *Hryniak*.

Summary judgment requires a chambers application.

Current test for summary judgment: is there a genuine issue that requires a trial to decide it or can it be done at a chambers application based on affidavit evidence?

“Court” (Master or Justice) authorized to give part or full judgment in an action if (R. 7.3) [Affidavit evidence is required, must be personal (NOT based on information and belief, is “swearing positively”)]:

- there is no defence to the claim or part of it – not if there was a SOD, if there is no defence available
- there is no merit to the claim or part of it
- the only real issue is to amount

Hryniak v Mauldin, 2014 SCC 7

- Court had access to justice concerns, wants a “culture shift” away from full blown trial.
- SCC in favour of summary judgements if it can be determined on its merits based on summary procedure (affidavit evidence). Culture shift one of proportionality.
- Interpret summary judgment rules more broadly than narrowly.
- former test was that you could only have summary judgment if there was no triable issue. Now, the test is if it is an issue that NEEDS a trial to decide it.
- If can tell what is the better affidavit evidence without a trial then don’t need to go to trial to resolve.
- Note: case from ON where they do not have summary trials, so not clear how this is supposed to apply in AB

Windsor v Canadian Pacific Railway Ltd, 2014 ABCA 108

- States *Hryniak* applies in AB.
- Myth of trial should no longer govern civil procedure. If we don’t need a trial then issue a summary judgment.

1214777 Alberta Ltd v 480955 Alberta Ltd, 2014 ABQB 301

- describes summary judgment test in AB. Test is basically if a court decides it is essential to see live witnesses to decide the merits of the lawsuit, then it has to go to trial. But if the affidavits and transcripts of any cross-examination of the affidavits give enough info to decide the issues than it can be done summarily.
- Court can only decide based on the evidence before them, have to determine the admissibility of the evidence, if conflicts in the evidence, have to ensure they have been resolved via questioning, ect.
- Can decide for Δ if cause of action not made out, or for π if no defence established

776826 Alberta Ltd v Ostrowercha, 2015 ABCA 49

- if a judge decides that a matter can’t be decided on summary judgment, the judge is exercising their discretion that a full trial is needed and that is entitled to discretion (if appealed).

- Restates the new test: the summary judgment should be given only if it is fair and just to both parties to dispose of the lawsuit on the record (on the basis of affidavit evidence without oral testimony)

Stout v Track, [2015] ABCA 10

- decide cases on summary judgment when possible. Don't go to trial if you can avoid it.

Pyriah Design Inc v Plum, 2016 ABCA

F: summary judgement application unsuccessful, also respondent did not file a counter summary judgement application.

- Court grants summary judgment to the respondent, ending the lawsuit.
- Ended the lawsuit by granting summary judgement for someone who didn't ask for it, odd, but under 1.33 they can issue any order they want.
- Strong dissent saying can't grant applications that haven't occurred.

Summary Trial

Rules Part 7, Division 3; Rs. 7.5-7.11 & Form 36.

Requires chambers application + filing & serving form 36. Requires a justice.

Can have a summary trial on one issue or everything. Expedites trial by providing an alternate trial process: trial via documentary or written evidence only. Summary trial on the merits.

Two step process for summary trial. *Rules* authorizes justice to:

1. determine if the issue/lawsuit is appropriate for resolution by summary trial
2. if yes to #1, conduct the summary trial and issue judgement (can be same or different day than step #1)

Litigation does not continue if at summary trial judge dismisses the case, only option is appeal. If summary trial is held but judge unable to issue a decision on the evidence, litigation continues.

Process for Summary Trial:

1. Applicant files & serves Form 36, plus affidavit & other evidence (ex. expert reports) to be relied upon in summary trial. Must specify why matter/issue is appropriate for summary trial. Includes proposed summary trial date.
 - just has to see evidence to decide if it's appropriate to decide on just that evidence so it has to be filed
2. Respondent files and serves responding evidence (10 days prior to summary trial date) and notifies of any objection to summary trial procedure (5 days prior to summary trial date)
 - Respondent has to provide their evidence, even if arguing there shouldn't be a summary trial. Have to take a position and notify the other party if they want to object to summary trial as a process.

Difference between Summary Judgement and Summary Trial = extent of evidence. Summary trial considers things like expert evidence, ect., summary judgement does not as much. Summary judgement 1 step process, summary trial is 2. If there is an issue of credibility you have to have a full trial (not summary trial or judgment).

Westjet v ELS Marketing Inc, 2013 ABQB 666, 2014 ABCA 299

- Court can hear both the application for summary trial and proceed with the trial at the same time.
- When deciding if summary trial is appropriate court looks asks 2 questions:
 1. on the evidence presented, are they able to make a decision?
 2. would it be unjust to either party to decide it on the basis of a summary trial?

Manson Insulation Products Ltd v Crossroad C&I Distributors, 2013 ABQB 702

F: Contract dispute between 2 parties. Application was for summary trial of one issue, the definition of a contract term.

- Not appropriate for summary trial because deciding this issue first will not achieve many efficiencies in the overall trial.
- Discretionary. No hard rules for when summary trials are appropriate.
- Even though there is a drive for efficiency, isn't necessarily best. Viva voce trial leads to just results.

Trial of Particular Questions or Issues

Rules Part 7, Division 1; R. 7.1

Authorizes a court (Master or Justice) to issue a ruling on an issue of fact or law without a full trial where resolution of that issue is likely to expedite the resolution of the overall litigation. Best for threshold questions that the rest of lawsuit hinges on. Issue must be central to whole action. Cost saving rule, because with this decision, more likely to settle.

Rule authorizes a Court (Master or Justice) to [2 step process]:

1. Determine if a trial of an issue is appropriate
 - normally at regular chambers with application with affidavits establishing the question and why its resolution will expedite the resolution of the litigation.
2. If yes to #1, conduct the trial of an issue.
 - normally at special chambers, with an application with affidavits, expert reports, other written evidence relevant to determine the issue.

If court determines trial of an issue is not appropriate, litigation continues. If trial of an issue is held and court decides the issue, court can make a ruling as to the impact of its decision on the remainder of the lawsuit, give a judgment for all or part of the claim, or make whatever order is necessary.

Trial of an issue application can use hearsay (information and belief) evidence (unlike summary trial). But can actually have live witnesses come into court for a trial of an issue, whereas summary trial is decided on the affidavits.

Bailey v Guaranty Trust Co of Canada (1987), 77 AR 387 (CA)

F: Trial of particular issue, whether a party was liable for a mortgage. Wanted to argue the issue again at full trial.

- Court said no. *Res judicata* – the trial of a particular issue is a judgment so can't be argued again later.

Gallant (Litigation Guardian of) v Farries, 2012 ABCA 98

F: Negligence against a dentist resulting in personal injury to a disabled patient. Application to split the lawsuit, have the court decide liability on trial of issue and then damages later.

- Court said no, trial on an issue is not to split up all parts of your cause of action.
- Some of the evidence on liability will be applied to damages too so not that efficient. Courts reluctant to use trial of an issue on liability and damages.

Edmonton Flying Club v Edmonton Regional Airport Authority, [2013] ABCA 91

F: π subtenants of the airport, said Δ's decision to close the airport was a breach of their lease agreement. Could they have a trial on the issue to order an injunction?

- Court of Appeal said no, can't have a trial on the issue of the injunction without talking about damages because they are related. Does not make sense to separate them.
- To have a trial on an issue you have to have an isolated issue/issues, efficient because does not require all the same evidence and witnesses. If not getting that advantage then can't be used.

Delay

Rules Part 4, Division 6; Code of Conduct: R. 6.01(1); R. 15.4; Rs. 4.31-4.33;

Requires a Chambers application.

Both rules (4.31 & 4.33) require affidavit evidence of the delay, including length of the delay and reasons for the delay.

General Delay Rule (4.31): where there is some delay, court (Master or Justice) can issue a procedural direction or if delay has resulted in significant prejudice, can dismiss all or part of the claim. Requires Chambers application.

- Inordinate and inexcusable delay presumes significant prejudice.

3 things Court (Master or Justice) can do with delay application:

1. Find no delay, don't issue an order and litigation continues
2. Finds delay, and issues procedural order, litigation continues subject to that order.

3. Finds delay, and dismisses the claim, litigation ends regarding that claim.

Drop Dead Rule (R. 4.33): Where delay has been 3 or more years since a “significant advance” in the action, court MUST dismiss the action unless one of the stated exceptions applies. Requires Chambers application.

- Exceptions: parties have agreed to the delay (“standstill agreement”); action has been stayed/adjourned by the court; no response to a written proposal for delay of more than 3 years; applicant has participated in proceedings since the delay.

Difference between Rs. 4.31 & 4.33: 4.31 has the word MAY and court can order parameters for moving litigation along, 4.33 is mandatory and ends the suit.

Dejanovic v Axa Pacific, 2015 ABQB 200

F: Application to strike for delay from Δ insurance company. π had been in 2 accidents, had 2 actions against insurance company but hadn’t done anything in those cases, but had actively been pursuing the tort claims. π argued the rules of the tort claims impact the insurance cases, because same accident, injuries, and defences are identical so even though nature of the claims slightly different, significant advances in those actions should advance these ones.

R: 4.33

- Master said π wins application, is a significant action, but they should be making steps in those lawsuits too so the Master did not award costs. Skating on thin ice.

Empson v Wenzel Downhole Tools Ltd, 2013 ABCA 418

R: 4.31; 8.14

- Death of a witness is no longer significant prejudice. Death of a witness may give rise to a presumption of prejudice, but it is a rebuttable presumption – if you have questioning transcript you can read it in (R. 8.14) and if there is other witnesses/evidence to fill the gap then it has not prejudiced.

Calihoo v Canada (Attorney General), 2015 ABQB 337

F: π filed SOC and since Δ filed AASOD π had only changed counsel, filed statement of reply and a constitutional notice.

R: 4.33

- Court looks at each potential advance in the context of the lawsuit. Said a reply can advance a lawsuit, this one did not. No significant advance in 3 years here so lawsuit dismissed.

Charik Custom Homes Ltd v Sara Developments Inc, 2014 ABQB 63

F: Δ asked for extra time to file defence, π agreed. 3 years passes.

R: 4.33

- A courtesy for when to file SOD does not constitute an agreement to freeze the lawsuit. Asking for more time to serve a defence does not constitute an agreement to waive the drop dead rule

Security for Costs

Rules Part 4, Division 4; Rs. 4.22 – 4.23;

Business Corporations Act, RSA 2000, c B-9, s 254: In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

Security for costs: order to put security of money from one party into the court so that if the other party wins they can claim the money for costs.

Requires Chambers Application & affidavit evidence of *prima facie* merits of the litigation and ability of the respondent to pay costs. Party makes a preliminary bill of costs to give judge with idea of costs. Can get several security of costs awards if litigation takes longer than expected.

Either party can bring this application, if application made litigation frozen until the party puts the money into the court.

A procedural order: if application successful, litigation is stayed until security is paid (rule requires payment within 2 months but the Court can vary that) and then litigation continues, if unsuccessful litigation continues.

Does not resolve anything like above alternatives. Just torques up the pressure because forced to put the money upfront, increased interest in settling or otherwise resolving the lawsuit.

Rules authorize a court (Master or Justice) to order security for costs, when it is “just and reasonable”, considering:

- respondent’s assets in AB and likelihood of successful enforcement of a judgment
- ability of respondent to pay costs
- merits of the lawsuit
- whether order or security would unduly prejudice the respondent’s ability to continue the action
- any other issues the court finds appropriate.

Court Order must specify nature of security; require payment within 2 months (or vary this time), stay the proceeding until security is paid; state that if security is not paid, the claim is dismissed or pleadings are struck out.

Amex Electrical Ltd v 726934 Alberta Ltd, 2014 ABQB 66

R: 4.22-4.23; *Business Corporations Act*, s. 254

- If you have a π that is a corporation, you have to make a security for costs application under the *Business Corporations Act*, every other situation can make the application under the *Rules*.

Koemer v Capital Health Authority, 2011 ABCA 146

F: π SRL, π made application for something, Δ made counter application for security of costs. Special circumstances of the π , little action.

- Court only awarded small amount (\$1500) of security of costs award

Discontinuance of Action

Rules Part 4, Division 8; Rs. 4.36 – 4.37 & Forms 23-24.

Discontinuance = a party “quitting” the lawsuit in advance of a judgment being issued – ends the lawsuit.

Rules allow π to discontinue as of right but have to pay costs to Δ (unless parties or the court orders otherwise). May require a Chambers Application depending on when the discontinuance occurs in the action and whether parties can agree on how to resolve costs.

If discontinuance by π occurs:

- Before trial date set: can discontinue at will (Form 23), but Δ is entitled to costs.
- After trial date set, but before trial begins: can discontinue only with written agreement of all parties OR court’s permission (court will look at how to deal with costs)
- After trial commences: can discontinue ONLY with court’s permission.

If discontinuance by Δ : can discontinue (Form 24); Δ is then in default and π is entitled to costs for responding to discontinued defence.

Newel Post Developments Ltd v 1402801 Alberta Ltd, [2012] ABQB 422

F: Why is the court getting involved with discontinuance if trial hasn’t occurred yet?

- Quest for certainty in the litigation process. Case is worthy of consideration on whether discontinuance should be granted with or without costs.
- To allow discontinuance without costs, Court has to see it would be fair to allow π to discontinue without paying costs, usually with some sort of fault of the defendant.

Chapter 25: Settlement

Alberta Rules of Court encourage settlement:

- Rule 1.2 – gives the parties an obligation to resolve matters in the most cost efficient way.

- Rule 4.16 & 8.4(3) – requires parties to enter into some sort of dispute resolution process. There is now a notice to the profession that says the alternate dispute resolution requirement rule is not being enforced currently.
- Formal Offer Rules: R. 4.24 – 4.30

Formal Offers

Rules Part 4, Division 5 and Rule 3.10, 4.24-4.30

Rules impose procedural requirements for making a settlement offer. Impose negative cost consequence on the party receiving the offer if the offer is rejected when it should have been accepted.

FORM OF THE OFFER:

- Offer must be served at least 10 days prior to the commencement of trial or summary trial (NOT filed with court)
- Offer must remain open for at least 2 months or until the commencement of trial or summary trial
- Offer must be made in Form 22
- Must include specific details including: parties involved, whether interest is included (rate and time if included), whether costs are included, and notice of cost consequences of the formal offer process

Cost consequences:

- If offer is not accepted AND judgment is equal to or less than the offer, the party making the offer is entitled to more than the usual costs awarded from the date of the offer to the date of the judgement. Handout has presumptions – can be varied by the courts if they have good reason

Torode Realty Edmonton Ltd v Winfield Power Co, 2010 ABQB 729

- For an amount to constitute a formal offer, it has to be realistic in the circumstances (was it a reasonable reflection of the relative merit of the parties at the time, was it made honestly or in bad faith, was it made with the expectation that it would be accepted [does the other party know about the lawsuit to accept it yet], is it a sufficient compromise in the circumstances.
- Can serve a formal offer that is the exact same amount claimed in the SOC if it is a realistic offer based on their likelihood of success and the defendant had sufficient information to see that.
- Nature of the case determines if it is a valid formal offer.

Informal Offers

Informal offer: offer not made in compliance with the formal offer rules.

Paniccia Estate v Toal, 2012 ABCA 397

- Court always has discretion over costs, so even if you don't comply with the formal offer rules, the court can exercise discretion to apply the double costs rules (usually just for formal offers) to an informal offer.
- If you want the presumption that the court will follow the double costs rules you need a formal offer.

Part V: Trial and Judgement

Chapter 26: Entry for Trial and Trial

Entry

Rules Part 8, Divisions 1 & 2

Trial has to be scheduled by court employee.

Two ways to schedule for trial:

1. If parties agree, complete and file Form 37 – “A Request to Schedule a Trial Date”
 - trial coordinator then sets a date after contacting the lawyers to see which dates are best.
2. If parties don't agree that it is time for trial yet (still want medical exams, ect.) one party can apply to have the court set a trial date via Form 38.

Form 37:

- Sets out basic info to figure out how long trial will be: # witnesses, the anticipated length of trial, whether there is any conflict of interests with judges (ex. was a case management judge), whether you want a jury trial, ect.
- Also include all of the pre-trial steps that have been completed (pleadings, AOR, questioning, medical exams, expert reports that have been exchanged, ect.)
- Sometimes some things are not completed but both parties want to schedule a date (ex. personal injury, the party has to be questioned right before trial), so tell the clerk we agree to setting a date for trial, subject to one more questioning regarding the plaintiff's injury state right before trial. If clerk is satisfied, they send it to get a date set, if clerk isn't satisfied they send it to a judge to determine.

Form 38:

- applying to a judge to have matter scheduled for trial.
- Judge has to determine whether the matter is actually ready for trial, requires info.

Once trial is scheduled, the action cannot be discontinued without agreement of the parties or the approval of the Court

3 months prior to trial date parties have to certify that they are still ready to go with trial.

Tan v Swyrd, [2013] ABQB 229

F: trial was scheduled and certified that all expert reports had been exchanged. After trial was scheduled the π tried to serve Δ with more expert reports. Matter got settled, but part of agreement was Δ has to pay costs.

- Court said Δ has to pay costs for everything except the late reports, to make sure the certifications in Form 37 are taken seriously.

Jury Trial

Rules Part 8, Division 1; *Jury Act*, RSA 2000, C. J-3, ss. 17, 18 and 19 and *Jury Act Regulation*, Alta Reg 68/193, s. 4.1

In AB, the presumption for civil trials are that they are done by a judge alone. You can apply for a jury trial if preferred.

Before you submit Form 37 or 38 you must apply to the chief justice in writing for a jury trial. The chief justice decides whether you get a jury or not based on s. 17 of the *Jury Act*, which lists what civil actions are considered (includes tort or contract). *Jury Act Regulation* specifies civil jury trial have to be for an amount claimed of over \$75,000. It is a presumption that if those two requirements are met you get a jury, but then s. 17 permits the judge to decide if you get a jury anyways based on complexity (prolonged examination of documents or accounts, or a scientific or long investigation).

Test is whether it is too complicated/complex for a jury to make the decision because it is overwhelming.

Chief Justice can grant a jury trial just by reading the letter or having a hearing.

Chief justice will set conditions on the jury trial, like number of dates, ect.

There has to be a financial deposit given to the court for the cost of a jury trial.

If you get a jury trial granted then within one month you have to apply for case management.

Fowler v Dion, 2009 ABQB 734

F: 4 π s in the case, 2 π s claiming < \$75000 and the other 2 π s have very complicated cases.

- Chief justice rejects application for jury trial. 2 cases below the minimum amount required and the other two cases are too complicated, too much for a jury to conveniently decide.

Attendance of Witnesses at Trial

Rules Part 8, Division 3; *Interprovincial Subpoena Act*, RSA 2000, c. I-9 and *Evidence Act*, RSA 2000, c. A-18, s. 21

Rs. 8.8-8.9; Form 40

Form 40: Notice to Attend as a Witness

- Filed with the court and served on anyone you want to attend. Notice is a way of giving the court a way to enforce it and will help the person get the day off of work.
- Requires personal service, 20 days prior to trial date.
- Have to provide witness with allowance (amount set in Schedule B)

Chapter 27: Judgment

“Judgment” used 2 ways in the *Rules*, 1. the finding of the court, 2. the name of the document with the finding of the court (same with the word Order).

Judgement is different from an order because it ends the lawsuit (subject to appeal) while an order is interlocutory (does not end the lawsuit).

Preparation and Entry of Judgment and Orders

Rules Part 9, Division 1; Rs. 9.1-9.8

As with an order, the rules require that with a judgement the winner presumptively has to draft the judgment that reflects the outcome of the judge’s decision. Draft has to be served within 10 days of the judgment being pronounced so other parties can approve it. If the parties disagree with what is on the order, a judge has to sign it. Parties have 10 days after the draft judgement is served to object to the draft, providing particulars of the objection.

Once it is signed by a clerk or judge it has to be filed with the court. Judgement is effective from the date the judgement is pronounced but not enforceable until it is filed [distinction important for pre- and post-judgment interest, the date the judgment is pronounced divides these two, you just can’t start collecting on it until the judgment is filed]. Has to be filed within 3 months of the judgment being pronounced.

Variation Before Entry

R. 9.13

Filing the judgement is important because the court has the power to change the judgment before it is filed (R. 9.13 – permits them to completely rethink the case and change their mind).

Lewis Estates v Brownlee LLP, 2013 ABQB 731

F: A judgment given on legal accounts issued by a law firm. Application made to change the judgment made because they got more information.

- Court refused to vary their judgment, and said while the court has discretion under R. 9.13 to vary a judgment, the court should exercise that judgment narrowly.
- High standard to convince the Court to change its judgment and hear new info. Has to be clear evidence of an error in the original judgment.

Variation After Entry

Rs. 9.12, 9.14, 9.15

If a judgment has been filed, the Court will only change it to correct surface/transcription errors (like typos) or alter the ruling to provide a missing detail (ex. a date was written down wrong for interest calculation). Basically only correcting because the written judgment went in without really reflecting what the judgment was or the court failed to include a detail that was necessary to the judgement.

R. 9.15 – allows the court to set aside, vary or discharge a default judgment that was made because a party did not have notice or the party did not appear because of a mistake (had wrong trial date, ect.), if an application is made within 20 days after service of the judgment/date the judgement first came to the attention of the applicant.