

# Chapter 1 - Introduction

What are the Rules of Court?

- Rules are a provincial REGULATION governing litigation procedure in ABQB
  - o This falls under s **92(14)** of the *Constitution Act, 1867*
- Rules are enacted under s **28.1** of the *Judicature Act*
- Rules of Court committee recommends the rules to Minister of Justice under s **28.2** of the *Judicature Act*

Why are there Rules?

- Needed to establish and provide means of enforcing common litigation procedures

Purpose of the Rules?

- See *C(L) v Alberta* (2011) ABQB and **R1.2(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.
- *Hryniak v Mauldin* (2014) SCC: Culture shift needed for timely and affordable access to the civil justice system.
- *Windsor v CPR Ltd* (2014) SCC: Myth of trial should no longer govern civil procedure, interlocutory procedures are primarily to prepare an action for resolution.
- *Nafie v Badawy* (2015) ABCA: Don't cast aside procedures prescribed by the Rules for the sake of expediency.
- *Allen v AB* (2015) ABCA: Procedural deadlines are imposed to further the administration of justice, not thwart it.

Terms:

- Plaintiff: party bringing the lawsuit
- Defendant: party being sued
- Third party: someone that the D is bringing into the claim
- Third party plaintiff: the D who says it's someone else's fault and brings another party in
- Third party defendant: the person being brought in by "third party plaintiff"
- Cause of action: basis on which suing i.e. breach of contract
- Court file number: when you start a law suit, court opens a file
- Court clerk: has two responsibilities 1) stand behind counter and file docs 2) help in court room by passing docs to judge, etc.
- Service: means officially providing party with a document
- Affidavit of record: this is a special sworn document whereby party of lawsuit swears to the evidence they have (affidavit: sworn statement, usually by one of party in the lawsuit)
- Questioning (formerly examination for discovery): process under Rules where parties and lawyers each provide sworn answers to questions asked by opposing lawyer (oral exchange)
- Expert: someone hired to provide opinion evidence (hired witness)
- Expert report: document must be provided to other party if plan to include expert at trial
- Interlocutory: something that is decided by the court but does not end the lawsuit (interlocutory ruling is asking them a question about the procedure – arguing process; doesn't end lawsuit)
- Application: the "asking process" is an application (to resolve an interlocutory question) – place you go to do that is called chambers – justice or master makes these decisions (master is a delegate of QB with limited jurisdiction)
- *Ex parte*: when go to chambers and ask for resolution without telling other party you are going (asking court to order something without telling other party i.e. without notice) – limited circumstances
- Order: court's resolution of an application (it is an "answer" to application, given after interlocutory)
- Judgment: distinguished from "order" - it is the court's ruling at end of lawsuit
- Costs: money expended on steps and litigation (fixed costs for ex: filing; lawyer's fees)

## Chapter 2 - Jurisdiction

Three aspects to jurisdiction: subject matter, territory and *forum conveniens*. We assume that physical location is AB and sufficient connection to sue in AB.

Supreme Court of Canada

- Statutory court, can do what is defined specifically by statute, appellate court only.

Federal Courts (Court of Appeal, Trial Court)

- Statutory courts, get their jurisdiction from the *Federal Court Act*

AB Provincial Court (Family, criminal and civil divisions)

- Commonly called small claims court, civil jurisdiction set out in **s 9.6** of the *Provincial Court Act*
  - o Cannot hear land title issues, defamation, etc. and there is a \$50k cap on damages (can forfeit the remaining balance if you wish to proceed in this court).
- You can move actions between ABPC and ABQB, and vice-versa.

AB Queen's Bench

- Has plenary jurisdiction, have to make sure its jurisdiction hasn't been taken away by another court.
- There is no minimum limit to bring an action in QB, concurrent jurisdiction with ABPC.

AB Court of Appeal

- Statutory court, jurisdiction set out in the *Judicature Act*.
- Limited to appeals, sometimes hears judicial reviews directly from tribunals, but usually from ABQB.

Bottom-line: Look at Rules if suing in ABQB, presuming the decision has been made to seek a court resolution.

### Enforcement of the Rules

1. Justices and Court Officers (Masters)

- Master → QB Justice → CA Justice
- Jurisdiction of QB/CA Justices: *Judicature Act*
- Jurisdiction of Masters: *Court of Queen's Bench Act, s 9*
  - o Cannot hear a trial, decide disputed issues of fact, issue contempt finding, etc.
- Note: Case management counsel assist in managing cases but do not enforce the Rules!

2. Generally 3 means by which Court enforces the Rules

- Court orders (see Ch 23)
- Costs (see Ch 3)
- Contempt of court (**Rs10.51-10.55**)
  - o Judicial finding that a party has acted in blatant disregard of the Court
  - o Can be made on court's initiative or on application by opposing party
  - o Must be personally served on the party who is subject of the order (unless lawyer accepts for them)
  - o High degree of proof
  - o Can be made on various grounds, including:
    - Failure to obey court order
    - "Contemptuous" conduct before the court
    - Failure to attend
    - Failure to comply with an undertaking given to the court
    - Anything which a statute defines as contemptuous
  - o Punishment for contempt can include:
    - Imprisonment for up to 2 years

- Fine
- Striking out/staying party's pleadings or action
- Judgment against the party
- Costs

*Carey v Laiken* (2015) SCC: Contempt finding has 2 components.

- 1) Are they in contempt?
- 2) If yes, what is the punishment or sanction for being found in contempt?

To establish civil contempt, establish 3 components beyond a reasonable doubt:

- 1) Exists a court order that clearly and unequivocally states what was expected to be done or not done;
- 2) Have to establish the party against whom you are seeking contempt knew what the order said; and
- 3) Intentionally breached the court order. Does not mean intentionally defied it, but rather what they did or did not do was on purpose, not by accident.

Court always has discretion, these are the minimum requirements.

*336239 AB Ltd v Mella* (2016) ABCA: Speaks to second component of contempt, what sanction can there be?

Factors that should be weighed when deciding are (see para 35 of the decision):

- Proportionality between the wrongdoing and the sanction
- Mitigating factors
- Aggravating factors
- Deterrence
- Similarity of sentences in like circumstances
- Reasonableness of fine or incarceration.

If the party doesn't purge their contempt, and order comes in context of civil litigation, you cannot continue to participate. Also, freemen on the land are not necessarily in contempt, need more to prove it.

## Chapter 3 – Costs and Fees

Costs are between P and D. Court fees are paid by lawyers to the court. Lawyer fees are paid by the P or D to the lawyers.

### A. Solicitor's Fees (**Rules of Court, Part 10, Div 1**)

- A lawyer's bill to their client typically includes 1) Lawyer's fee and 2) Disbursements (out of pocket expenses paid by the lawyer – e.g. court fees, postage, photocopies, expert fees).
- Fee is determined by agreement between lawyer and client but can be reviewed by the court for fairness, must be in writing and signed, include specified information.
- Lawyer is entitled to reasonable compensation.
- Fee arrangement can take the form of a contingency agreement as long as the agreement meets certain requirements.
- Lawyer's bills (including retainer agreements and contingency agreements) can be reviewed by a Review Officer and the Officer's finding can be appealed to a court (ask: is the bill reasonable?). Can be at request of client for overcharging or by lawyer if client refuses to pay bill.
  - o Time frame for review: generally within 6 months of bill being issued, or 6 months after termination of retainer agreement.

### B. Court Fees

- List of fees set by provincial government for court services, includes: court clerk fees, sheriff's fees, allowances payable to witnesses, court transcripts & transcription services, receiver fees, registrar fees (for appeals).
- Court fees set out in Schedule B to Rules.

*Trial Lawyers Association*: SCC said provinces do not have complete authority to set court fees at what they want, has to be governed by principles of access to justice. Can't demand such high fees people have no access to justice.

### C. Costs Between Parties

- Known as recoverable costs of litigation, may also be called court costs, party/party costs.
- Rules reflect the general philosophy that loser should compensate winner for money which winner has expended in the litigation, amount of compensation should be partial indemnity (these are only PRESUMPTIONS).
- Self-litigant entitled to recoverable costs even though they didn't hire a lawyer.
- Basic principles:
  - o Awarded by the court
  - o Discretionary decision by the court whether to award, to whom, and for what litigation steps (*Court of Queen's Bench Act, s 21*)
  - o Presumptive award of partial indemnity under Schedule C
- Costs are an issue throughout litigation, used as a tool for rule enforcement
- Procedure:
  - o Winner prepares a Bill of Costs
  - o Opposing party approves
  - o If they cannot agree, goes to assessment officer
  - o May appeal assessment officer's finding to the court
- Can go for full indemnity, but losing party will usually have engaged in some form of misconduct.

*Pillar Resource Services v Prime West Energy Inc* (2017) ABCA:

- 1) Setting recoverable costs amount is job of the superior court
- 2) Recoverable costs amount is discretionary
- 3) Discretion must be exercised within a principled/logical framework
- 4) Presumption is recovery by successful party
- 5) Presumption is indemnity of legal fees
- 6) Presumption is partial indemnity

7) In exceptional cases, substantial or full indemnity may be awarded

8) Recoverable costs pertain to necessary steps

D. Costs Award Against Counsel

- Costs may be awarded against lawyer personally only in exceptional circumstances (i.e. where lawyer's conduct has seriously undermined the authority of the courts or seriously interfered with the administration of justice).

*Quebec v Jodoin* (2017) SCC: If seeking court award for costs to be paid by lawyer, you have to notify that lawyer as to allegations of misconduct you will be arguing about, and the cost consequences being sought. More often they pick an amount to award against the lawyer, in addition to Schedule C costs to the client.

## Chapter 4 – Professional Responsibility

### A. Lawyer of Record (**Rules, Part 2, Div 4**)

- Become a lawyer of record by filing commencement or other document
- Change lawyer of record by serving Notice of Change of Representation on opposing party and filing Affidavit of Service: change effective immediately on filing affidavit
- Withdraw as lawyer of record by serving Notice of Withdrawal of Lawyer of Record on client and opposing party and filing Affidavit of Service: effective 10 days after filing of Affidavit of Service (good to file these right away because you don't want to wait around for client to find a new lawyer).
  - o If trial date has been scheduled, need court approval to withdraw.

### B. Undertakings

- Lawyer's promise to court or to a litigant

*B & J Petroleum Ltd v Rhim* (2015) ABQB: Undertaking can be verbal, written, implied, and is enforceable by the court. Can give an undertaking to other party, their lawyer, and the court. So do not give one you cannot comply with!

Trust condition: E.g. Settlement cheque in return for release of liability. Cheque would come with a letter saying we are giving you this cheque under the condition that you do not give it to your client unless they sign this form without changing it.

### C. Code of Conduct

- Practice protocols/obligations established by the Law Society of Alberta. Lawyers are always expected to act in accordance with the Code.

## Chapter 5 – Commencement of an Action

Formal commencement of a lawsuit with the court accomplished by filing appropriate document with the court.

- Decision to commence involves: (1) substantive law (2) practical considerations (3) procedural law.
- **R3.2** – Filing of a document, this is how you satisfy the limitation requirement. Service is a different consideration.

### 1) Substantive questions

- Is there a cause of action?
- Is the cause of action enforceable?
  - o Maybe there is already a judgment, so no valid cause of action is already decided.

### Limitation period

- Court's usually address this as a procedural question, however.
- D does not have to raise limitation period as a defence (happens with cases where policy gets in the way e.g. forced sterilization – would look bad to dismiss based on procedural ground).
- Limitation period achieves certainty, and fairness.
- Objective test determines when limitation starts to run: when would a reasonable person in P's position have known...
- **S 3 Limitations Act** – All claims (contract, tort, etc.) have 2 year limitation period after claim was discovered or ought to have been. Drop dead limitation period is 10 years after claim arose.
  - o Exceptions:
    - For some claims, there is no limitation period: **s 3.1 Limitations Act** – sexual assault
    - Suspension of period: **s 4 Limitations Act** – where D fraudulently conceals the loss or **s 5 Limitations Act** – where P is under disability or **s 5.1 Limitations Act** – period suspended when the P is a minor (mechanism for D to trigger by giving notice to guardian and public trustee).
    - Can be extended by agreement – **s 7 Limitations Act**
  - o Limitations only apply if there is no specific statute setting out a limitation (e.g. Insurance Act has its own limitation period on claims)

### 2) Practical Considerations

- Economics
- Time
- Emotions

### 3) Procedural Questions

- Where to commence the action?
  - o Look at jurisdiction (province) and which court
- By what means?
  - o Statement of Claim or Originating Application
    - OA much shorter, totally different process. SoC accesses all pre-trial steps, such as being able to see the other side's evidence.
    - General presumption is file a SoC, can hold your place in litigation if you want to switch

*Dash Distributors Inc v Powlik* (2012) ABQB (Master): Confirms these are the two ways to start an action.

# Chapter 6 – Parties

## General Principles

- Party: “a party to the lawsuit” i.e. any legal entity claiming or defending a legal position in the lawsuit
  - o Two issues:
    - Capacity: does the person/entity have capacity to participate as a party?
    - How to identify in documents: how to “name” a party
- Capacity is necessary to natural justice, need the competence to understand the nature of the proceedings so as to be able to instruct counsel and be responsible for costs involved in litigation.
- A natural adult person with full mental capabilities can be named as a party to a lawsuit without special rules or accommodations, presumed to have full mental capacity.

## A. Persons Lacking Legal Capacity

**R2.11** says the following persons lack legal capacity to litigate on their own (self-represent or hire a lawyer) and that it is overcome by attaching them to a “litigation representative” (this is NOT their lawyer, so would still need to get a lawyer for the lit rep):

### 1) Deceased persons

- o **Section 2, 3 and 4** of Alberta’s *Survival of Actions Act* says any cause of action for or against an individual, arising before or after their death, survives for the benefit/burden of their estate regardless of the cause of death. However, damage claims are limited to actual pecuniary losses (**s 5** *Survival of Actions Act*).
- o If a person’s death is caused by wrongful act of another, Alberta’s *Fatal Accidents Act* (**ss 2 & 3**) say that the certain relatives of the deceased are entitled to damages. This includes pecuniary damages relating to the death (**ss 3 & 7**) and compensation for bereavement of particular family members (**s 8**) - \$82k to spouse/parents of the deceased and \$49k to each child. This action is brought by the estate but on behalf of the family members.
- o Sample 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) Minors

- o Alberta’s *Minor Property Act* (**s 4**) says no settlement of minor’s claim without consent of the court, needs to take into account interests of the minor.
- o Alberta’s *Public Trustee Act* (**s 23**) provides for public trustee’s role in ensuring that an appropriate litigation representative is selected if s 5.1 of the *Limitations Act* is invoked.
- o Sample naming: “Hugh Jelbo, as Litigation Representative for Ima Kidd, an infant” or “Ima Kidd, an infant, by her Litigation Representative, Hugh Jelbo”.

### 3) Mentally incompetents

- o Alberta’s *Public Trustee Act* (**s 30**) says if public trustee is trustee of the estate of a person of unsound mind, need leave of the court to commence or continue litigation.
- o Alberta’s *Adult Guardianship & Trusteeship Act* provides for the appointment of a guardian for a mentally unsound adult, applies to defending and claiming lawsuit.
- o Sample 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”.

- There are also missing persons, but we don’t really go into that.

### 4) Appointment and Role of a Litigation Representative

- o Automatic: authority already exists by another legally recognized means (**R2.13**)
  - *AGTA* says trustee can represent that person



- Self-appointed: self-selected litigation rep files an Affidavit with required information (**R2.14**)
  - Someone volunteers, friend of the child, etc.
- Court-appointed: application by interested party or opposing party (**Rs2.15-2.17**)
  - If no one acting, court appoints. Could be application by interested party.

#### Parents as Litigation Representatives

- In the ordinary course, a parent is an automatic litigation representative for their child.
- *Family Law Act ss 20 and 21* provides that parents are guardians and guardians can commence legal proceedings on behalf of their children.

#### What does the litigation representative do?

- Main function is to give instructions to counsel regarding lawsuit and be responsible for costs, BUT:
  - Unless specifically authorized to settle or discontinue, need court's approval (**R2.19**)
  - Litigation rep for P is liable for costs, but litigation rep for D is only liable if litigation rep engaged in serious misconduct and court orders payment (**R10.47**)

*LC v Alberta* (2011) ABQB: Court determined what the parameters are for litigation representatives under the new rules.

- 1) Lit rep of minor does not need to be the parent, and further, consent of the parent not required to sue.
- 2) D has no say in who the lit rep is for P, and vice-versa, unless you can establish some sort of conflict of interest.
- 3) Court, in certain circumstances, if they do not feel interest is being represented, can substitute or appoint new lit rep (first one does not need to resign, it's in the court's hands).
- 4) Sometimes a question is raised whether you can be a party to the lawsuit and also a lit rep – Court frowns upon.

*Champagne v Sidorsky* (2012) ABQB: Lit rep cannot act as a lawyer. Lit rep will need to get a lawyer!

#### B. Trust and Estate Proceedings

**R2.1:** Name trustee, not the beneficiaries.

#### C. Business Entities

- 1) Corporations
  - Registered corporation is a legal person so can sue and be sued in corporate name (i.e. has capacity)
  - If registration lapses, can be revived to sue or be sued (may want to do this to access insurance or records)
  - Sample naming: “Sony Entertainment Ltd”
- 2) Partnerships (**Rs2.2-2.4**)
  - Can sue as a partnership
  - Can be sued as partnership or as individuals and can defend individually even if sued as partnership
  - Sample naming: “TIC Associates”, or “Tom Cat, Ingrid Bear and Candice Frog carrying on business under the firm name of TIC Associates, and TIC Associates” (might as well name both).
- 3) Sole Proprietorship (**R2.5**)
  - Can sue and be sued in individual name
  - Sample naming: Milton Middle, carrying on business under the firm name and style of Milton's Printing Service

#### D. The Crown

- Alberta's *Interpretation Act* (s 14): no enactment binds the Crown unless it specifically says so
- Alberta's *Proceedings Against the Crown Act*: all civil rules of procedure apply to the Crown unless otherwise specified
- Federal *Crown Liability & Proceedings Act*: provincial court rules apply to the federal Crown
- Some rules treated differently (e.g. cannot compel disclosure of documents if it would be injurious to the public)
- Sample naming: Prov – “Her Majesty the Queen in Right of Alberta” Federal – “Attorney General of Canada”

## E. Related Issues

- 1) Class Proceedings & Representative Actions (**Rs2.7-2.9, R2.6** and Alberta's *Class Proceedings Act*)
  - One person is representative P, usually actual harm caused to each person is too small for each to sue individually, and money that is awarded will get ordered to get paid somewhere so D doesn't get away with it.
- 2) Representation Before the Court
  - **R2.22**: Allows for self-representation
  - **R2.23**: Allows for an "assistant" in making representations to the court (e.g. bring in a family member to help with language barrier – cannot be providing legal advice contrary to the *Legal Profession Act*)

*Park Avenue Flooring Inc v EllisDon Construction Services Inc* (2016) ABQB: Can corporations self-represent? No. A non-lawyer cannot represent a corporation under the Rules. It does not fall under **R2.22**. No exception in statute for corporation, so must follow *Legal Profession Act* and have a lawyer represent the corporation.

- 3) Vexatious Litigants
  - The court has authority to prevent vexatious litigants from accessing the courts.
    - o Two ways to do this:
      - If litigation itself is vexatious, court can strike it out
      - If an individual is vexatious, can prevent them from bringing any action or participating in any litigation without permission of the court
      - Bigger deal to be declared a vexatious litigant, rather than your lawsuit being found vexatious

*Ewanchuk v Canada* (2017) ABQB: Authority to control misuse of court exists in the *Judicature Act* and in the common law, they have inherent jurisdiction to control their own proceedings. If a court is determining if someone is vexatious, they only look at the effect of what the litigant is doing and NOT their intent. Can be unintentionally vexatious. In terms of process, can be by application or by a motion of the court. The litigant must be given a chance to respond.

*Chutskoff v Bonora* (2014) ABQB: Describes a vexatious litigant – see case for list (not closed, might be other things). Biggest thing you need to think about is difference between vexatious litigation and a vexatious LITIGANT.

## Chapter 7 – Pleadings General Rules

- 1) Definition
  - Documents providing written statement of a party's position regarding the issues in a lawsuit. Includes pretty much any claim document, defence document, or reply document, and a response to a request for particulars.
- 2) Order of pleadings
  - Party making the claim initiates, then defence, then reply (if applicable). This applies to 3Ps as well.
- 3) Purpose of pleadings
  - Natural justice – give notice to court and all parties of the issues and the position of each party in relation to each issue. This minimizes time/cost by clarifying the boundaries of litigation. Generally, cannot grant a remedy not asked for, BUT there is a balance to be struck between the need for adequate notice/efficiency of court resources on one hand and the need to ensure access to judicial resolution of disputed matters on the other hand.

*Saadati v Moorhead* (2017) SCC: Even if certain damages not specifically identified, pleading was broad enough to give recipient of the pleading notice there may be an issue with respect to those damages as there were experts attesting to the facts, and the briefs referred to the injuries.

*Tsilhqot'in Nation v British Columbia* (2014) SCC: Minor defects should be overlooked in the absence of clear prejudice.

*Lax Kw'alaams Indian Band v AG Canada* (2011) SCC: Pleadings can't be too general, need some form of specificity.

- Pleadings are important especially given the culture shift noted in *Hryniak*. They should not be too vague. The content of pleadings must be sufficient to establish a legal claim or response. Pleadings confine the issues which a court can properly decide, and can be amended, subject to exceptions.
- 4) Drafting pleadings - See **Technical Rules (Part 13, Div 3 & 4, and Forms)**
    - Plead material facts (NOT evidence)
    - Plead any matter which would take the opposing party by surprise (**Rs13.6 & 13.8**)
    - Plead remedy
    - Silence is deemed denial
    - Alternative allegations are allowed
    - Need to comply with technical requirements in **R3.13**, otherwise clerk may not file it.

## Chapter 8 – Interest

Typically, the loss occurs, then litigation starts, then judgment is issued (litigation ends) and then judgment is paid. Prejudgment interest accumulates from date of loss to date of judgment, where post-judgment interest then starts accumulating until the date of full payment). This difference is crucial.

Interest awards are governed by the *Judgment Interest Act*:

- **Section 2(2)**: not entitled to interest on interest, only simple interest. No interest on punitive damages. No interest on costs. No interest if money paid into court.
- **Section 2(3)**: Court can vary interest party is entitled to, similar to costs in that there is still a presumption though
- **Section 4**: Non-pecuniary damage rate is 4%
- Regulation for pecuniary damage rates for different years.
- **Section 5**: Award of interest is part of judgment enforcement.

*Aetna Insurance Co v Canadian Surety Co* (1994) ABCA: Talks about the wording of the statute. Presumption of entitlement to interest but Court has discretion to alter than entitlement and stray from the presumption. Also, CA says if trial judge has made a ruling on interest, and the judgment is appealed, CA will not generally exercise discretion to vary trial judge's award if interest unless they also substantially change the judgment.

*321665 Alberta Ltd v ExxonMobil Canada Ltd* (2012) ABQB: 14 year litigation, argument was that this was P's fault, so D argued they should owe less interest. Court awarded 12 years instead of 14. This is one reason a court may vary interest – conduct of one of the parties.

Note: If limitation period is suspended under *Limitations Act*, interest clock keeps running!

## Chapter 9 – Venue

This is judicial center in Alberta where you start your action. Relates to pleadings, interlocutory applications and trial. Wherever you file commencement document, that is the court presumptively holding all the pleadings and where you go to deal with interlocutory applications. Can apply to have it moved (**R3.5**). There are 11 judicial centers in AB.

Choice of venue begins with party commencing lawsuit, then opposing party can object.

- **R3.3:** Have to commence action closest by road to the parties to the action.
- **R3.4:** Exception – involving claims on land, have to commence judicial district closest or on that land.
- **R3.6:** Can have action carried out in one center and solely for the purpose of trial, change it to another.

Restriction: unreasonable choice.

*Regular v Regular:* Court says unreasonable is a matter of convenience. See if venue is inconvenient on a balance of convenience. Burden lies on party attempting to change the judicial center. Court says it does not have to be illogical, but that it's a functional idea. Factors include:

- Number of parties and witnesses abiding in current judicial center compared to new center
- Nature of the issues
- Relationship of the parties
- Parties respective financial resources
- Stage of proceedings

Court not as concerned about interlocutory proceedings, since you can do this by teleconference. But still an issue.

# Chapter 10 – Joinder of Parties and Causes of Action

Joinder refers to the “joining” of multiple parties and/or causes of action in a single lawsuit. Issues of joinder involve both substantive questions (e.g. who and what causes of action can be joined) and procedural questions (e.g. how to join or separate parties and/or causes of action).

Basic approach: joinder of parties and/or causes of action should be allowed to maximize the litigation efficiency and cost effectiveness.

**R1.2:** Efficiency is important.

**R3.69:** Re cause of action – can join more than one claim in a single lawsuit.

**R3.70:** Re parties – can join more than one P and more than one D if claims (1) arise from the same event OR (2) raise common questions of law or fact OR (3) the court permits.

Don't want to sacrifice justice for the sake of efficiency, D might object if it would overly complicate things.

## A. Res Judicata as a Limit on Joinder

“A matter already judged” – limits/restricts the basic principle of joinder, and prevents joinder from being used to raise issues that have been previously decided by a court. Only applies to Court decisions. Can be based on cause of action estoppel or issue estoppel.

*Erschbamer v Wallster* (2013) BCCA: Sets out technical difference between cause of action estoppel and issue estoppel.

- Cause of action estoppel applies where there is a prior decision by a competent court, and parties to that prior decision are the same parties now before the court. This is the principle of mutuality. Doesn't have to be exact same parties, can be representative. Basis of cause of action was either argued or could have been argued in original cause of action.
- Issue estoppel is where the same question has been decided in prior proceedings, and that decision was final, and some degree of privity between the parties involved. It's not the same two parties attempting to re-litigate, but trying to determine whether that decision about that issue means we can't have that issue litigated again.
  - o E.g. for issue estoppel: Court already found that B was negligent towards A in building a coffee maker. If C sues B for same coffee maker issue, B can be estopped from raising any defenses to negligence since they had already been found negligent with respect to building the coffee maker.

*Penner v Niagara* (2013) SCC: Talks about balancing idea of judicial finality and economy with consideration of fairness to the parties. Hard to distinguish between the two forms of estoppel.

## B. Amendment of Pleadings

This can refer to changing the content, adding or deleting parties, adding or deleting causes of action. The amendment process depends on timing of the amendment. Consider the stage of litigation and *Limitations Act* (too late to add a party).

- 1) Before filing the pleading – “amend” as of right (**R1.2, 3.69 & 3.70**)
- 2) After filing the pleading but before pleadings have closed – amend as of right (**R3.62(1)(a)**)
- 3) After pleadings have closed – amend by agreement (**R3.62(1)(c)**) or by court order (**R3.62(1)(b)**)

Note: Pleadings close (**R3.67**) 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 on the P (**R3.33**)). Rules governing a Court Order to Amend differ depending on whether you are changing parties (**R3.74** – need consent of person being added, application made by existing party, and court generally satisfied order should be made) or making other changes (**R3.65** – Court must give restrictions on it, doesn't talk about limitations if adding parties, but Court does anyway).

When a Court Order is required (try to get agreement first), it is obtained by a Chambers Application, supported by an Affidavit setting out what the proposed amendments are and why they are necessary. Costs arising from the amendment are borne by the party seeking the amendment (**R3.66**). Note: This is different from the costs of the application!

#### Responding to an Amended Pleading

- Amendments to pleadings which respond to an amendment pleading can be made as of right if filed and served within 10 days after receiving the initial amended pleading (**R3.62(3) and (4)**).
- Where an amendment is made as of right, an opposing party may apply to a court (within 10 days of being served with an amended pleading) to have the amendment struck out/disallowed (**R3.64**).

#### Why would a party or court refuse to permit an amendment?

- Not properly included in the action
- Unduly complicates the action (time and cost)
- Is “hopeless”
- Barred by *Limitations Act* (note: **s 6** permits addition/substitution of parties and claims after expiry of the standard limitation period if certain requirements are met) – section is all about prejudice.

*Attila Dogan Construction and Installation Co Ltd v Amec Americas Ltd* (2014) ABCA: No reason has to be given why amendment is required, but will not be allowed where prejudices opposing party, is hopeless, not allowed under *Limitations Act*, or malice or bad faith in not pleading it in the first place.

*Poff v Great Norther Data Supplies* (2015) ABQB: Got the name of the corporation wrong, and tried adding right name after limitation period expired. Allowed amendment since initial suit was filed in time.

#### C. Joining and Separating Claims and Parties

##### Consolidation (**R3.72**)

- Merge together for reasons of efficiency and cost. Can consolidate just for purposes of trial, extent can vary.

##### Severance of claims or parties (**R3.71**)

- One action where rules of joinder have been utilized, but you want to pull them apart into separate law suits. Concerns of the court are the same: cost and efficiency. Weigh this against attempt to achieve justice.

*Egg Lake Farms Ltd v Alberta* (2014) ABQB: Should not automatically grant severance, only where real likelihood of saving time and expense in doing so. Number of factors to look at and are the same for consolidation, but in reverse:

- Degree of commonality between the issues and parties?
- How much time saved in pre-trial steps?
- Time saved in trial?
- Is there prejudice to either party by consolidating or severing?
- What stages are the lawsuits at?
- Any delay that might be caused by the order?

Consolidation should enhance administration of justice and limit prejudice to the parties, it is a balancing act!

#### D. Parties Added on Own Motion/Intervenors

The Court may allow a party to be added to the lawsuit or may allow an intervenor to participate if the addition increases the opportunity for a just outcome and does not cause unfairness (**R2.10**). Allowed at QB, and on appeal.

*University of Alberta v Alberta* (2011) ABQB: Court will extend usual considerations under CL for intervenors:

- Subject matter of lawsuit
- Whether intervenor has sufficient interest in that subject matter
- Are they specifically affected by the decision
- Does the intervenor have special expertise the court would not hear from otherwise
- General catchall: interest not fully protected otherwise!

# Chapter 11 – Service

Service is the official delivery of court documents to the opposing party/parties in accordance with the Rules. There are a few documents where the Rules require service where document is not filed, but that is the exception (two main exceptions where served but not filed are Affidavit of Records and Expert Reports).

## Purpose of Service

- Natural justice/fairness – gives notice to opposing party and court, can't ask for a remedy without giving the opposing side a chance to make submissions to the contrary.
- Giving notice provides court with authority to grant a remedy. So, the presumption is that service of notice is needed whenever you are seeking a court remedy.

*Butkovsky v Donahue* (1984) BCSC: Prima facie entitled to continue proceedings in jurisdiction where served.

## Effect of Service:

- Starts time running for a response
- Permits the court to provide the remedy you seek even if the opposing side does not respond

The issues we deal with in this chapter are how to serve, how to prove service and how to overcome service problems. When to serve a document is dealt with throughout and will be mentioned whenever a specific document is talked about.

## How to achieve service

The method of service depends on:

- 1) The type of document being served (commencement vs non-commencement)
  - Notice is more strict for commencement documents
- 2) Nature of the party being served (individual, corporation, partnership, etc.)
- 3) Location of the party being served (in AB, in CAN but not AB, outside CAN)

## How to serve commencement documents on parties in AB

- Automatic jurisdiction of AB courts over service
- Must be served via a personal service method (ensures the document made it into the hands of the recipient)
- Personal service methods vary depending on who is being served (**R2.12 and Part 11, Divs. 1, 2, 4 & 5**)
  - o Individuals (**R11.5**): Achieved if you leave document with that individual, or send it to them by recorded mail. Need to know it's the person who is being served, but doesn't have to be at their home. Recorded mail is good enough when it's the person being served who signs for it. If there is a litigation representative, have to serve them, not the person they are representing (**R2.12**).
  - o Corporations: Leave document on someone with management control of the corporation, or who appears to have management control over the corporation's principal place of business, or where claim arose. Can also send by recorded mail to principal place of business in AB, as long as signature is from someone in the corporation.
    - Another method provided under the *Business Corporation's Act* of Alberta, personal service can be achieved by sending the document by registered mail to the office of the corporation. Since you don't know when it gets there, *Interpretation Act* of Alberta says its deemed to have arrived in 7 days.
  - o Firm/Partnerships: Personally deliver notice to general partner or person with management control, or by recorded mail to place of business. For sole proprietorship, treat like individual. If trying to claim against a specific partner, have to serve that partner personally.
  - o Statutory Entity: Statute will say how service is to be properly effected. If not, **R11.14** says you can achieve service by leaving with office administrator or someone with management control or by recorded mail.

For all of these, day of service is where you put it in their hand, or the day the slip for recorded mail is signed.



- Special circumstances
  - Address for Service (**R11.15**): If address for service already in the lawsuit. Would never apply with SoC, but could with other commencement documents.
  - Lawyer (**Rs11.16 & 11.17**): A lawyer can agree they will act as a representative for their client for the purposes of service.
  - Business Representative (**R11.19**): If party you're trying to serve is out of province but have business representative in the province, can serve them instead. Still have to leave it with them or send by recorded mail, but at least it's still within the province.
  - Agreement (**R11.13**): If disputing contract, and says how to serve documents, can do it that way. Don't have to, but allows an alternative to the Rules.

#### How to serve commencement documents on parties outside Alberta (ex juris) – Rs11.25 & 11.26

- Jurisdiction for service is NOT automatic, must have a real and substantial connection to Alberta
  - Don't need advance permission, but must be prepared to defend on that basis if another province
  - If outside Canada, need court order and the same test applies, substantial connection to Alberta
- Must be served via a personal service method under Rules or by Rules of the jurisdiction of service OR Hague Convention.
- **R11.25(3)** talks about real and substantial connection, lists things that might reflect this connection:
  - Contract entered into in AB
  - Claim about tort occurring in AB
  - Claim relates to land in AB
  - Catchall: is a necessary and proper party to the action brought against someone else who is in AB

*Metcalfe v Yamaha Power Motor Products* (2012) ABCA: When it involves the court's jurisdiction outside of Canada, it must be brought to the attention of the parties.

#### Service of non-commencement documents (Rs Part 11, Divs 1 & 3)

Can serve:

- Personally
- Electronically
- Recorded mail
- Agreed upon method

Note: Service method less significant, since already know of claim and have an address for service.

Note: Notice of appeal is NOT a commencement document.

#### How to prove service of a document

- Essential to obtain the relief sought, and is achieved by providing evidence to the court that service has been effected within the required time frame and in the manner required by the Rules.
- Forms of evidence include:
  - Written acknowledgement by the party being served or their lawyer
  - Filed affidavit of the person who served the document
  - Lawyer CANNOT serve, as they cannot be a witness in the trial of their own client!!!

#### Overcoming service problems

1. Substitutional Service (**R11.28**): Court order allowing you to serve in a manner other than specified in the Rules, usually to do with commencement documents.
  - E.g. If party dodging service, can apply to Court with affidavit evidence stating why it is impractical to comply with the service method set out in the rules, stating an alternative method and stating why it would be effective.
  - Order must be served along with the document.
  - A court order will presumptively say when the service date will be achieved with the new service method.

2. Validating Service (**R11.27**): Forgiveness application, where not in strict compliance with the Rules. Court can validate where what you did to serve did or is likely to have brought the document to the attention of the person being served.
  - Have to bring evidence to the court saying what you did, and why you think it is sufficient.
  - Date of service is the date specified in the court order.

*226911 Alberta Ltd v Redecopp* (2012) AB: Not only is it important to prove D received the notice, but it is also important that sending the notice was intended to be service. You have to intend to trigger legal rights and/or obligations.

*Thomson v Procrane Inc* (2016) ABCA: Says method of service doesn't really matter, so long as notice is achieved. Even if you intentionally flout the rules of service and serve unconventionally, if you can prove the other party likely got notice, should be good enough (but taking a chance). Bottom-line: you need intention to serve and that notice was received.

3. Dispensing with Service (**Rs11.28 & 11.29**): Court can issue order dispensing with the need for service at all if convinced service is impractical or impossible (high threshold!).
  - Need affidavit stating that reasonable ways of achieving service have been used, no other alternatives available, and that there is little likelihood of this person appearing even if you did achieve service.

These past 3 applications all are made by the person serving the document. This next method is an order setting aside service, which is brought by the responding party.

4. Setting Aside Service (**R11.31**): Party can ask the court to say they have not been properly served. Can be in response to service, substitutional service order or order dispensing with service. D has to make this application before they participate in the lawsuit. Hard order to get, how do you prove service was faulty if you are there contesting it? Most commonly seen when complaining about the court's jurisdiction over you.
  - E.g. If a party serving you outside AB but inside CAN, can bring this application to say you are not involved and that AB has no jurisdiction over you, no substantial connection!

## Chapter 12 – Renewal of the Statement of Claim

Filing a Statement of Claim: Must be done to satisfy the requirements of the *Limitations Act*.

Serving a Statement of Claim: Must be done to satisfy the requirements of the *Rules of Court*.

- Provides a basis for the court to exercise jurisdiction/authority over the D.
- Gives notice to the D that they need to respond to the claim within a specified period of time.

Basic rule **R3.26(1)**: A filed Statement of Claim must be served within 1 year of filing.

- **R3.28**: If the SoC is not served within 1 year, it is invalid as against the unserved D.
- E.g. If you serve the day after the DoL, then don't serve within that 1 year, still have a year less a day before the limitation period is over, so you can file a new SoC!

Exception (**Rs3.26 & 3.27**):

- A filed SoC can be served after 1 year of filing if P obtains a court order extending the time for service
- On an application brought within the initial 1 year:
  - o The court can grant an extension of up to 3 months (open discretion – still file affidavit evidence)
- On an application brought after the initial 1 year:
  - o The court may grant the extension in particular circumstances (court discretion much more confined)

**R3.27(1)(a)**: D or someone on behalf of the D led the P to reasonably believe and to rely on the belief that:

- (i) The defendant has been served OR
- (ii) Liability will not be contested OR
- (iii) Time limit will not be enforced

*Brousseau v Janz Estate* (2014) ABQB: Look at whether P had subjective belief that service was not necessary and whether this was objectively reasonable to believe.

**R3.27(1)(b)**: An order for substitutional service, dispensing with service, or validating service is set aside

**R3.27(1)(c)**: Special or extraordinary circumstances exist resulting solely from the D's conduct or from the conduct of a person who is not a party to the action.

*McHowan v Lang* (2015) ABCA: P's argument is that settlement discussions fell under D's conduct that led them to believe they did not have to worry about the 1 year service date. Majority of CA said no extension, dissent said yes. Majority found no extraordinary circumstances that would lead P to believe the 1 year period would be relied upon. This finding was despite the fact that no prejudice would have resulted to D. Court says, "the takeaway from this appeal is this, lawyer acting for P ought to file in timely fashion and thereafter effect service as expeditiously as possible". Dissent argued there was no requirement in this rule for there to be proof of a causal relationship between activity of D and P's decision not to serve.

Other points to note regarding renewals

- Usually is an *ex parte* application
- **R3.26** time limits cannot be extended
- **R3.27** can only be used once unless a new circumstance arises under **R3.27(1)**
- The court order authorizing the extension must be served on the D along with the SoC (**R3.29**)

Failure to serve the SoC on one D does not make it invalid as against another D who was properly served (**R3.28**).

After being served, the D can apply to set aside the extension if the D has grounds for concluding that the extension should not have been granted (**R9.15**).

# Chapter 13 – Introduction to Responses and Particulars

## Possible Responses to a Statement of Claim

- Once a D is served with SoC, the time starts running for D to respond
- Options for responding (**R3.30**):
  - o Do nothing (not expressly identified in the rules as “permitted”)
  - o Object to/Challenge the process (applying to the court to set aside service or to strike out the SoC)
  - o Respond to the action on the merits (SoD or Demand for Notice)
- There are consequences to each option; NEED your client’s instruction as to which option to pursue

## Timeframe for Responding (**Rs3.31 & 3.34**)

- A response on the merits (a SoD or Demand for Notice) must be filed and served on the P:
  - (a) Within 20 days if the SoC was served on the D in Alberta;
  - (b) Within one month if the SoC was served on the D outside of Alberta but in Canada; and
  - (c) Within two months if the SoC was served on the D outside Canada.

Note: The time period for responding can be extended (**R13.5**) by agreement or by court order. Should grant an extension where reasonable under Alberta’s *Code of Conduct*.

## Request for Particulars

Particulars fall under the heading of objecting to or challenging the process; you are making a procedural response.

- Procedural option to help make the decision as to how to respond or to help make the response more meaningful
- Can be used by any party who is served with a pleading
- Is a way of asking for more detail about the facts or issues raised in the pleading which was served

**R3.61**: Any party served with a pleading can serve a request for particulars about anything raised in the pleadings. If there is no response within 10 days of service of the request, can apply for a court order directing particulars (court will set a compliance date).

- Note: This does NOT extend the 20 day period to reply to a commencement doc, would still have to agree to extend that in addition to the request for particulars (**R3.61(4)**).

*Alberta v Atria Group* (2015) ABQB: Talks about purpose of this rule – narrow scope of issues to be decided, guide the discovery process, help streamline litigation, not intended to help learn about other party’s evidence. If bringing application, need affidavit stating why you need them. Not explicit in Rules, but this case says you need it. Without one, court will only look at pleading and decide itself whether particulars are needed. Court also discussed the legal test, which is a matter of discretion; no set test. What is reasonable and fair will depend on the lawsuit.

*1021018 Alberta Ltd v Bazinet* (2015) ABQB: Just because a party has the information does not preclude them from requesting it. There is a distinction between pleading and evidence. D might know what happened, but they don’t necessarily know what the P thinks happened. The test a court will apply in deciding whether they should be given is does the opposing party have adequate notice of the case they are supposed to meet.

## Chapter 14 – Procedure on Default

### A. Time for Defending (**Rs3.31 & 3.34**)

- A response on the merits (SoD or Demand for Notice) must be filed and served on the P
- (a) Within 20 days if the SoC was served on the D in AB
- (b) Within one month of the SoC was served on the D outside AB but in CAN
- (c) Within 2 months if the SoC was served on the D outside CAN

### B. Default Judgment (**Rs3.36 – 3.42**)

- A potential consequence of a D (purposely or unintentionally) missing the deadline for responding to the commencement document (e.g. SoC). May also apply if an SoD is struck out by the court.

Default judgment is:

- Judgment in favour of the P (claimant) on the basis of a procedural defect
- Cannot be obtained where the D has filed a procedural challenge to the SoC or to service of the SoC
- Can be obtained despite an outstanding Request for Particulars
- Where multiple D's exist, can be obtained against one, some or all D's
- Not as definitive as merit based decision, Court can set it aside if unjust for one party to win on procedural defect

Obtaining default judgment:

- Party seeking DJ must prove:
  - o Service of SoC (claiming document)
  - o Elapse of designated time for responding
  - o No response
- Application is made on *ex parte* basis
- After DJ is issued, the defaulting D can apply to have judgment set aside (**R9.15(3)**) – more below
- 2 methods of obtaining DJ: single-step process or two-step process

### Single Step Process (**Rs3.36, 3.38 & 3.39**) [Liquidated demand]

- DJ is entered immediately upon proof of service of claim, expiry of time to respond and lack of response
- Applies only to a claim for property recovery or for a debt/liquidated demand
- Is achieved by filing a default judgment with the court
  - o Documentary process only, do not appear in chambers.
- Cannot be used if the non-responding D is represented by a litigation representative, unless the court permits
- Once you file DJ, D cannot file SoD. There is a judgment issued, if they want to start defending on the merits, need to get court's permission to set aside DJ.

*TLA Food Services Ltd v 1144707 Alberta Ltd* (2011) ABQB: To use single-step process, must be a calculable number.

### Two-Step Process (**Rs3.36 & 3.37**) [Noting in Default]

- Court assessment of the judgment is needed (i.e. NOT property recovery or a debt/liquidated demand)

Step 1: File a Request to Note in Default

- Instructs the Clerk to “freeze” the court file so D can no longer file a response document

Step 2: Apply to the Court for Default Judgment

- The Court will conduct a hearing to determine the default judgment amount (in Chambers)

*Argent v Gray* (2015) ABQB: Noting in default prevents response from D, but now, when you come to the application for DJ, court assumes all the facts you've alleged are true. Court still has to determine whether that is enough to formulate a cause of action against the D.

C. Setting Aside Default Judgment (**R9.15(3)**)

- “Re-opens” the action against a defaulting D in order to decide the action on the merits
- Discretionary decision: Court can grant “upon such terms as it thinks just” – usually includes time frame for filing a defence and costs to P.
- Typical arguments of D in this application are:
  - o DJ is procedurally flawed (e.g. obtained by irregular/technically incorrect process)
  - o DJ is substantively unfair (justice demands the action be heard)
    - Need to demonstrate that you have a good prima facie defence (merits), reasonable excuse for not responding, and brought application with reasonable promptness (**R9.15(2)** does not apply)

*Palin v Duxbury* (2010) ABQB: Sets out these three requirements, Court looks whether it’s worth setting aside and whether the D is acting in good faith.

# Chapter 15 – Pleadings Subsequent to the Statement of Claim

Where a D decides to defend the claim on the merits, there are three inter-related strategies that may be employed:

- A. Deny the P's allegations
- B. Reduce the amount payable to the P
- C. Blame someone else (another named D or a third party)

## A. Defendant's Procedure (Denial of P's allegations)

- A defendant may:
  - o Deny liability
    - D didn't commit the alleged wrong
    - P's loss was not caused by the D's wrongful act
  - o Deny damages
    - P did not suffer any damages
    - P did not suffer the extent of damage claimed
- Denial arguments must be in a defence pleading

There are two main types of defence pleadings:

- Demand for Notice
- Statement of Defence

The decision as to which of these pleadings to use depends on what denial arguments the D wants to make.

### 1. Demand for Notice (**R3.34, Form 13**)

- Use where the D is contesting the P's damage claim only and where the D is satisfied with having an assessment hearing rather than a trial on the issue of damages
  - o Affidavit evidence rather than witnesses, very limited document.
- It is possible to substitute an SoD for a Demand for Notice, but this requires a court order (**R3.34(5)**).

*Bell v Grande Mountain Apartments* (1984) ABQB: To obtain the order, D must demonstrate

- Good reason for not filing an SoD
- Application to replace was brought within a reasonable time; and
- D has a prima facie good defence on the merits

### 2. Statement of Defence (**R3.31, Form 11 & Part 13, Division 3**)

- Can be used to do one or more of the following:
  - o Deny or partly deny liability
  - o Deny or partly deny damages
  - o Blame the P or others
- Anything not expressly admitted is deemed to be denied (i.e. silence is not an admission) but a denial of fact must meet the point of substance (**R13.12**)
- Alternative allegations are permitted (**R13.8**)

*C(L) v Alberta* (2011) ABQB: In Alberta, silence is not an admission. Be careful with jurisdiction, not always the case.

Filing and service a Demand for Notice or an SoD within the required time frame prevents the P from entering the default judgment against the defendant. However, if an SoD is filed but not served:

- DJ cannot be entered (*Barcellona v Einarson* (2012) ABQB)
- The P can seek costs against the D for anything arising from the failure to serve (**R3.36(3)**)
- All the rules in Part 13 that apply to pleadings, apply to defence pleadings too

## B. Reduce the amount payable to the P

- Deny extent of liability/causation (includes contributory negligence): statement of defence
- Deny quantum of damages: statement of defence
- Reduce damages award by arguing P owed D money: COUNTERCLAIM

### Counterclaim (Rs3.32 & 3.56 – 3.60, Form 21)

- Claim raised by the D against the P to counter the P's claim against the D
  - Joined in the existing action for efficiency
  - Serves as a defence strategy: "best defence is a good offence"
  - P becomes defendant by counterclaim and D becomes plaintiff by counterclaim
1. Set-off
    - A counterclaim can be used as a procedure for pleading "set-off"
      - o The D (P by counterclaim) argues that any judgment obtained by the P against the D should be set off (reduced by) a judgment granted in favour of the D (P by counterclaim) against the P (D by counterclaim)
    - Applies where there are (*Holt v Telford* (1987) SCC):
      - o Mutual liquidated debts; or
      - o Unliquidated or liquidated claims arising out of the same event such that it is fair or equitable for the debt to be reduced
  2. Counterclaims generally:
    - D can file counterclaim against existing P or anyone else (but cannot add a non-party P by counterclaim)

*Lil Dude Ranch v 1229122 Alberta Ltd*: Counterclaim must be filed and served within time frame for filing an SoD.

- An action brought by counterclaim is an independent action (note: AB's *Limitations Act*, ss 6(2) & 6(4))
- Rules as between P's and D's apply as between P's by counterclaim and D's by counterclaim, EXCEPT note that for default judgment must give notice of the application for judgment to the D by counterclaim.

### C. Third Party Claims and Notices to Co-Defendants

- Defendant argues that, if D is liable to P, a Third Party D or an existing co-D must pay all or part of the damages payable by the D to the P
1. Basis of the claim: Legal grounds/right to bring the claim
    - Statutory Contribution: Not just my fault, but someone else's too. That other person who might be at fault also owed a duty to the plaintiff, whereas in common law contribution and indemnity there is no duty owed by the third party to the plaintiff.
      - o *Contributory Negligence Act*, ss 2 & 6
      - o *Tort-feasors Act*, s 3
    - Common Law Contribution or Indemnity:
      - o Only reason you harmed the D was partially or solely due to the actions of a third party. The third party does not owe a duty to the P, but to the D, in contract or in tort.
    - Separate duty
      - o Where D seeking recovery from someone else, not because that person caused D to cause harm, not because that other person owed duty to P, but because they owe a completely separate duty to the D that relates to the circumstances. What if D has an insurance company and they are not paying? Sue them for breach of contract. Insurance contract related to what has happened, and no duty owed to P. No duty to D either, did not cause them to harm the plaintiff. Totally separate duty. No causal link to the loss.
  - Against whom
    - o New party
    - o Co-D
  - By what procedure
    - o Third party claim
    - o Notice to Co-D



Third party claim is an all encompassing document. Can use for any of the three types of claims. The notice to co-D has limited applicability. Can only apply to statutory contribution and indemnity claim. So must be a claim in tort (Tort-feasors Act or Contributory Negligence Act). Second, must be to a **co-D**. Someone already a D in the action. SoC already issued to them in that action. If you have these two things, can use this abbreviated type of 3P claim. Notice to co-D is a **subset** of what is captured by 3P claim, since it requires those 3 features.

#### Third Party Claim (Rs3.32, 3.34 – 3.55 & Form 16)

- Can be brought by an existing D against any party who is or might be liable to the D for all or part of the P's claim on any basis or who should be bound by a decision issued between the P and the D

*CNR v Arcelormittal Tubular Products* (2012) ABQB

*O'Connor Associates Environmental v MEC* (2014) ABCA: Third party claims require a cause of action between the D and the third party.

Must be filed and served on the Third Party D and the P within 6 months of the date on which the D filed the SoD or Demand for Notice, and before judgment is entered against the D.

- SoC must be served on the third party along with the Third Party Notice
- Essentially the same rules apply between D (Third Party P) and Third Party D as between a P and a D

BUT

The Third Party D:

- May dispute D's liability to the P and/or may dispute the Third Party D's liability to the Third Party P

NOTE: If Third Party D does not deny the D's liability to the P, then it is deemed to admit any judgment for the P; if the Third Party D does not deny its own liability to the Third Party P; it is deemed to admit the liability to the extent claimed.

#### Notice to Co-D (Rs3.32, 3.43 & Form 15)

- Essentially is a short form third party claim
- Must be against an existing D
- Must be based on *Tort-feasors Act* or *Contributory Negligence Act* ONLY
- Must be filed and served on the Co-D within 20 days after the D has filed an SoD or Demand for Notice

#### 2. Restrictions/Limitations

- Timing for making the claim over:
  - o Rules of Court provisions (as already stated) – note: can be extended under **R13.5**
  - o *Limitations Act* ss **3(1.1) & 3(1.2)**
- Implications for the lawsuit:
  - o Add time/expense/complexity?
  - o Achieve efficiency? Achieve justice?

#### D. Reply

- P can issue a Reply to an SoD, must be filed and served within 10 days after service of SoD on the P (**R3.33 & Form 12**)
- P or Third Party P may issue a Reply to an SoD of a Third Party D, must be filed and served within 10 days after service of the SoD to third party claim (**R3.54 & Form 20**).
- There is no such thing as a reply to a reply!

# Chapter 16 – Scope of the Disclosure Obligation

## **Rs5.1, 5.2, 5.4, 5.6 & 5.25**

The parameters for pre-trial disclosure of both oral and recorded/documentary evidence are determined by:

- Whether the information is relevant and material; and
- Whether the information is privileged.

The extent of the disclosure obligation is NEVER determined by whether the information is beneficial or harmful to a party's case. Can't be forced to give up information that has nothing to do with litigation.

### A. Relevant and Material Information

- The general requirement is that each party must disclose, to an adverse party, information in its possession that is relevant and material to the litigation.
- Information is relevant and material (**R5.2**) if:
  - o It could reasonably be expected to significantly help determine an issue raised in the pleadings; or
  - o It could reasonably be expected to ascertain evidence that could reasonably be expected to determine an issue raised in the pleadings

*Kaddoura v Hanson* (2015) ABCA: Duty of disclosure is a broad one. Subject to privilege, must produce everything that meets relevant and material test. It's a positive obligation, cannot wait to produce or be asked, must disclose! Also not a reason to say other side already knows the information. Also can't say party could find it another way.

- Court may restrict these principles if the cost of producing the record is disproportionate to its evidentiary value.

*Leduc v Roman* (2009) ONSC: FB page is a record. If relevant to the action, must produce.

### B. The Exception for Privileged Information

## **R5.6, Form 16 & R5.25**

- A party does not have to disclose relevant and material information which is privileged
- Three types of class privilege: solicitor-client, litigation, settlement. If in one of these, automatically privileged
- Also, "case by case" privilege test – individualized argument

### 1. Solicitor-Client Privilege

- Applies to communications between a lawyer and a client for the purpose of providing legal advice to the client
- Purpose is to protect the confidential relationship
- This privilege lasts forever unless waived by the client

*Alberta (Information & Privacy Commissioner) v University of Calgary* (2016) SCC: Statute said must disclose information "despite any other enactment". Does solicitor-client privilege get captured in this and have to be disclosed? SCC said no, legislature has to be extremely clear to overrule this privilege.

Note: Privilege belongs to the client, NOT the lawyer. It is theirs to waive. Is now a principle of fundamental justice.

### 2. Litigation Privilege

- Applies to information created for the dominant purpose of litigation (existing or anticipated)
- Purpose is to provide a "zone of privacy" for preparing a party's litigation case
- Lasts for the duration of the litigation (or closely related litigation)

*Lizotte v Aviva Insurance Co* (2016) SCC: SCC describes it as protecting records whose dominant purpose is for the litigation. But left out creation. What if client brings you a receipt, and you make a copy?

*AB v Suncor* (2017): Litigation privilege applies only to documents that in their original form were created for litigation.

### 3. Settlement Privilege

- Applies to communications between the parties for the purpose of achieving an out of court settlement
- Purpose is to facilitate settlement discussions
- Lasts forever but exceptions apply!

*Union Carbide Canada Inc v Bombardier Inc* (2014) SCC: Justice system has interest in settlement, efficiency and costs. Applies to all of the substance of settlement discussions even if words “without prejudice” are not used. Exceptions include where the public interest outweighs the privilege.

*Bellatrix Exploration Ltd v Penn West Petroleum Ltd* (2013) ABCA: Would want to produce settlement discussions to prevent double recovery.

### 4. Case by Case Privilege

- Wigmore’s Test:
  - o The communication arises in confidence
  - o The confidence is essential to the relationship
  - o Maintaining the relationship serves the “public good”
  - o The interest served by protecting the privilege outweigh the interests served by disclosure

*AM v Ryan* (1997) SCC: Sets out the Wigmore’s test.

*Stingam Denecky LLP v Sun Media Corp* (2016) ABQB: Columnist claims privilege on affidavit provided by client. But fourth part of test not met. This has recently gone to CA and decision no longer has much relevance.

### 5. Waiver of Privilege

- Where a party, expressly or implicitly, by words or by actions, waives its right of privilege over information, it must disclose the information to an opposing party.

*Sturgeon Lake Indian Band v Canada* (2015) ABCA: Waiver of privilege has to be intentional. Have to know you have the privilege, and intend to give it up!

# Chapter 17 – Disclosure of Records

## **Rs5.2 – 5.4 & 5.5 – 5.16, 5.32 & Form 26**

Each party must disclose to opposing parties all records currently or formerly within its possession which are relevant and material to the action except for privileged records.

Record disclosure process has 2 steps:

- 1) Each party serves other parties with an Affidavit of Records listing the records they have relating to the lawsuit
- 2) Each party makes its producible records available for inspection by the opposing parties

### Step 1: The AoR (Form 26)

Every party must serve an AoR on each of the other parties (**R5.5**)

- A P must serve within 3 months after being served with an SoD
- A D must serve within 2 months of being served with the P's AoR
- A Third Party D must serve within 3 months after filing an SoD

The AoR must be sworn by (**R5.9**):

- The party
- If a corporation, the corporate representative (**R5.4**)
- If incapacitated, the lit rep
- If inconvenient for the above, another “suitable” person if agreed to by the parties or allowed by the court
- NEVER by a party's lawyer (**R5.9(2)**) – can't be a witness in their client's trial

The AoR attaches Schedules which list ALL the relevant and material records:

- Currently under the party's control and which the party will produce (i.e. producible records)
- Currently under the party's control but which the party objects to produce because of privilege (i.e. privileged records)
- Formerly under the party's control and not privileged (including details of loss of control)

And identify a time and place for inspection of the producible records.

Process for creating the AoR

- Collect all relevant and material records from the client, definition of record is very broad
- List the records (“master list”)
- Classify the records: producible and privileged
- Put the information into **Form 26**
- Party executes the affidavit

Note: The time period for serving the AoR can be extended (**R13.5**). The AoR is not filed with the court except for the purposes of an application or trial (**R5.32**). The AoR must be updated if new records are found (**R5.10**).

### Step 2: Viewing of Records (R5.14)

Every party is entitled to inspect and obtain copies (at a reasonable expense) of the producible records listed in another party's AoR

#### A. Records Under a Party's Control

- The AoR must list relevant and material records which are or have been under a party's control (**R5.6**)
  - o Control is fact dependent but generally means within physical control of the party

*McAllister v Calgary* (2012) ABCA: Readily under physical power to access is within their control for purposes of R5.6, same test as under old rules, designed to prevent people escaping duty to produce.

B. Identification & Description of Records

- **R5.7** – Have to sufficiently describe documents to allow other party to decide whether they want to challenge or see the document
- **R5.8** – Have to describe privileged documents too, but careful as you do not want to give up privileged content

*1400467 Alberta Ltd v Adderley* (2013) ABQB: AoR was 13000 pages long. Other D said, “what he said”. Court said party had to identify which documents were relevant to their own defences. This type of massive disclosure does not serve efficiency requirements in **R1.2**.

*Canadian Natural Resources Ltd v ShawCor Ltd* (2014) ABCA: Do not hide documents, need description of documents in both schedules!

- Every relevant and material record is prima facie producible, then apply lens of privilege and pull out those docs
- Idea that you can number and bundle documents and describe them applies to privileged docs too
- Need to describe the docs applies to relevant and privileged documents
- Specified grounds for each privileged doc or bundled doc has to be stated so you can test it against that ground

C. Enforcement (**R5.11**)

- A party can apply for the court to order another party to produce an omitted record or to produce a document over which privilege has been claimed
  - o Always speak to OC first before applying to court, don’t want to lose and pay costs
- To decide this application, the 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 cannot be entered at trial unless the parties agree or the court orders (**R5.16**)
- Court can assign costs penalty for failure to serve AoR or produce a record (**R5.12**)
- Court can strike out pleadings for failure to serve AoR without sufficient cause (**R3.68**)

*Sun Life Assurance Co v Tom 2003-1* (2010) ABQB: Outlines ability of court to impose multiple costs for deficient AoR, where rule actively being flouted.

D. Documents in Possession of a Non-Party

- If public body, proceed under *Freedom of Information & Privacy Act*
- If private party, seek court order under **R5.13**

**R5.13** application:

- Must give notice to the party affected
- Must prove:
  - o That the record sought is under the non-party’s control;
  - o Good reason exists for believing the record is relevant and material; and
  - o The non-party could be required to produce the record at trial

Note: person requesting must pay for the record (amount determined by court)

*Cullihall v Liyanage* (2016) ABQB: Court determines what is relevant and material and what might be privileged.

**R5.15** – Any record listed in AoR is deemed by the parties to be authentic unless party receiving the AoR objects within 3 months!

# Chapter 18 – Questioning

**Rs1.2, 5.2-5.4, 5.17-5.33, 6.15-6.19, 6.38, 8.14**

Questioning is an opportunity to obtain sworn evidence from an opposing party. Do not have to use a questioning.

- Purposes include:
  - o Assess the strength of the case
  - o Assess the credibility of the opposing party as a witness
  - o Avoid surprise at trial and to obtain evidence to use at trial

When does questioning take place?

- P can question other parties any time after the SoD has been served on the P (**R5.20**) and other parties can question each other or the P any time after an SoD has been served (**R5.20**).
- BUT unless other parties agree, a party is only entitled to question other if that party has served its AoR (**R5.20**)

How is questioning attendance arranged?

- Usually by agreement, but the Rules provide for service of a Notice of Appointment on the party who will be providing evidence (i.e. answering questions) (**R5.21, 6.15-6.19, Form 29**)
  - o Aggressive practice to send one of these before talking about it!
- If a party fails to attend after being served with a Notice of Appointment, a court order for attendance can be issued (**R6.38**). Once you have that court order, can use it to issue a finding of contempt.

What questions can be asked/must be answered?

- Questions which are relevant and material and which are not objectionable on grounds of (**R5.25**):
  - o Privilege
  - o Being unreasonable or unnecessary
  - o Other legal grounds (e.g. asking for expert evidence, abusive)

How are the questions and answers recorded?

- Questions and answers are recorded word for word by a qualified reporter by a method that is capable of producing a written transcript (**R5.26**)

## A. Who can question whom?

First, fees. Schedule B to the Rules. Sometimes, lawyers waive costs if both sides will be questioned. On top of these fees, also entitled to reasonable expenses to come to the questioning. If Notice of Appointment was used, must include the fees. Usually P sets up the questioning because they want to move the action along. They pay for the court reporter, so they technically own the transcript and sell it to the other side for a low fee. Also, if showing a document during questioning, enter it as an exhibit so everyone is clear on what it is.

### 1. Parties Adverse in Interest

*Turta v CPR* (1951) ABSCTD: To determine whether a party is adverse in interest, see if pleadings have been exchanged between them (except where third party is questioning the P, but would have to say something about P's claim against D in their SoD, otherwise deemed to admit it).

*Golden Estate v Neilson* (2011) ABCA: Another exception to needing pleadings exchanged between parties to be adverse in interest. In this case, spouse and family of a deceased can be adverse in interest even though it is the estate bringing the proceedings.

### 2. Employees/Officers

**R5.17** – Can question one or more officers, employees, existing or former, who have relevant information about the lawsuit. In addition, can examine corporate representative. Need to have reason to believe employees have relevant and material information, can't just randomly choose a name. If getting evidence from employee, should run it by corporate representative in order for it to become the evidence of the corporation.

- If you choose to question more than one, cost of questioning the others is on you. Get one person where paying usual costs, but otherwise recoverable court costs are yours for any others. This prevents abuse. Costs stick with you unless you convince the court those individuals were necessary to question.

**R5.18** – Questioning of independent contractors. Stricter rules here, can only question if information cannot be obtained through employees or officers, and it would be unfair to go to trial without and court satisfied that questioning would not cause undue hardship, expense or delay.

None of these rules apply to questioning experts for the purposes of the lawsuit. They do not count as IC's of other party.

*Cogent Group Inc v Encana Leasehold Ltd* (2011) ABQB: Limited to questioning independent contractors that have knowledge as a result of providing services to the party being sued. Want to prevent the questioning of ordinary witnesses.

*Tremco Inc v Gienow Building Products Ltd* (2000) ABCA: Can question an employee about things that happened after they were no longer employed. E.g. if they still get newsletters from the company.

*CDM Direct Mail v Centre for Immigration Policy Reform* (2000) ABCA: Case sets out that evidence of corporate officer or employee or IC is not evidence of the corporation until acknowledged by the corporate representative.

### 3. Infants, Persons of Unsound Mind

**R5.17** – where there is a lit rep, question them! Rule also allows questioning of incapacitated person with the court's permission.

### 4. The Crown

*Proceedings Against the Crown Act, s11* makes a crown representative examinable. Caveat on what you can ask, cannot undermine the public interest.

### 5. Even if no Defence

Would want to do this where multiple D's and this particular D's evidence is still needed. Rules allow this to happen.

NOTE: **R5.19** – Court has the authority to vary anything under Part 5 of the Rules.

### B. Undertakings (R5.30)

- The UT must be relevant and material, also can't ask for privileged information. This is a promise to the court, and should not be given lightly. Can be held in contempt for not fulfilling an UT. It is a good habit to say "use best effort to" if you are unsure your client will be able to perform.

*Psychologists Association of Alberta v Schepanovich* (1991) ABCA: Realized after questioning they had undertaken to give away privileged information. Court did not let them withdraw the UT. Cannot be unilaterally revoked! If other party allows it (agreement), that is fine. Court will only relieve a party where the UT is given inadvertently, no prejudice to the other side results and evidence should not have been given. If unsure, take it under advisement.

### C. Abusive Questioning (R5.3, Code of Conduct)

Can be abusive when asking, or when answering questions.

*Holowaychuk v Lopishinsky* (2015) ABQB: Court awarded full indemnity costs against party who's lawyer was acting abusively. However, in this case, entire transcript was before the court because it was a questioning on an affidavit.

*Landes v Royal Bank of Canada* (1997) ABQB: Questioning party has the right to question without undue interruption, you cannot object on the basis that your client does not understand the question. It is okay to answer with "I don't know!"

Although you cannot coach the witness, you do have an obligation to properly prepare that witness. Explain objection system, and basis on which you can object.

#### D. Use of Questioning (Rs5.29, 5.31 & 5.32)

Transcript not usually filed except as permitted by the Rules and only as necessary for an application or at trial. It is only useable at trial or in an application by the party asking the questions.

- Except if permitted by the court:
  - o A party witness can use to correct a misleading use (**R5.31(3)**)
  - o Where the witness is unavailable for trial (**R8.14**) – would need a good reason for this one.

Two ways to use it at trial:

- i. As evidence of a prior inconsistent statement (i.e. to challenge credibility of witness on the stand)
- ii. Read in admissions
  - Why do this when party will take the stand? Have to finish case sometimes before you get a chance to cross-examine
  - Note: evidence of corporate witness cannot be read in unless acknowledged by the corporate representative as evidence of the corporation (**R5.29**).

#### 1. Procedure to Read In

*410675 Alberta Ltd v Trail South Developments Inc* (2011) ABQB: Can only read it in if witness has not been on the stand or it was not raised on the stand. Courts prefer where possible to use transcript for cross-examination rather than as a read in.

#### 2. Implied Undertaking of Confidentiality

Evidence at questioning has implied UT of confidentiality by everyone in the room. **R5.33** says affidavit evidence in litigation and any transcripts are confidential, only to be used for purposes of the lawsuit. To be excused from this, need to agree or get court order or some other law that allows for the information to be used in another context. Purpose of this is to encourage parties to be free with disclosure.

*Juman v Doucette* (2008) SCC: AG wanted access to evidence in the lawsuit for criminal charges. Implied UT of confidentiality only relieved where public interest in disclosing outweighs the privacy concerns. Cannot be disclosed just because its easier to do it that way.

*Hall v Wilcox* (2011) ABQB: No implied UT of confidentiality with respect to cross examination on affidavit (only lasts until point of trial, because once you start reading it in, becomes part of trial record which is public).

#### Additional Matters

- Interpreter (**R6.19**): Can have interpreter in the room.
- Re-examination (**R5.25**): If your client provides misleading information, can invoke this rule and give yourself the right to re-examine your own client to clarify matters problematic on the transcript.
- Continuing duty to disclose (**R5.27**): If something happens after that makes something said at questioning incorrect or misleading, there is a duty to disclose it.
- Written Interrogatories (**Rs5.22, 5.24 & 5.28**): Can question in writing, only get one set of follow up questions. If multiple parties want to question that party, have to do it orally.



# Chapter 19 – Admissions

A party no longer needs to prove a relevant point of fact or law to meet its BoP at trial if the point is admitted by opposing party. The effect of gaining admissions as early as possible is to shorten the time of litigation, which in turn reduces the cost of resolution (meets efficiency requirement in **R1.2**).

- A party's failure to admit something that should have been admitted may be taken into account by a court in awarding costs (**R10.33(2)(b)**)

Methods of obtaining admissions from another party:

- Informal discussions/agreements (e.g. Agreed Statement of Facts)
- Pleadings
- Affidavits
- Questioning
- Notice to Admit (**R6.37 & Form 33**)
  - o Document whereby a party asks another party to admit facts or an opinion for the purposes of an application or for trial
  - o Must be served on the party from whom admissions are requested and on each of the other parties

Responding to a Notice to Admit

- For each fact or opinion itemized in the Notice to Admit, a respondent may:
  - o Provide the admission requested
  - o Fully or partially deny the requested admission and state the basis for the denial
  - o Object to the requested admission on the basis that it seeks information that is privileged, irrelevant, improper or unnecessary

Use/Effect of a Response to a Notice to Admit

- 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 party making the admission agrees otherwise
- Once made, admission or denial can only be withdrawn or amended by agreement of the parties or by permission of the court (even if you only deemed to admit it by silence)

*Stringer v Empire Life Insurance Company* (2015) ABCA: Court takes admissions seriously. Want admissions, but there is also an unfairness or prejudice that deemed admissions create. Admission should not be lightly set aside because it disturbs the goal of facilitating early resolution, but also do not want to disincentivize parties from admitting facts because they will never be able to be set aside once admitted.

- Factors to consider:
  - o How admissions were given
  - o Timing of application to withdraw
  - o Evidence to show it should not have been admitted
  - o Prejudice from the withdrawal

Rules doesn't mention filing, only serving. However, BB says you have to file because of the formality of the process.

# Chapter 20 – Experts

## A. Experts

- The role of experts in civil litigation is to help resolve issues by means of opinion evidence. Experts can be in any field relevant to the issues raised in the litigation. Admission of the opinion as an expert opinion at trial depends on the court being satisfied that the person providing the opinion “qualifies” as an expert in the subject matter.

An expert report may be:

- Report in chief: proves an element of a claim/defence which lies within the scope of the burden of proof of the litigant hiring the expert
- Rebuttal report: report contesting or responding to a report in chief
- Surrebuttal report: report contesting or responding to a rebuttal report

An expert report is privileged if the expert is retained by a litigant to provide an opinion on a matter relevant to the litigation (litigation privilege applies).

- BUT in order to avoid surprise at trial, the Rules state that a party intending to rely on an expert report at trial must disclose the report to opposing parties a reasonable period of time prior to trial (i.e. waive privilege)

The Rules of Court (**Rs5.34-5.44, 8.4, 8.16 & Form 25**)

- Sets out the obligation of parties to disclose expert reports prior to trial
- Sets out the rights and obligations of parties receiving expert reports
- Assists in ensuring that experts have access to information necessary to formulate an expert opinion
- Set out parameters for introducing expert evidence at trial

### 1. Obligation to Disclose

In order to use an expert’s report at trial, unless the parties agree otherwise or the court orders, the reports must be served on all parties prior to trial and in the following sequence:

- Experts in Chief
  - Rebuttal Experts
  - Surrebuttal Experts
- A reasonable time prior to trial is presumed.

The expert’s report must include: (1) the expert’s opinion, (2) the information and/or assumptions relied upon for the opinion, and (3) the qualifications of the expert (**Form 25**)

- Any change in the expert’s opinion must be immediately disclosed by the expert in writing and served on each of the parties.

### 2. Rights and Obligations Upon Receiving an Expert Report

The receiving 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).

- Agreeing to admission is not an agreement with the content of the opinion
- 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.

Note: The preceding process of disclosure and response presumes that in most cases the expert report will be entered into evidence at trial through the oral testimony of the expert witness.

- **R5.39 & 5.40** allow for a party serving the expert report to serve an intention to enter the report without calling the expert as a witness. The parties receiving this notice have 2 months to object or to request that the expert attend the trial for purposes of cross-examination.

### 3. Access to Information Needed by an Expert

**Rs5.41-5.44** give a medical expert access to the opposing party for purposes of a medical examination, if the mental or physical health of that person is an issue.

#### Arranging the Examination

- The Rules provide that, on application, where the mental or physical health of a person is in issue in the action, a 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 (commonly done by agreement of the parties without involving the court)
  - o Cost of the examination is borne by the party requesting it

#### Conduct of the Examination

- The person being examined must answer the health care professional's relevant questions. They must provide samples or undergo tests only if they agree to do so or if ordered to do so by the court.
  - o The party being examined can have their own health care professional watch, can videotape the examination, or can make a transcript.

#### Disclosure of the Results

- The party requesting the medical examination:
  - o Must promptly deliver the written expert's report to each of the other parties, and
  - o **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!**
    - This is a huge exception to the idea you don't have to produce documents not being used at trial

Note: This may result in the reversing of the sequence of disclosure pertaining to these medical expert reports AND give rise to disclosure/early disclosure!

### 4. Use of Expert Reports at Trial

- To schedule a trial date, parties must identify the number of expert witnesses to attend and certify that the disclosure of expert reports has been completed (**R8.4**).
- Unless the court permits otherwise, only one expert opinion can be admitted per subject (**R8.16**).

*Kon Constr Ltd v Terrahova Developments Ltd* (2015) ABCA: Three types of people with expertise – independent experts, someone involved in the litigation (e.g. family doctor), and the litigant himself.

*Reid v Bitangol* (2016) ABQB: An underlying report was not disclosed, but was referred to by two expert in chief reports. Not sure if this was bad or not.

*Henderson (Estate) v Arnett* (2011) ABQB: No need to file expert reports under the new Rules.

*Adacsi v Amin* (2013) ABCA: Court ordered a woman to undergo gene testing to see if her ailment was caused by Huntington's Disease.

### B. Preservation and Inspection of Property

- A court may:
  - o Make an order preserving property (**R6.25**)
  - o Make an order for the inspection or testing of property (**R6.26**)

### C. Referees & Court Assistants

- A court may:
  - o Appoint a court expert to give independent evidence (**Rs6.40-6.43**)
  - o Refer a question or matter to a referee (i.e. a master, court clerk, another person appointed by the court, or a person appointed as a referee by the Lieutenant Governor in Council (**Rs6.44-6.46**)).

## Chapter 21 – Other Evidence

Alternatives to the usual situation of introducing evidence at trial via oral witness testimony.

A. Affidavit Evidence at Trial (**R8.17**)

- Parties can agree or court can order evidence at trial via affidavit. Court cannot order if a party wishes to cross-examine the witness.

*Toliver v Koepke* (2013) ABCA: This is exceptional circumstances, the presumption is *viva voce* evidence.

B. Preserving Evidence for Future Use

- Court can order the questioning, under oath and before trial, of any witness in Alberta or outside of Alberta (**Rs6.21-6.24**)
  - o A judge may allow all or part of the evidence given at questioning to be read in as the evidence of the person questioned if the person questioned is dead, unable to give evidence in court because of accident/illness or disability, refuses to take an oath or answer questions in court, or cannot attend trial or some other sufficient reason (**R8.14**)
  - o Again, this is the exception, NOT the rule!

# Chapter 22 – Managing Litigation

In Alberta, responsibility for managing the dispute in a manner consistent with the purpose and intent of the rules (**R1.2**) lies with the parties to the litigation. The courts enforce this obligation.

## A. Responsibilities of the Parties (**Part 4, Division 1**)

- Planning the litigation appropriately
- Applying to the court for planning direction when the case is especially complex
- Engaging in settlement (dispute resolution) processes

Remember: **R13.5** allows parties to agree to, or the court to order, an extension of any time period provided under the Rules unless the rule says otherwise

The parties have a specific duty to categorize the dispute and to plan the litigation accordingly.

- Within 4 months of an SoD being filed, parties must classify the litigation as STANDARD or COMPLEX case
- If parties cannot agree, the Court can categorize
- If parties fail to categorize, the case is deemed to be standard
  - o So practically, unless one party wants a complex case, nothing is discussed and it will be deemed standard
- Categorization depends on various factors, including:
  - o Claim and issue complexity, number and value
  - o Number of parties
  - o Number of documents
  - o Number and type of experts anticipated
  - o Duration of questioning
  - o Third party proceedings

If a case is standard, parties must ensure that the following litigation steps occur within a reasonable time:

- Pleadings close
- Pre-trial disclosure of information
- Dispute resolution process attempted (unless court orders otherwise)
- Application is made for the setting of a trial date

A party MAY propose a litigation plan.

If a case is complex, parties must, within 4 months of categorization (mandatory):

- Agree on a litigation plan
- Plaintiff must file and serve the plan on all parties
- The plan must ordinarily address:
  - o Dates (and methods) for determining real issues, organizing and producing records, completing questioning, exchanging expert reports, applying for a trial date.

Parties are responsible for continuously monitoring litigation progress and adjusting expected completion dates as required.

- Generally, it's P who proposes the plan, and other parties agree to it

## B. Court Assistance in Managing Litigation (**Part 4, Division 2**)

Exception to the basic premise of party responsibility! Where parties cannot agree/meet their management responsibilities, the court can resolve the management issue(s).

In particular, the court can:

- Exercise its general authority to enforce a rule (i.e. issue a procedural order) – includes setting deadlines, categorizing, re-categorizing a case and creating/amending a litigation plan
- Direct attendance of parties at, and conduct, a court conference
  - o Ask the judge to sit down with you and other party or their counsel and talk about what’s happening in the litigation. Not necessarily about merits, but procedure. Possible for judge to issue court order at a court conference. Useful where one party generally uncooperative, they have to answer to that in front of a judge
- Take over management of the litigation via case management
  - o Extreme option, asking a judge to oversee the lawsuit. Nuclear option for an unruly party, but useful when there is complex litigation
- Generally these occur by application of the parties, but can also be a result of court initiative
  - o Usually done by chamber application, but case management a bit different. There is a notice to the profession stating that there is a form to fill out, instead of the letter called for in the Rules

AB now has case management counsel. A CM judge can assign these individuals to help throughout litigation.

C. Dispute Resolution by Agreement (**Rs4.16-4.20, 8.4 & 8.5, Notice to the Profession Feb 12/13 and June 27/16**)

Unless waived by the court, parties **MUST** engage in good faith in a pre-trial third party dispute resolution process

- Court can waive where process is duplicative of past efforts, unlikely to resolve the claim, or is otherwise unnecessary or undesirable
- Currently, notice to the profession says this requirement will **NOT** be enforced
  - o Everyone was choosing JDR under this rule, and so it slowed down trials. Signal to legislature that they need more resources.

JDR

- Settlement facilitated by a judge
  - o Judge’s opinion helps parties realize how case might be decided
- Can result in settlement or consent judgment
- All information is provided “without prejudice”
- If no settlement achieved, the judge cannot hear/decide any other matter in the lawsuit unless everyone agrees
  - o Since they see all evidence, not just what is admissible in court

# Chapter 23 – Chambers Practice

Notice → Affidavit → Order

What is Chambers?

- Public courtroom
- Hearing of designated issues (NOT trial)
- Usually based on affidavit evidence (can technically ask for oral evidence, but BB never seen this used before)
- Need statute or rule or other authority to apply

What issues are decided in Chambers?

- Interlocutory applications (procedural)
  - o Not ending lawsuit, just guidance moving forward usually on a very specific issue
- Applications for final resolution (alternatives to trial)
  - o Can have a court decide it on its merits by affidavit evidence in a Chambers application

Requirements are very different for these two different types of applications.

Regular Chambers vs Special Chambers

- Ask, is the application likely to take more than 20 minutes in total? If so, special application.

Regular Chambers Order of Proceeding

- Start with adjournments (don't want people waiting around to say they've moved their date)
- Next are *ex parte* application (need relief and didn't give notice to other party – protocol is senior lawyers go first)
- Then are consent matters (managed to agree to a particular order and just need a signature)
- Finally, contested matters that are on the list.

Benefits of a Chambers Application

- Enforceable resolution (i.e. Court Order)
- Certainty
- Efficiency

Detriments of a Chambers Application

- Potential adverse costs award
- Inflexible decision
- Adversarial
- Inefficient

## A. Procedure (How to Get Into Chambers) – **Rs6.3-6.4, 13.3, Form 27, Code of Conduct**

### 1. On Motion (Notice)

- Presumption is that all applications are on notice to all parties
- Notice is achieved by filing the Application (**Form 27**), and serving it on ALL other parties and on persons affected by the application 5 days before the scheduled application date (the “returnable” date).
  - o Don't need to talk to other side, just has to be 5 days prior. If this doesn't work, they call and ask to adjourn to another day.
  - o See **R13.3** for counting days. You do not count the application date. (i.e. If you file and serve on Friday, earliest day that application can be heard is Wednesday).
  - o **Form 27** contains what rule you're relying on, what you're complaining about, what they did or did not do, ground for making the argument, evidence relied on and what remedy you are seeking.

- The responding party does not file a response to the notice but, within a reasonable time before the application date, the respondent must file and serve the applicant with any affidavit or other evidence that the responding party will be use at the application.
2. *Ex Parte* (No notice)
- Exception to the notice rule: Permitted if an enactment says so, or the court finds that:
    - o No notice is necessary, or
    - o Notice would unduly prejudice the application.
  - The applicant bears the burden of satisfying the court that the application should be heard *ex parte*
  - Duty on counsel to disclose ALL information (i.e. for both sides)
  - The application must be recorded word for word

## B. Appearance in Masters' Chambers

### 1. Jurisdiction

- Masters' jurisdiction is prescribed by the Alberta *Court of Queen's Bench Act*
  - o They cannot hear trials, decide disputes of fact, or issue civil contempt orders
  - o Justice has plenary jurisdiction, so whatever a Master cannot hear you have to see a justice
- If a rule permits an application to a "court", then both Masters and Justices have jurisdiction; if the rule permits application to a Justice, then only a QB Justice has jurisdiction (see Definitions)

*South Side Woodwork v RC Contracting* (1989) ABQB: Masters are bound by any decision by QB Justice, and QB Justice hears appeals from the decisions of Masters.

*Janvier v 834474 Alberta Ltd* (2010) ABQB; *Schaffer v Lalonde* (2014) ABQB: Both cases say that Masters can't hear matters of fact or weigh evidence. If one side's evidence is not credible, or has been discredited, that evidence doesn't count. So technically the Master is not weighing, just saying no evidence on that side anymore. Then can rely on remaining evidence.

Steps to decide if Master or Judge:

- 1) Does the rule say "Court" or "Justice"?
- 2) Does the application involve court weighing credibility?
- 3) What is the remedy you want?

### 2. Appeals

- Master in Chambers decision can be appealed to a QB Justice in Chambers (*Court of Queen's Bench Act*)
  - o Notice of Appeal must be filed and served within 10 days after the Master's Order is entered (filed)
  - o Notice of Appeal must be returnable within a reasonable period of time but at the latest 2 months after the date the Notice of Appeal is filed

Appeal is "on the record" unless the judge hearing the appeal finds additional evidence to be relevant and material

- Intended to contrast with "hearing de novo"
- Intended to restrict material to the order of the Master and the evidence which was before the Master
  - o However, not exactly how this has played out. CA looks at this rule and says you cannot hinder a justice this way. If there is new evidence they want to hear, they should be allowed to hear it.

*Bahcheli v Yorkton Securities Inc* (2012) ABCA: New rule interpreted like the old rule. Functionally, hearing on the record is no different than hearing de novo.

## C. Affidavits

Ordinarily, evidence in Chambers takes a written form:

- Affidavit (sworn written statement) – presumptive way of bringing evidence in Chambers
- Transcript of Questioning or Questioning on an Affidavit (don't put full transcript of questioning, only relevant parts – questioning on affidavit, the whole transcript is filed with the court, more on that later)



- Written Interrogatories
- Admissible Records disclosed in AoR

The presumption is that evidence will be filed before the application is heard. Sometimes not possible, application too fast to get client in to sign affidavit. So you get the other party to accept an unfiled, unsigned copy that you undertake not to change. Downside is, court doesn't get a chance to read it. Better to always file and serve before the hearing.

1. Content of an Affidavit (**Rs13.18-13.25, Form 49, Alberta Evidence Act ss.15-17, Code of Conduct**)
  - Must comply with formal requirements (**R13.19**)
  - Must be sworn before a commissioner for oaths or a notary public
  - Facts only
  - Attached records/exhibits must be identified in the affidavit and commissioned
  - Cannot be relied upon if altered, unless alteration is initialed by the person administering the oath
    - o Do not commission if you don't think client has capacity!

If filed in support of an interlocutory application, 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, the source of the information and belief must be stated!

If filed in support of an application to dispose of all or some of the claim (final disposition), the affidavit must be based on personal knowledge only (personal knowledge requirement applies when disposed of procedurally AND on the merits).

Note: **R3.68(4)** – All or part of an affidavit can be struck out if information provided is frivolous, irrelevant or improper.

## 2. Questioning on Affidavit (**Rs6.7, 6.11 and 6.15-6.20**)

A party adverse in interest on the application has the right to cross-examine the deponent of an affidavit made in support of or in response to an application. Cross-examination takes place in the usual manner of a questioning but is restricted to matters relevant to the affidavit/application.

- BUT use of the transcript is different
  - o Transcript is filed in its entirety with the court
  - o Transcript is usable by both parties at the application
    - Can be used later in trial as well, for example, as evidence of a prior inconsistent statement

*Penn West Petroleum v Devon Canada Corp* (2017) ABQB: Difference between **R6.7** and **R5.11** – the former refers to affidavits in general, you have a right to question someone on their affidavit in support of an application. The latter refers to the AoR, specific type of affidavit. It says you need permission of the court to question on the AoR. Despite the difference in wording, you have the right to question on an affidavit, and would probably receive costs if other party forced you to get this permission.

*Smith v Copestone Capital Inc* (2013) ABCA: Usually cannot fit questioning into five days notice you've been given for a Chambers application, not itself a good enough reason to refuse cross-examination on an affidavit.

*Rozak Estate v Demas* (2011) ABQB: Can ask anything relevant and material to the application. Can you ask for UT's? No bar to this, but should be done judiciously, given there is delay involved. Only ask UT where the affidavit evidence references some document that is not there, or UT relates to particularly important issue in the application and is not difficult to answer.

## D. Appearance in Chambers

- Counsel cannot be a witness (Code of Conduct).
- Electronic applications can be permitted if parties agree and court orders or if court permits.
  - o Usually when in remote judicial centers where they don't have chambers everyday or parties are in different places (don't fly in for a 20 minute Chambers application).
- Special chambers applications have specific procedures for exchanging written materials, etc. (See the Civil Practice Notes).

## E. Orders (**Rs9.1-9.8, 9.12-9.16**)

A court order takes effect upon pronouncement unless the court says otherwise BUT a court order cannot be enforced until: (1) the order is signed by the Master or judge pronouncing the order, and (2) the order is filed with the court.

- So once it leaves mouth of judge, becomes effective UNLESS specifically stated otherwise (keep this in mind for timing requirements). Difference between effective and enforceable.
  - o Only enforceable when signed in written form by Master or Judge and filed with the court.

The successful party in the application has the responsibility of drafting, filing and serving the order (unless the court orders otherwise). If the order is not signed by the Master or judge “on the spot”, the party drafting must circulate draft for other parties within 10 days of the date of pronouncement; other parties must indicate approval within 10 days of receiving the draft.

- So ideally, want to have a draft order prepared so you can have it signed then and there. Pencil in the changes.

If parties agree on content, clerk can sign and enter the order.

- If they don't agree, court must settle the content of the order.

Note: A party can ask the court to dispense with the need for the opposing party's approval of the content of the order (**R9.4(2)(c)**). Good to use if self-rep litigant on other side. Might as well ask.

The Court can vary/change the order pronounced anytime before it is entered (filed) or can re-open the application for more evidence.

- After entry of the order, court can, on application, correct errors or make a further order as to implementation

If the order was issued *ex parte* or without the appearance of opposing party, court can set aside, vary or discharge the order if, unless the court orders otherwise, an application is brought within 20 days of the service of the order or the date when the applicant first learned of the order (whichever came first).

The 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 judge who pronounced the order. Prevents a party from running around trying to get what they want.

## Chapter 24 – Pre-Trial Strategies

Strategies designed to facilitate the resolution of a lawsuit without a trial. These strategies involved:

- Applying to the court (chambers application) to resolve the action on procedural grounds, or
- Incentivizing the settlement of the lawsuit

Note: Where a chambers application is necessary, a costs risk arises if the application is unsuccessful.

### A. Striking Out Pleadings (**R3.68**)

- Abuse of process rule
- Requires a chamber application
- If successful, pleadings are struck out so the action may end. If unsuccessful, litigation continues.
  - o Strike SoC – no more claim. Strike SoD, begin default judgment application. Cannot bring the DJ application until the application to strike is heard, though.

**R3.68** authorizes the court, at any stage of the proceeding, to strike out a pleading if:

- a) Court has no jurisdiction over the cause of action
- b) Pleading fails to disclose a cause of action or defence
- c) Pleading is frivolous, irrelevant or improper
- d) Pleading constitutes an abuse of process
- e) Pleading's irregularity causes prejudice sufficient to defeat the claim

D can apply to strike SoC before even filing SoD!

Note: Affidavit evidence is not permitted for (b); for the other grounds, affidavit evidence can be filed and can be based on information and belief (**This is not true according to BB – she talked to a Master who said their view is that you need an affidavit based on personal information for any application disposing of a claim, does not matter whether it is done procedurally or on the merits**).

*R v Imperial Tobacco* (2011) SCC: Under **R3.68**, read pleading and say “if we assumed everything here true, would there be a cause of action or defence on behalf of that person”? This is the test set out by the SCC, but we have to be careful not to strike out new types of claims.

*Joly v Pelletier* (1999) OJSCJ: Pleadings said he was a Martian. Assuming this was true, under the test set out in *R v Imperial Tobacco*, would not be able to bring the application since he didn't fall under the definition of a “person”.

*Ernst v Encana Corporation* (2014) ABCA: When striking out pleadings on procedural grounds, cannot apply res judicata, since it has not been decided on the merits. Can be refiled as long as within the *Limitations Act*.

### B. Security for Costs (**Rs4.22-4.23 & AB Business Corporations Act, s254**)

- Incentivizes settlement and may have the effect of ending the lawsuit on procedural grounds
- Requires a chambers application
- If successful, litigation is stayed until the security is paid or pleadings may be struck out. If unsuccessful, litigation continues.

Rules authorize the court to order security for costs when it is “just and reasonable”, taking into account:

- The respondent's assets in AB and likelihood of successful enforcement of a judgment
- The ability of the respondent to pay costs
- The merits of the lawsuit
- Whether an order for security will unduly prejudice the respondent's ability to continue the action
- Any other issues the court considers appropriate

*Amex Electrical Ltd v 726934 Alberta Ltd* (2014) ABQB: Relationship between two different ways of seeking this – AB and the Rules. Rules more flexible than BCA, but have to use BCA if corporation is the P. Courts have discretion to decide based on fairness and so on, under both. Case also has list of factors in deciding whether to issue security for costs.

#### C. Delay (**Rs4.31-4.33**)

- Incentivizes the timeliness in pursuing a claim
  - o Unfairness on D if P doesn't prosecute their claim, evidence becomes stale, etc. Also have a lawsuit hanging over your head.
- Requires a chambers application
- If successful, can result in an order to advance the litigation, or in an order striking out the claim. If unsuccessful, litigation continues.

#### Delay (R4.31)

- Where there is some delay, the Rules authorize the court to issue a procedural direction (**R4.31**)
- Where some delay results in significant prejudice, the Rules authorize the court to dismiss all or part of the claim (**R4.31** – general delay rule)
  - o Significant prejudice is presumed from inordinate and inexcusable delay
  - o Can be proven by showing many things, delay itself can be enough sometimes. No minimum time, totally discretionary.

#### Long Delay (R4.33 – the “Drop Dead” Rule)

- Where delay has been 3 or more years (i.e. since a “significant advance” in the action), the Rules require the court to dismiss the action unless one of the stated exceptions applies.
  - o Exceptions: parties have agreed to the delay, action has been stayed/adjourned, no response to a written proposal for delay of more than 3 years, applicant has participated in proceedings since the delay
  - o But what is a significant advance? No bright line rule, functional rather than formalistic test.
  - o Applies to any 3 year period, do not have to bring application right away

*Humphreys v Hanne* (2017) ABCA: Step 1 – has there been delay? Step 2 – is that delay inordinate? Step 3 – excuse for being slow? Step 4 – any real prejudice? (Think about prejudice in the litigation – fading memories, etc.) Step 5 – If relying on presumption of prejudice, has respondent rebutted the presumption? Step 6 – Any other reason it may be unfair to strike this claim?

*Flock v Flock Estate* (2017) ABCA: No discretion under long delay rule, have to strike if no significant advance. Define significant advance in accordance with **R1.2**. Most common exception is agreement to the delay. Either they've agreed in advance that delay is relieved, or they participated in some step after the delay making it look like they waived it, after the fact. Agreement must be express, cannot be implied. Can be written or oral.

#### D. Discontinuance of Action (**Rs4.36-4.37 & Forms 23-24**)

- Ensures that a party does not quit the litigation without paying the opposing party costs (unless the parties or court orders otherwise).

#### Plaintiff:

- Before trial date is set, can discontinue at will (**Form 23**) but D is entitled to costs
- After trial date is scheduled, but before trial begins, can discontinue only with written agreement of all parties OR court's permission
- After trial commences, can discontinue **ONLY** with court's permission

#### Defendant:

- Can discontinue (**Form 24**); D is then in default and P is entitled to costs for responding to discontinued defence

*Newel Post Developments Ltd v 1402801 Alberta Ltd* (2012) ABQB: Why do you need court's permission to discontinue when trial date set, but not when settling? It adds certainty to the litigation, and prevents abuse. Could technically go up until trial, discontinue, then start a new lawsuit if within the limitation period.

#### E. Settlement (**Rs1.2, 4.16, 8.4(3), 4.24-4.30**)

A settlement is a contract by which the parties voluntarily agree to resolve a lawsuit. It reduces the risk of an adverse outcome, reduces time spent in litigation, and reduces cost of litigation and risk of adverse costs award.

- Can never be forced into settlement.

##### 1. Formal Offers (**Rs4.24-4.30**)

- Incentivizes settlement
- Impose procedural requirements for making the offer
- Impose negative cost consequences on the party receiving the offer if the offer is rejected when it should have been accepted (i.e. if the offer is equal to or better than the receiving party obtains at trial)

Note: To gain the benefit of the cost consequences, party making the offer must follow the proper procedure.

Procedure:

- Offer must be served at least 10 days prior to the commencement of trial or summary trial
- Offer must remain open for at least 2 months or until the commencement of trial or summary trial
- 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

Consequences: If the offer is not accepted AND judgment beats 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 judgment.

E.g. Assume: Statement of Claim for \$100,000.00 in damages. If no formal offers are made: presumption is costs to the winner.

If P claim is dismissed at trial (100% win for D), D receives costs from commencement date to end of trial.

If P obtains a judgment of \$30,000.00 (partial win for P), P receives costs from commencement date to end of trial.

If P obtains a judgment of \$100,000.00 (100% win for P), P receives costs from commencement date to end of trial.

E.g. Assume: Statement of Claim for \$100,000.00 in damages. If P issues a Formal Settlement Offer of \$50,000.00:

If P claim is dismissed at trial (100% win for D), D receives costs from commencement date to end of trial

If P obtains a judgment of \$30,000.00 (partial win for P but less than offer), P receives costs from commencement date to end of trial.

If P obtains a judgment of \$50,000.00 (partial win for P equal to offer), P receives costs from commencement date to date of offer and double costs from date of offer to end of trial.

If P obtains a judgment of \$100,000.00 (full win for P; more than offer), P receives costs from commencement date to date of offer and double costs from date of offer to end of trial.

E.g. Assume: Statement of Claim for \$100,000.00 in damages. If D issues a Formal Offer of Judgment of \$50,000.00:

If P claim is dismissed at trial (D has a 100% win), D receives costs from commencement date to date of offer and double costs from date of offer to end of trial.

If P obtains a judgment of \$30,000.00 (P has a partial win less than D's offer), P receives costs from commencement to date of offer and Defendant receives costs from date of offer to end of trial.

If P obtains a judgment of \$50,000.00 (P has a partial win equal to D's offer), P receives costs from commencement to date of offer and D receives costs from date of offer to end of trial.

If P obtains a judgment of \$100,000.00 at trial (P wins more than D's offer) Plaintiff receives costs from commencement to end of trial.

*Union Square Apts Ltd v Academy Contractors Inc* (2017) ABQB: Only requirement besides complying with formal requirements is that the offer be genuine. A genuine offer is one that the offering party could have reasonably expected the receiving party to accept.

*Pillar Res Services Inc v PrimeWest Energy Inc* (2017) ABCA: Appeals are a separate consideration, so full indemnity costs ordered in trial did not apply to the appeal. Court always discretion to vary costs!

2. Informal Offers

- Offers made without following the formal rules
- Courts have discretion to take offers into account in awarding costs

*Paniccia Estate v Toal* (2012) ABQB: Nothing in Rules preventing court from imposing extra cost consequences for refused informal offer. However, you want the presumption in your favour, rather than trying to prod the court into issuing extra costs.

## Chapter 25 – Judicial Resolution Without a Full Trial

This is not short-circuiting litigation, like Chapter 24 (procedural). This is a shortcut to judicial resolution (merits).

### A. Summary Judgment (Rs7.2-7.4)

The Rules authorize a court to issue judgment via Chambers application because the merits of the claim or defence are sufficiently clear that a trial is not required.

**R7.3** authorizes a court to give part or full judgment in an action if:

- a) There is no defence to the claim or part of it;
- b) There is no merit to the claim or part of it;
- c) The only real issue is as to amount.

Affidavit evidence is required, and must be personal (cannot be based on information and belief). Have to “swear positively” to the evidence (**R7.3**).

Currently, the courts employ a two-step analysis to determine if a matter can be decided by SJ:

- 1) Procedural: is there sufficient evidence to determine the issue(s)?
- 2) Substantive: does the evidence make clear that the respondent’s case has no merit?

If successful, the action or issue subject to the summary judgment order is ended (judgment is issued). If unsuccessful, litigation continues.

Essentially, the rule is a mess right now due to all the case law. Used to be an exceptional application, but with *Hryniak* has come a lot of ambiguity.

*Hryniak v Mauldin* (2014) SCC: Came from Ontario, which has a different rule that looks a lot like our summary trials. The test they laid out: SJ available where no genuine issue for trial. This is clear when a judge can make a fair and just determination on merits of the SJ motion, where process allows judge to make necessary findings of fact, allows judge to apply law to the facts...does not really fit with our rule. So does not look like it would apply in AB. However, next case brings it in anyways. How do you apply weighing evidence to our SJ rule? AB courts have struggled describing this new test in any way that makes sense with our rule to allow Masters to still decide SJ applications.

*Windsor v CPR* (2014) ABCA: Brought *Hryniak* into AB.

*Condominium Corp 0321365 v Cuthbert* (2016) ABCA: Describes the two part analysis – can this matter fairly be decided by SJ, and do we have enough evidence in front of us on the issues to resolve in a summary way?

*Transamerica Life Canada v Oakwood Associates* (2015) ABQB: Is this a fair and just process to establish that there is no merit to the claim (blends two steps together).

*McDonald v Brookfield Asset Management Inc* (2016) ABCA: Party applying for SJ has burden of proof that there is no merit to other party’s case.

*Stout v Track* (2015) ABCA: A party’s case is without merit if the likelihood of the opposing party losing at trial is very high, or likelihood of applicant winning at trial is very high. Do not have to show 100% success, looks quite subjective.

*Wolfe v Shawcor Ltd.* (2017) ABCA: Most recent decision so far. Says that to be successful, position has to be unassailable. Court also makes the point that D can bring SJ application without having filed a defence. Remember, this will not extend the time limit to respond! Need agreement between the parties.

## B. Trial of Particular Questions or Issues (**R7.1**)

The Rules authorize a court to issue a finding 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.

2-part decision:

- 1) Determine if trial of an issue is appropriate
- 2) If yes, conduct the trial of an issue.

Step 1 requires a regular chambers application with affidavits establishing what the question is and why its resolution will expedite resolution of the litigation. Step 2 usually requires special chambers application, with affidavits, expert reports, questioning transcripts, other written evidence relevant to determine the issue (could be via *viva voce* trial, but on an isolated question, rather than whole lawsuit).

- Courts generally disinclined to slice up litigation this way, needs to be a pivotal issue.

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

*Bailey v Guarantee Trust* (1987) ABCA: Finding on the issue is binding. Once court decides, can only appeal it, cannot have the issue reheard at trial.

*NEP Canada ULC v MEC Op LLC* (2016) ABCA: CA says that trial judge's decision to have a trial of an issue is entitled to deference. Test: whether severing issue from litigation is likely to or has a reasonable likelihood of disposing of the claim early, saving expense in litigation, or substantially shortening the trial time. There is a fine line between issue that is really going to help the parties move on and save litigation steps vs slicing the lawsuit into bits and pieces.

## C. Summary Trial (**Rs7.5-7.11 & Form 36**)

- Alternative trial process via documentary or written evidence only
- May be on central question or only on select issue(s)
  - o Because it can be on a select issue, there is some overlap between this and trial on a particular issue
- The rules authorize a judge to:
  - o Determine if ST is appropriate
  - o If so, conduct the ST and issue judgment.

Step 1 requires a regular Chambers application.

If a ST is not held, litigation continues, If held, and judgment is issued, litigation ends (either entirely or with respect to the designated issue). Judgment is binding, subject to appeal. If a ST is held but the judge is unable to issue a decision on the evidence, litigation continues.

Process:

- Applicant files and serves **Form 36**, plus affidavit and other evidence to be relied upon in the ST
  - o Must specify why matter/issue is appropriate for ST
  - o Include proposed ST date
- Respondent files and serves responding evidence (10 days prior to ST date) and notifies of any objection to ST procedure (5 days prior to ST date)

So first we argue process, then merits. Looking at process involves looking at the evidence though, need to see if enough to decide the case.

*Imperial Oil v Flatiron Constructors Canada Ltd* (2017) ABCA: Court has to ask whether it can decide all disputed questions based on affidavit evidence and other written evidence permitted and as a secondary consideration, whether it is unjust to decide the case that way.



## Additional Points about Judicial Resolution Without a Full Trial:

### Summary Judgment vs Summary Trial

- Traditionally, a failed SJ application will result in the lawsuit continuing because the court is refusing to award SJ in favour of the applicant.
  - o BUT, for ST:
    - A failed application for a ST process will result in the lawsuit continuing; but
    - If the court agrees that an ST should take place, following the ST the court decides the substantive issue and the litigation ends.
- i.e. Winning application for SJ – you win lawsuit. Winning application for ST – win right to the process where you can lose on the merits.

### Affidavit Evidence:

The SJ rules require the affidavit in support to be based on personal knowledge (**R7.3**). This means not based on information and belief. The rules for “trial of an issue” and ST (**Rs7.1 & 7.5**) do not specify affidavits must be based on personal knowledge.

- BUT: **R13.18(3)** says that an affidavit filed in support of an application to dispose of all or some of a claim must be based on personal knowledge. So, affidavits filed in support of an application to obtain court permission to have a matter heard by “trial of an issue” or ST do not need personal knowledge, BUT if a court agrees to conduct a “trial of an issue” or ST, affidavits providing evidence on the substantive questions for determination must be based on personal knowledge.

Essentially, accessing process can be based on information and belief, but when dealing with merits, must be personal knowledge. However, see recent e-mail from BB below, which changes this I believe.

“Rule 13.18(3) states that affidavits in support of an application to dispose of all or part of a claim must be based on personal knowledge (i.e. NOT on information and belief). I recently was advised by a Master in Chambers that the courts are reading this rule as requiring affidavits based on personal knowledge for ALL applications which might dispose of a claim, regardless of whether the disposition is based on procedural or substantive grounds. So, where an affidavit is filed in support of an application which seeks to end the claim (e.g. R. 3.68, R. 4.31, R. 4.33, etc.), the affidavit should be based on personal knowledge. This also means that an affidavit filed in support of a Summary Trial should be based on personal knowledge because, in deciding whether a summary trial is appropriate, the court needs to see the evidence that will be brought at the Summary Trial hearing. (The application for trial of an issue procedure can be based on information and belief, but the evidence for the conduct of the trial of an issue must be based on personal knowledge). A summary judgment application always requires personal information in the affidavit because the summary judgment rule expressly demands it. In short, only interlocutory applications (those relating to the ongoing process of litigation) can be based on information and belief” - BB

## Chapter 26 – Trial

### A. Entry (**Part 8, Divisions 1 & 2**)

Important from a procedural point of view. Rules say it is up to the parties to decide when ready to go to trial, presumptively.

There are 2 methods of getting on the court calendar:

- 1) Parties agree they are ready to go, jointly complete **Form 37**
- 2) Parties do not agree, so party wanting it scheduled can apply through **Form 38**
  - Have to indicate number of witnesses, conflict of interest with judges, jury trial, etc.
  - If there are a few things left to be done, but clerk think sits reasonable they will be done before trial date, they can still schedule it in.
  - For claims that can change substantially before a trial date (injuries), clerk can refer it to a judge to decide. Once scheduled, clerk gives notice to all parties.
  - Once scheduled, cannot be adjourned or discontinued without approval of court, unless settled, then taken off court calendar.

Regardless which method is used, at least 3 months before trial, each party has to confirm its readiness under **Form 39**. Just to make sure nothing has changed. At least one party has to confirm readiness; if neither does, struck from calendar.

*Benc v Parker* (2016) ABCA: **Form 37** is like an UT, when you sign, doesn't matter if filed, you are saying you are ready for trial. This form is serious business.

### B. Jury Trial (**Part 8, Division 1, Jury Act & Jury Act Regulations**)

Need to apply in writing to Chief Justice before signing readiness for trial for a jury trial. Court concerned about jury complicating the litigation and holding up the process.

### C. Attendance of Witnesses

Serve personally, unless lawyer representing and you know that. Need 20 days notice before trial, and an allowance for attendance is set in Schedule B to the Rules. Want to serve Notice to Attend so that if they don't show, can ask court to enforce. If they don't, then they are in contempt!

## Chapter 27 – Judgment

### A. Preparation and Entry (**Part 9, Division 1**)

- Court order: reflect interlocutory finding
- Judgment: reflects final disposition!

If there is no objection to how its drafted, the clerk can sign it. Filed within 3 months of pronouncement date unless otherwise stated.

- Want to file it because that is how you enforce it, and it also triggers appeal dates.

### B. Variation Before Entry (**Rule 9.13**)

Another reason you want to file is so the court doesn't change their mind or rehear part of the case.

### C. Variation After Entry (**Rules 9.12, 9.14 & 9.15(4)**)

After filing, can only be altered for transcription errors or to add necessary detail that enforces the judgment.

- Court can issue follow up order if needed

Under **R9.15**, can apply to set aside judgment given in absence of one of the parties.

- Need a reasonable excuse for not attending, and have to do this within 20 days of the judgment coming to their attention

Also, the variation has to be from the judge of first instance.

NOTE: Once judgment is entered, it is effective for 10 years. If you want to enforce past that 10 years, would have to renew the judgment.