Table of Contents

COMMENCING PROCEEDINGS 1

INTERPRETATION / TIME 1

INDIGENT STATUS - Rule 20-5 2

CHANGE OF LAWYER – Rule 22-6 2

NON-COMPLIANCE – Rule 22-7 3

WANT OF PROSECUTION 4

PRELIMINARY CONSIDERATIONS 4

\*COSTS\* 4

LIMITATION PERIODS 5

FORM 6

JURISDICTION 10

DEFINING AN ACTION 11

Pleadings – Rule 3-7 11

NOTICE OF CIVIL CLAIM – Rule 3-1 12

RENEWAL OF NOTICE – Rule 3-2 13

SERVICE – Part 4 Rules 14

RESPONDING TO AN ACTION 15

RESPONSE TO NOCC AND COUNTERCLAIMS 15

Rule 3-4 COUNTERCLAIM 16

DEFAULT JUDGEMENT – Rule 3-8 16

PARTIES 17

CHANGE OF PARTIES – Rule 6-2 17

PARTNERSHIPS – Rule 20-1 17

PERSONS UNDER DISABILITY – Rule 20-2 18

MULTIPLE CLAIMS AND PARTIES – Rule 22-5 18

REPLY – Rule 3-6 18

THIRD PARTY PROCEEDINGS – Rule 3-5 19

PARTICULARS – Rule 3-7(18-24) 19

SCANDALOUS, FRIVOLOUS OR VEXATIOUS MATTERS – Rule 9-5 20

AMENDING PLEADINGS – Rule 6-1 20

DISCONTINUANCE AND WITHDRAWAL – Rule 9-8 21

BUILDING YOUR CASE 21

DISCOVERY AND INSPECTION OF DOCUMENTS - Rule 7-1 21

(18) Non-Party Documents\*\* 22

PRIVILEGE – Rule 7-1(6) 23

EXAMINATIONS FOR DISCOVERY – Rule 7-2 24

FILLING IN THE GAPS 26

PRE-TRIAL EXAMINATION OF WITNESSES – Rule 7-5 26

DISCOVERY BY INTERROGATORIES – Rule 7-3 27

PHYSICAL EXAMINATION AND INSPECTION – Rule 7-6 27

NOTICES TO ADMIT / ADMISSIONS – Rule 7-7 28

INTERLOCUTORY PROCEDURES – Keeping Proceedings on Track 28

INTERLOCUTORY APPLICATIONS – Rule 8-1 28

CONSENT APPLICATIONS – Rule 8-3 29

WITHOUT NOTICE APPLICATIONS – Rule 8-4 29

URGENT APPLICATIONS – Rule 8-5 30

CHAMBERS – Rule 22-1 30

AFFIDAVITS – Rule 22-2 30

CASE PLANNING CONFERENCE – Rule 5 31

MASTERS AND APPEALS FROM MASTERS – Rule 23-6 32

ORDERS AND INJUNCTIONS 33

ORDERS – Rule 13-1 33

ENFORCEMENT OF ORDERS – Rule 13-2 34

INTERLOCUTORY INJUNCTIONS – Rule 10-4 34

WITHOUT NOTICE ORDERS 35

RECOVERY OR PRESERVATION OF PROPERTY ORDERS – Rule 10-1 35

MAREVA INJUNCTIONS 37

PRE-JUDGEMENT GARNISHING ORDERS 37

SUMMARY PROCEEDINGS 39

SUMMARY JUDGEMENT – Rule 9-6 39

SUMMARY TRIAL – Rule 9-7 40

SPECIAL CASE – Rule 9-3 42

POINT OF LAW – Rule 9-4 42

ALTERNATIVES BEFORE TRIAL 42

OFFERS TO SETTLE – Rule 9-1 42

JUDICIAL SETTLEMENT CONFERENCE – Rule 9-2 44

MEDIATION 44

ARBITRATION 44

HEADED TO TRIAL 45

DEPOSITIONS – Rule 7-8 45

TRIAL PROCEDURE – Rule 12 45

TRIAL MANAGEMENT CONFERENCE – Rule 12-2 46

EVIDENCE AND PROCEDURE AT TRIAL – Rule 12-5 47

WITNESSES 47

EVIDENCE 49

PROCEDURE 50

MOTIONS TO STRIKE A CASE 50

JURY TRIALS – Rule 12-6 51

EXPERT REPORTS – Rule 11 51

11-2 – Duty of Expert witness 52

11-3 Appointment of Joint Experts 52

11-6 EXPERT REPORTS 52

11-7 EXPERT OPINION EVIDENCE AT TRIAL 53

FAST TRACK AND EXPEDITED LITIGATION – Rule 15-1 53

\*\*COSTS\*\* - Rule 14-1 54

(3) SPECIAL COSTS 55

SECURITY FOR COSTS 56

Bill of Costs 56

APPEALS AND REVIEW OF DECISIONS 57

BC Court of Appeal 57

Court of Appeal Act, ss. 6 and 7 57

Supreme Court of Canada 58

***PROFESSIONAL CONDUCT HANDBOOK***

**CHAPTER 2 – Standards of the Legal Profession**

* A lawyer is a minister of justice, and officer of the courts, a client’s advocate, and a member of an ancient and learned profession
* **2.1 Canons of Legal Ethics, Lawyer owes** **duties**:
* **1. To the State**
* **2. To Courts and Tribunals**
* **3. To the Client**
* **4. To other Lawyers**
* **5. To Oneself**

**CHAPTER 5 – 5.1 Lawyer as Advocate**

* + **5.1-2** things lawyer **must not do** when acting as advocate
  + **5.1-4** if lawyer has unknowingly made a breach/error/omission, need to **disclose**
* **5.2 The Lawyer as Witness**
  + **5.2-1** lawyer should not testify or submit his own affidavit evidence in a trial he is working on unless (a) permitted to do so by law (b) the matter is purely formal or uncontroverted, or (c) it is necessary in the interests of justice for the lawyer to give evidence
* **5.3 Interviewing Witnesses**
* **5.4 Communication with Witnesses Giving Evidence**
  + **5.4-1** a lawyer should not obstruct examination or cross in any way
* **5.5 Relations With Jurors**
* **5.6 The Lawyer and The Administration of Justice**
* **5.7 Lawyers and Mediators**

COMMENCING PROCEEDINGS

* Start an action with NOCC
* Proceeding = action, petition, requisition
* Petition and action are the 2 main ways for starting a proceeding
* **OBJECT OF RULES**
* Focus on the merits of the cases, not technical aspects
* Now, explicit reference to **proportionality**
  + Can argue against a rule, if it is not proportional to the whole of the case
* **Rule 1-3 Object of Rules** 
  + (1) **The object of the rules is to secure the just speedy and inexpensive determination of any proceeding on its merits**
  + (2) **Proportionality TEST -** *conducting the proceeding in ways that are proportionate to*
    - *(a) the amount involved in the proceeding,*
    - *(b) the importance of the issues in dispute, and*
    - *(c) the complexity of the proceeding.*
* The rules are **informed** by **proportionality (*kim v lin)***
  + Even though riles might provide for multiple medical exams, a smaller injury may not require multiple visits to multiple docs **(*kim v lin)***
  + Court can knock down an **expert fee** if it is large in proportion to the claim itself (***stapleton)***
    - Party was trying to recover expert fees of $36,000 when case was only $100,000- court knocked it down to $20,000
* Court can consider **economic concerns of parties** (***boss power)***
* INTERPRETATION / TIME

- FIRST look to **rule 1-1** in the book for definitions and interpretations

* + **“action”** – proceeding started by a civil claim
  + **“document”**  - includes a photograph, film, recording of sound, record of a permanent or semi-permanent character
  + “**pleading**” – means a NOCC, a response to civil claim, a reply, a counterclaim, a response to counterclaim, 3rd party notice or response to 3rd party notice
  + **“proceeding”** – means an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, states case under rule 18-2
  + \***can also look at annotations to see if any cases have interpreted the term**
  + Action – Plaintiff 🡪 Defendant
  + Petition – Petitioner 🡪 Respondent
* Next option is to look at ***Interpretation Act*** – p. 1233 in book
  + **S.25 calculation of TIME or age**
    - 25(2) if the date for doing an act falls on a **holiday** – then the time is extended to the next day that is not a holiday
    - 25(4) if the time is expressed as **clear days, weeks, months or years,** OR as “at least” or “not less than” a number of days, weeks etc, then the **first and last days must be excluded**
    - 25(5) any time expressed other than in (4) must exclude first day and include last day
  + **s.29 expressions defined**
    - “corporation”
    - “holiday” – includes Sunday, xmas, good Friday, easter Monday, dec 26, Canada day, victoria day, BC day, labour day, remembrance day, new years
* **TIME: Rule 22-4** 
  + **22-4(1) computation of time** – unless contrary intention, if a period of **less** than 7 days is set out, then holidays are NOT counted
  + **22**-**4(2)** the court may **extend or shorted** any period of time, **even if the application for the extension is made AFTER the period has expired**
    - **ie** even if you let the time expire, you can still be granted an extension
  + **22-4(3)** – can be extended by **consent**
  + **22-4(5)** – despite this rule, a D or R can apply to have a proceeding dismissed for **want of prosecution**
  + **22-4(6) attendance** – attendance before official reporter within ½ hour following the fixed time is sufficient
* Onus is on Applicant to **give evidence** to justify extending time (***tung wise)***
* Parties generally work out time between them by consent
* Extensions are liberally granted
  + 2 factors:
  + 1. Prejudice (in not granting vs granting)
  + 2. Whether justice overall will be served
* INDIGENT STATUS - Rule 20-5
* Court can waive certain fees if a party is indigent
* Ex receiving benefits under *Employment Assistance Act*
* Can make order before or during proceedings
* (1) court wont grant if it thinks the claim or defence (a) discloses no reasonable claim or defence, (b) is scandalous, frivolous or vexatious, or (c) is otherwise an abuse of process
* CHANGE OF LAWYER – Rule 22-6
* **(1)** party can (a) change lawyers, (b) engage a lawyer, or (c) discharge their lawyer and represent themselves
* \*but in any change, until proper **copies of notice of change** have been delivered, the other side is entitled to act as if nothing has changed – ex send files to old lawyers office
* **Client always has total right to terminate**
* Lawyer doesn’t have complete freedom to terminate the relationship
  + Has duties to the client
  + Client must have time to retain and instruct new counsel so **timing is key\***
* To get off record, lawyer files a **notice of intention** to withdraw – other side has 7 days to object – if no objection then you file **notice to withdraw**
  + if they object, have to go to court
* When withdrawing need to **maintain privileged information**
* (2) – Order that lawyer has ceased to act
* (3) – Order on application of lawyer
* (4) – Notice of withdrawal
* (5) – Filing of objection
* (6) – Procedure if no objection filed
* (7) – Service of notice of withdrawal
* (8) – Service of documents after withdrawal
* (9) – Procedure if objection filed
* (10) – Substituted service
* (11) – Service of copy order
* ***Code of Professional Conduct – Withdrawal Chap 3.7***
  + 3.7-1 a lawyer must not withdraw from representation of a client except for **good cause and on reasonable notice**
  + **3.7- 2** If client refuses to accept **reasonable advice given on a significant point**, then you are entitled to talk about withdrawal
    - or if client is deceiving lawyer, persistently unreasonable or uncooperative in a material respect
  + (3) non-payment of fees
  + (4) withdrawal from criminal proceedings
  + (7) obligatory withdrawal – have to withdraw if client is telling you to act contrary to ethics, or you are not competent to continue to handle the matter
  + (8) manner of withdrawal – lawyer must do best to facilitate transfer to new lawyer
  + (9.1) confidentiality
* NON-COMPLIANCE – Rule 22-7
* Courts want actions to proceed, so very rarely will non-compliance nullify a proceeding
* Instead, will treat non-compliance as an **irregularity** that courts should rectify so long as it does not give rise to an injustice **(*international forest products)***
* Court will often use **costs** to address mistakes
* (1) Unless the court otherwise orders, failure to comply must be treated as an **irregularity** and does not nullify a proceeding, document, step taken etc
* (2) **powers of the court** – if rules are not complied with, court can
  + (a) set aside a proceeding, wholly or in part
  + (b) set aside any step taken, or a document or order made
  + (c) allow an amendment under 6-1
  + (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
  + (e) make any other order it considers will further the object of these rules
* (5) – Consequences of certain non-compliance
  + Without limiting any other power of the court under these Rules, if a person, contrary to these Rules and without lawful excuse,
    - (a) refuses or neglects to **obey a subpoena or to attend at a time and place** appointed for his or her examination for discovery,
    - (b) refuses to be **sworn** or to **answer any question** put to him or her,
    - (c) refuses or neglects to **produce or permit to be inspected any document** or other property,
    - (d) refuses or neglects to **answer interrogatories** or **to make discovery of documents,**
    - (e) refuses or neglects to attend for or submit to a **medical examination,**
  + then
    - (f) if the person is the **plaintiff**…the court may dismiss the proceedings, and
    - (g) if the person is a **defendant**…the court may order the proceeding to continue as if no response to civil claim or response to petition had been filed.
* (6) failure to comply with direction of court
* (7) dismissal for want of prosecution
* ***Nayyar (2012)***
  + P was refusing to answer questions on examination for discovery and then did not bring an application within 7 days of discovery for determination as to the questions with which P took issue. Also, P did not serve D with his trial brief before case management conference. Disobeyed several other orders
  + D applied under 22-7(5)(f) to have case dismissed
  + 2 step **TEST**:
    - 1. Has there been non-compliance?
    - 2. Has there been wilful disobedience of a court order or is there a lawful excuse?
      * Onus is on party who allegedly failed to comply to give **adequate explanation for non-compliance**
      * Striking a claim or defence is a blunt draconian tool to be used sparingly
  + Here, there was a **wanton disregard** for the court rules with no adequate attempt to present a lawful excuse or explanation
  + Proceedings dismissed, and P pay all of D’s costs as if the case was tried on its merits
* ***Cheal (2012)***
  + Non-compliance with particulars for case planning conference, court found non-compliance but said dismissal was too draconian
  + Still, admonished Mr. Cheal – said he should not take the ruling to mean he was excused from compliance
  + \*J**ust because a case is not dismissed, does not mean the non-compliance will go unnoticed and unpunished**
  + Other methods:
    - Contempt, costs etc

### WANT OF PROSECUTION

* + If a petitioner files a claim and then does nothing to pursue it, D can file an application seeking dismissal for want of prosecution
  + **Court wants to decide case on merits rather than a technicality so will rarely find in favour of D**
  + **TEST:** D must prove there has been:
    - 1. A long delay, AND
      * A few years is not enough
    - 2. Prejudice
      * Ex it has been 4 years and key witness died
    - Then burden switches to P to prove on BOP that there has NOT been prejudice or that justice demands the action continue
    - Ex delay was because P switched lawyers
  + **Factors** courts will consider for granting a dismissal (***country west construction)***
    - **(a)** length of delay and whether it was inordinate
    - **(b)** any reasons for the delay offered in evidence or inferred from the evidence including:
      * whether the delay was intention or tactical
      * whether it was product of negligence, illness or some other cause
      * ultimately, is it excusable in the circumstances?
    - (c) whether the delay has caused serious prejudice to the defendant in presenting a defence, and if so, whether it creates a substantial risk that a fair trial is not possible at the earliest date it could get back on track
    - (d) whether justice requires a dismissal
  + **Rule 22-4 (5**) – **Want of prosecution**
  + Despite this rule, a defendant or respondent may apply to have a proceeding dismissed for want of prosecution without service a notice of intention to proceed in Form 44.
  + (4) – **Notice of intention to proceed after delay of one year**
    - In a proceeding in which judgment has not been pronounced and no step has been taken for one year, a party must not proceed until
      * (a) the expiration of 28 days after service, on all parties of record, of notice in Form 44 of that party’s intention to proceed, and
      * (b) a copy of the notice of intention to proceed and proof of its service has been filed.
  + **Rule 22-7 – Effect of non-compliance**
  + **(7) dismissal for want of prosecution**
    - court can order proceeding dismissed if, on application, it appears there is want of prosecution in a proceeding

PRELIMINARY CONSIDERATIONS

* \*COSTS\*Costs drive the litigation – have implications for how you decide to proceed
* Have to think about the cost of the trial, ability to recover / pay
* **Generally, costs go to the successful party**
* But even if you win, you likely won’t recover all of your costs
  + You get an award of costs – that doesn’t mean that you will **recover** those costs from the other party
  + Also, costs are paid on a schedule, not fully based on what you *actually* spent
* Costs are broken into
* **(1) LEGAL FEES** – actual fees paid to lawyer
  + Not dollar for dollar – paid under a **schedule – APPENDIX B**
  + Usually get ~50% of costs
* **(2) DISBURSEMENTS** – other out of pocket costs: court fees, photocopying, filing etc
  + Only reimburse those disbursements that are reasonably and necessarily incurred
  + \***so this CAN be dollar for dollar recovery – full recovery**
* **TEST:** proportionality – court will consider:
  + Size of the claim
  + Complexity of the proceedings
  + Number and importance of issues
  + The financial circumstances of the party
* **SETTLEMENT** – always need to think about settlement
  + If you take less earlier you might avoid litigation, expenses, fees etc
* LIMITATION PERIODS
* Do any limitation periods apply to your claim?
  + Breach of contract – 6 years
  + Personal injury – 2 years
* Look at **date of event and when the client sought legal advice**
* Generally, the time period runs from **time of the event**
  + Ex day of **breach of contract**, not formation of the contract
* Can get around limitation periods when filing **counterclaim or file in a claim that is already going**
  + ..? not sure how
* Max is generally 30 years
* **\*\*If there is an issue / doubt – FILE NOW AND AMEND LATER\*\***
  + Then you will be inside the limitation period, and amendments are easy to get
* *Limitation Act*
* **S.3 limitation periods**
  + (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
    - (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
    - (b) for trespass to property not included in paragraph (a);
    - (c) for defamation;
    - (d) for false imprisonment;
    - (e) for malicious prosecution;
    - (f) for tort under the Privacy Act;
    - (g) under the Family Compensation Act
    - (h) for seduction;
    - (i) under section 27 of the Engineers and Geoscientists Act
  + (3) actions with **10 year limitation period** – trusts and trustees
  + (4) actions **with no limitation period**
  + (5) any actions **not specifically addressed in this Act or another** are subject to a **6 year limitation period**
* **S. 4** **Counterclaim or other claim or proceeding**
  + (1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
    - (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
    - (b) third party proceedings,
    - (c) claims by way of set off, or
    - (d) adding or substituting a new party or defendant
  + under any applicable law, with respect to any claims relating to or connecting with the subject matter of the original action
  + **\*this is how you can get around a limitation period!**
* **S. 5**  **Effect of confirming a cause of action**
  + (1) If, after time has begin to run with respect to a limitation period set by this Act, but before the expiration of the limitation period**, a person against whom an action lies confirms the cause of action**, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the time period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.
    - E.g. if borrow money and promise to pay back Jan 1 – don’t pay back = breach and clock starts running – if during the 6 years you email stating that you know you owe money and are going to pay it back, the limitation period starts as of the date of that confirmation
    - \*Can’t confirm after the expiration of the time period (i.e. after the 6 years for debt claim for breach of contract)]
* **S. 6** **Running of time postponed**
  + (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is **postponed** as provided in subsection (4):
    - (a) for personal injury;
    - (b) for damage to property;
    - (c) for professional negligence;
    - (d) based on fraud or deceit;
    - (e) in which material facts relating to the cause of action have been wilfully concealed;
    - (f) for relief from the consequences of a mistake;
    - (g) brought under the Family Compensation Act;
    - (h) for breach of trust not within subsection (1).
  + (4**) Time does not begin to run** against a plaintiff or claimant with respect to an action referred to in subsection (3) **until the identity of the defendant or respondent is known to the plaintiff or claimant** and those facts within the plaintiff’s or claimant’s means of knowledge are such that a **reasonable** **person**, knowing those facts and having taken the appropriate advice that a reasonable person would seek on those facts, would regard those facts as showing that
    - (a) an action on the cause of action would, apart form the effect of the expiration of a limitation period, have a reasonable prospect of success, and
    - (b) the person whose means of knowledge is in question ought, in the person’s own interests and taking the person’s circumstances into account, to be able to bring an action.
    - **Time does not start running until a reasonable person should have known that the act occurred\*\*\*\*\***
    - where there is an unknown cause of action (ex faulty construction that you don’t notice until 20 years later) your time starts when you notice
* **S.7 If a person is a minor or incapable**
  + (2) If, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period set by this Act is **postponed** so long as that person is under a disability
    - If a permanent disability, would appoint a guardian ad idem to bring the case
    - If under 19, time does not start running until person turns 19
* **s.8 Ultimate Limitation Period**
* **\*\*\*THIS SECTION IS INCOMPLETE – ASK SOMEONE**
* FORM
* 3 forms for commencing a proceeding:
* 1. **Notice of Civil Claim** – this is the **default\***
  + All pre-trial tools available
  + Generally leads to a **trial** unless the matter settles
* **2. Petition – Rule 16-1**
  + A way to bring an issue before the court for a **full determination on the merits** without having a full trial 🡪 heard in chambers, based on affidavits and written arguments
  + Often used when facts are not in issue and there are no credibility concerns
    - If those concerns arise, you will want to **convert a petition to a trial**
      * Ex if kids are arguing over *validity of parents will*
      * Will need witnesses showing competency etc
  + No ongoing case, but **issues** you need the court to make findings on
  + Usually seeking relief in terms of orders based on court discretion or authorized by statute
    - NOT usually seeking damages
  + Quick process – serve respondents and *if they don’t respond* can set a date 21 days later and get an order
  + **TEST:** is petition format suitable to determine all issues?
    - Whether there is a dispute over the facts which make it more suitable for full trial
    - If full discovery necessary – cannot use petition because in petition judge makes a decision only based on affidavit evidence
    - Not suitable when there are **credibility** concerns because its based on affidavit evidence
      * If one isolated concern, can agree to let other side cross that one person, but the rest will be done by written argument
    - Not suitable if seeking damages
  + If found not suitable for petition, can be **converted** to an action
  + ***Douglas lake Cattle*** BCCA 1991 - In exercising his or her discretion as to whether to make a final determination in a proceeding brought by petition or to refer the matter to the trial list, the chambers judge should ask whether there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried
  + When petitions are used - E.g. *Petition for Sale Act* – if have a dispute between two joint owners over a property, any party can file a petition – the court must sever the joint tenancy and order the sale unless it would be inequitable
  + 16-1(1) – Definitions
  + (2) – Petitions
  + *A person whishing to bring a proceeding referred to in Rule 2-1(2) by filing a petition must file a petition in Form 66 and each affidavit in support.*
  + (3) – Service
  + *Unless these Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interest may be affected by the order sought*.
  + (4) – Response to petition 🡪 21 days in Canada, 35 if in US, 49 if anywhere else
  + (5) – Contents of a response to petition
  + *A response to petition must be in Form 67 and must*
    - *(a) indicate, for each order sought, whether the petition respondent consents to, opposes or takes no position on the order, and*
    - *(b) if the petition respondent wishes to oppose any of the relief sought in the petition,*
      * *(i) briefly summarize the factual and legal bases on which the orders sought should not be granted,*
      * *(ii) list the affidavits and other documents on which the petition respondent intends to rely at the hearing of the petition, and*
      * *(iii) set out the petition respondent’s estimate of the time the petition will take for hearing.*
  + (6) – Petitioner may respond
  + (7) – No additional affidavits
  + *Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).*
  + (8) – Setting application for hearing
  + (9) – Date and time of hearing
  + (10) – Date and time if hearing time more than 2 hours
  + (11) – Petition record
  + *Subject to subrule (13), the petitioner must provide to the registry where the hearing is taking place, no later than 4 p.m. on the day that is one full day before the sate set for the hearing, a petition record as follows:*
    - *(a) the petition record must be in a ring binder or in some other form of secure binding;*
    - *(b) the petition record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:*
      * *(i) a title page bearing the style of proceeding and the names of the lawyers, if any, for the petitioner and the petitioner respondents;*
      * *(ii) an index;*
      * *(iii) a copy of the filed petition;*
      * *(iv) a copy of each filed response to petition;*
      * *(v) a copy of each filed affidavit that is to be referred to at the hearing;*
    - *(c) the petition record may contain*
      * *(i) a draft of the proposed order,*
      * *(ii) a written argument,*
      * *(iii) a list of authorities, and*
      * *(iv) a draft bill of costs;*
    - *(d) the petition record must not contain*
      * *(i) affidavits of service*
      * *( ii) copies of authorities, including case law, legislation, legal articles or excerpts from text books, or*
      * *(iii) any other documents unless they are included with the consent of all the parties.*
  + (12) – Service of petition record
  + (13) – If petition respondent’s application is to be heard at the hearing
  + (14) – Petition record to be returned
  + (15) – Petition record to be returned to registry
  + (16) – Provision of amended petition record
  + (16.1) – Resetting adjourned hearings
  + (17) – Petition respondent may apply for directions
  + (18) – Powers of court
  + (19) – Amendment of petition or response to petition
  + (20) – Renewal of original petition
  + (21) – Further renewal of petition
  + (22) – When renewal period beings
  + (23) – After renewal of notice of civil claim
* **3. Requisition – Rule 17-1**
  + A doc you file asking court to do something that is straightforward and doesn’t involve contested facts or law
  + You will not be using tools under the Rules
  + (1) – Proceedings to which this rule applies
    - *A proceeding referred to in Rule 2-1(2) may be brought under this rule if*
    - *(a) all persons affected by the orders sought within the proceeding consent, or*
    - *(b) the proceeding is one of which notice need not be given.*
  + (2) – Filings required
  + (3) – If proceeding is by **consent**
  + (4) – If no notice is required
  + (5) – Disposition of referred documents
* Petitions and NOCC are both proceedings, but only NOCC is an **action**
* **4. Class Actions**
  + Governed by *Class Proceeding Act* p.1027
  + Set out facts and law as you would in NOCC
  + Used when there are **many litigants having the same concerns/damages/issues/facts**
    - Ex mass torts
  + Claim is based on a **representative plaintiff(s)** and then other Ps are grouped into classes based on their facts, extent of damages etc
    - Get damages based on their class
  + Courts want representative P to be a strong case
  + Need to **notify public** so potential plaintiffs can get their name on the list
  + Losses are calculated on the **aggregate** – totality of losses rather than loss of individual P
  + The facts/damages/losses do not have to be identical
    - Ex defective seatbelt – can lead to different injuries
  + **Defendants DON’T WANT a class action**\*\*
    - They want each P to have to get their own lawyer – the cost and time will be a deterrent
    - D will always be trying to use facts to show Ps are not an identifiable class
    - **Causation** is often a factor
  + Need to obtain **class certification**
    - D will try to kill it by showing differences between plaintiffs to the point where they cannot constitute an **identifiable class**
  + Rarely used in BC
  + **Steps**
    - 1. Representative Plaintiff applies for class certification
      * This is when you get all the people, establish damage, who is in what class etc
    - 2. Proceed on behalf of everyone
  + **Rule 20-3 Representative Proceedings**
    - (1) if numerous persons have the same interest in a proceeding...the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them
  + ***Hayes v BC Television Broadcasting*** BCCA 1990
    - TEST for appropriateness of representative action
      * (a) the class is capable of **clear and finite definition**
      * (b) the principal issues of fact and law are essentially the same with regard to all members, and
      * (c) there is a single measure of damages applicable to all members
      * With respect to (b), the question is, if P wins do the other persons he purports to represent win too?
  + ***Class Proceeding Act***
  + Part 1 – Definitions
  + Part 2 – Certification
    - Representative plaintiff must be a resident of BC who brings the action on their own but will plead the *Class Proceeding Act* in their notice of civil claim
    - Must apply to the court to certify the proceeding as a class proceeding
      * Mostly about certifying the classes (or sub-classes) of people
    - **S.4 Class Certification:**
    - **TEST 4 (1)** The court **must** certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
      * (a) the pleadings **disclose a cause of action;**
      * (b) there is an **identifiable class of 2 or more** persons;
      * (c) the claims of the class members raise **common issues**, whether or not those common issues predominate over issues affecting only individual members;
      * (d) the claims proceeding would be the **preferable procedure for the fair and efficient resolution** of the common issues;
      * (e) there is a **representative plaintiff** who
        + (i) would fairly and adequately represent the interest of the class,
        + (ii) has **produced a plan** for the proceeding on behalf of the class and of **notifying class members** of the proceeding, and
        + (iii) does not have, on the common issues, an interest that is in conflict with the interest of other class members.
    - **TEST (2)** In **determining whether a class proceeding would be the preferable procedure** for the fair and efficient resolution of the common issues, the court must consider all the relevant matters including the following:
      * (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
      * (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
      * (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
      * (d) whether other means of resolving the claims are less practical or less efficient;
      * (e) whether the administration of the class would create greater difficulties than those likely to be experienced if relief were sought by other means.
  + **Part 3 – Conduct of Class Proceedings**
  + (11) Stages of class proceedings
  + **(16)** **Opting out and opting in**
    - (1) class member may opt out in time specified in certification order
    - (2) a **non-resident** may **opt in** to a BC class action if the person ***would be****, but for not being a BC resident, a member of the class*
    - (4) can only opt in under (2) if the subclass they want to belong to has a satisfactory **rep P**
  + BC law 🡪 all BC residents in and non-residents can opt in
  + In Ontario 🡪 every Canadian who is potentially affected is automatically in the claim
  + **Part 4** – Orders, Awards and Related Procedures
  + **Part 5** – Costs, Fees and Disbursements
* **Rule 2-1 – Choosing the CORRECT form of proceeding**
* (1) Unless otherwise provided, every proceeding **must be started by NOCC**
* (2) In following circumstances – use a **petition or, if rule 17-1 applies, a requisition**
  + person starting proceeding is the only person who is interested in relief claimed, or there is no person against whom relief is sought
  + proceeding is brought in respect of an application that is authorized by the enactment to be made to the court
  + sole question is alleged to be one of construction of an enactment, will, deed, contract
  + question arising from the administration of an estate
  + question arises from guardianship
  + relief for payment of funds
  + relief relates to land and is simple
  + determination of solicitor/client privilege
* JURISDICTION
* Is BC the proper place for your claim?
* ***Court Jurisdiction and Proceedings Transfer Act***
* 2 parts:
  + 1. **Jurisdiction Simpliciter** - do you have basic jurisdiction?
  + 2. ***Forum non conveniens*** – even if correct jurisdiction, court can still throw out case if its not the most appropriate forum
* Process:
* **S. 3 Territorial Competence** – can we take this case on basic jurisdiction?
  + A court has territorial competence in a proceeding that is brought against a person only if
    - (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
    - (b) during the court of the proceeding that person submits to the court’s jurisdiction,
    - (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding, or
    - (e) there is real and substantial connection between British Columbia and the facts on which the proceeding against that person is based
* **S. 10 Real and Substantial Connection**  - can we take this case?
  + Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, **a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding**
    - (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
    - (b) concerns the administration of the estate of a deceased person in relation to
      * (i) immovable property in British Columbia of the deceased person, or
      * (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,
    - (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
      * (i) property in British Columbia that is immovable or movable property, or
      * (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,
    - (d) is brought against a trustee in relation to carrying out a trust in any of the following circumstances:
      * (i) the trust assets include property in BC that is immovable or movable property and the relief claims is only as to that property;
      * (ii) that trustee is ordinarily resident in BC;
      * (iii) the administration of the trust is principally carried on in BC;
      * (iv) by the express terms of a trust document, the trust is governed by the law of BC,
    - (e) concerns contractual obligations, and
      * (i) the contractual obligations, to a substantial extent, were to be performed in BC,
      * (ii) by its express terms, the contract is governed by the law of BC, or
      * (iii) the contract
        + (A) is for the purchase of property, services or both, for use other than in the course of the purchaser’s trade or profession, and
        + (B) resulted from a solicitation of business in BC by or on behalf of the seller,
    - (f) concerns restitutionary obligations that, to a substantial extent, arose in BC
    - (g) concerns a tort committed in BC,
    - (h) concerns a business carried on in BC,
    - (i) is a claim for an injunction ordering a party to do or refrain from doing anything
      * (i) in BC, or
      * (ii) in relation to property in BC that is immovable or movable property,
    - (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in BC,
    - (k) is for enforcement of a judgment of a court made in or outside BC or an arbitral award made in or outside BC, or
    - (l) is for the recovery of taxes or other indebtedness and is brought by the government of BC or by a local authority in BC.
* **S. 11 Discretion as to the exercise of territorial competence**
  + are any **discretionary reasons** why court should not take the case?
  + (1) after considering interests of parties and ends of justice, a court can decline if another place is more appropriate forum
  + (2) considerations:
    - (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
    - (b) the law to be applied to issues in the proceeding,
    - (c) the desirability of avoiding multiplicity of legal proceedings,
    - (d) the desirability of avoiding conflicting decisions in different courts,
    - (e) the enforcement of an eventual judgment, and
    - (f) the fair and efficient working of the Canadian legal system as a whole.

DEFINING AN ACTION

* Pleadings – Rule 3-7
* Need to set up the proper skeleton / format for your claim
* Defined in interpretation section
* **Pleadings:** 
  + 1. Notice of Civil Claim
  + 2. Response to Civil Claim
  + 3. Third Party Notice
  + 4. Response to third party notice
* **Pleadings serve 4 main functions**
  + 1. Clearly and precisely define question/issue in dispute
    - Why are you here?
    - Response – why are they wrong / why is it a non-issue?
  + 2. Give each side fair notice of the case it has to meet so it can prepare evidence for trial
  + 3. Inform the court of the events / issues in the action
  + 4. Permanent record of the dispute – issues and facts
* You only plead **material facts**
  + ***Jones v. Donaghey*** (BCCA 2011) – material fact is the **ultimate fact**, sometimes called the ultimate issue, **to the proof of which evidence is directed**. It is the fact put in issue by the pleadings
  + Facts that prove the facts at issue, or prove another fact that tends to prove the fact in issue, are **evidentially irrelevant facts**
  + \*know the difference between a material and irrelevant fact
* ***Rhodes v. All Pro*** 2012 BCSC -
* 3-7(1) - Pleadings do NOT contain **evidence** of how you are going to prove the facts
  + Ex say “A was speeding”, not “because the skid mark was 60 feet A was speeding”
* **Particulars ss(18) – (24)**
  + Where extra detail is required in order to respond to a pleading
  + Sometimes rules mandate that you must give particulars
  + Or other side can demand, then apply when they feel particulars are needed to properly respond
* **Rule 3-7**
  + (1) – Pleadings must not contain evidence
    - *A pleading must not contain evidence by which the facts alleged in it are to be proved.*
  + (2) – Documents and conversations
    - *The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or conversations must not be stated, except insofar as those words are themselves material.*
    - [Paraphrase – only quote if exact wording is important]
  + (3) – When presumed facts need not be pleaded
    - *A party need not plead a fact if*
    - *(a) the fact is presumed by law to be true, or*
    - *(b) the burden of disproving the fact likes on the other party.*
  + (4) – When performance of a condition precedent need not be pleaded
  + (5) – Matters arising since start of proceeding
    - *A party may plead a matter that has arisen since the stat of the proceeding*
  + (6) party must not plead an allegation of fact or new ground or claim inconsistent with **previous pleading**
  + (7) but (6) does not mean party cannot make **arguments in the alternative** or to **amend** or to **apply for leave to amend a pleading**
  + (8) – Objection in point of law
  + (9) – Pleading conclusions of law
  + (10) – Status admitted
  + (11) – Set-off or counterclaim
  + (12) – Pleading after the notice of civil claim
  + (13) – General relief
    - *A pleading need not ask for general or other relief.*
  + (14) – General damages must not be pleaded
    - *If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.*
  + (15) – Substance to be answered
    - *If a party to a pleading denies an allegation of fact in the previous pleading of the opposite party, they party must not do so evasively but must answer the point of substance.*
  + (16) – Denial of contract
    - *If a contract, promise or agreement is alleged in a pleading, a bare denial of it by the opposite party is to be construed only as a denial of fact of the express contract, promise or agreement alleged, or of the matters of fact from which it may be implied by law, and not as a denial of the legality or sufficiency in law of that contract, promise or agreement.*
  + (17) – Allegation of Malice
  + (18-24) – When particulars necessary etc.
* NOTICE OF CIVIL CLAIM – Rule 3-1
* (1) – Notice of Civil Claim
  + *To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.*
* (2) – Contents of notice of civil claim
  + *A notice of civil claim must do the following:*
    - *(a) set out a concise statement of the* ***material facts*** *giving rise to the claim;*
    - *(b) set out the* ***relief sought*** *by the plaintiff against each named defendant;*
    - *(c) set out a concise summary of the* ***legal basis*** *for the relief sought;*
    - *(d) set out the* ***proposed place of trial****;*
    - *(e) if the plaintiff sues or a defendant is sued in a* ***representative capacity****, show in what capacity the plaintiff sues or the defendant is sued;*
    - *(f) provide the* ***data collection information*** *required in the appendix to the form;*
    - *(g) otherwise* ***comply with Rule 3-7****.*
* Key elements:
  + **1. Identify the parties**
  + **2. Status of the parties**
    - corporations, individuals etc
  + **3. Establish jurisdiction of the court**
    - May be as simple as address or provided for in the contract
  + **4. What, where, when and how things happened**
  + **5. Legal basis**
    - Why is this before the court
  + **6. Relief sought** - what are you asking for
* **Form:**
  + **1. Statement of Facts**
    - “**Style of cause”**
    - Set up the parties, how they came to the relationship, why they are in front of court
    - Only include facts you want to **prove** in your case
    - Sets up jurisdiction
    - Don’t be more specific than you need to be – ex say “injuries” not specific injury
    - Certain **boilerplate** terms that come after SOC to make it a valid document
      * On EXAM just write “boiler plate”
  + **2. Relief Sought** – declaration, damages, injunction
    - For each relief sought, there should be a material fact pled as a legal basis
    - State relief sought against each named D
  + **3. Legal Basis**
    - ***Why*** should the court do what you request
    - Is there a statute violated?
    - Cause of action should be clear under this section, and should give court ability to do what you ask
      * Ex if a **legal test** to be met 🡪 set out the test and why this case meets it
    - If the law is **unsettled**, plead it the way you want it to be, then go to court and explain but make sure that it creates a cause of action
    - Clearly identify questions of dispute between the parties which are to be determined by the court
      * Gives fair notice to D about the case to meet
      * Sets **limits** on what the court will hear
      * Provides a permanent record of the issue
  + Think about facts and how you will **prove them**
    - If you don’t know how you will prove a fact in court, it shouldn’t be in there
    - If you later have proof, you can amend the pleadings
  + What is the **least** you need to prove to establish your cause of action
    - Ex say D was driving in excess of speed limit, rather than exact speed
  + Don’t plead underlying facts that are not in issue
* RENEWAL OF NOTICE – Rule 3-2
* NOCC is only valid for **one year (3-2(1))**
  + When you commence an action by NOCC, the next step is to serve notice of the defendant
    - You have 12 months to do so
  + Parties may want to file to **preserve their rights** (ex make sure you beat the limitation period) but not serve right away because you are in discussions with the other party
* If you don’t serve within **1 year** it will expire unless you get an **extension**
  + Apply for extension before 12 months, ***especially if there is a limitation period issue***
  + If there is no limitation period, can just start a new action
  + **3-2(1)** court can order renewal of 12 months if P applies ***before or after*** original expires
  + **3-2(2)** court can order **further** 12 months if P applies **within** 12 month renewal period
  + **3-2(3)** unless otherwise ordered, renewal period begins on day of order
  + **3-2(4) service** – a copy of each order granting renewal must be served *with* the renewed notice of claim
* If delay is the fault of the lawyer, the court will likely extend
* ***Sutherland v. Macleod*** BCCA 2004 – this rule is concerned with the rights of parties, not conduct of lawyers
  + Overarching objective is to see that justice is done
* ***Imperial Oil v. Michelin*** BCCA 2008 – factors to consider in renewal/extension
  + 1. Whether the application to renew was made promptly
  + 2. Whether D had notice of the claim *before*  the writ expired
  + 3. Whether D was prejudiced
    - ex is D unable to collect evidence/witnesses because P waited so long
  + 4. Whether the failure to effect service was attributable to D
  + 5. Whether P, as opposed to his solicitor, was at fault
  + In determining whether P acted promptly, the relevant time is the time elapsed from the date P learned the writ had not been served to the date of application
    - Where D has notice of the action within the time prescribed by the ruls for service, only a compelling case of prejudice should defeat its renewal unless P’s conduct in causing the delay is **egregious**
* SERVICE – Part 4 Rules
* Once NOCC is filed and registered, need to **serve it on other party!**
* **Personal Service** – someone delivers the document to the person or company
  + Certain documents MUST be served personally –ex NOCC
  + Can hire a process server
  + **This is the DEFAULT**
* Lawyers can agree on a certain type of service – ex say service to law office is OK
* **Substitutional Service –** used when you have D evading service or who cannot be found
  + **Evasion** – if you have evidence of their address, may be able to get an order that says posting to the door is enough
  + **Impracticable –** if D is in a coma or in jail
* **Service *ex juris*** – defendant outside jurisdiction
* **4-1 Address for service**
  + 4-1(1)(a) and (b) Party must have lawyer’s office as address, or their own if they are not represented
  + this is usually in **pleadings**
* **4-2 Ordinary Service** – by delivery
  + (1) docs normally served by ordinary notice unless otherwise ordered
  + (2) – **How** to serve documents by ordinary service
  + *Unless the court otherwise orders, ordinary service of a document is to be effected in any of the following ways on a person who has provided an address for service in a proceeding:*
    - *(a) by leaving the document at the person’s address for service;*
    - *(b) by mailing the document by ordinary mail to the person’s address for service;*
    - *(c) subject to subrule (5) of this rule, if a fax number is provided as one of the person’s addresses for service, by faxing the document to that fax number together with a fax cover sheet;*
    - *(d)* ***if an email address is provided*** *as one of the person’s addresses for service, by emailing the document to that email address.*
  + (3) – service by **delivery** is deemed to be completed on day of service if left before 4pm on a day that is not a Saturday or holiday
  + (4) – service by **mail** is deemed to be completed – same day one week later
  + (5) – When documents may be served by fax – if 30 pages or long, must be served btwn 5pm & 8am unless parties agree
  + (6) – When service by fax or email is deemed to be completed – day of service if before 4pm on a day that is not a Saturday or holiday
  + (7) – If no address for service given
* **4-3 Personal Service**
* **(1)** – When documents MUST be served by personal service
* Unless the court otherwise orders or these Rules otherwise provide, the following documents must be served by personal service in accordance with subrule (2):
  + (a) a **notice of civil claim**;
  + (b) a **petition**;
  + (c) a **counterclaim** if that counterclaim is being served on a person who **is not a party of record;**
  + (d) a **third party notice** if that their party notice is being served on a person who is **not a party of record;**
  + (e) a subpoena to a witness who is not a party of record;
  + (f) a subpoena to a debtor under Rule 13-3;
  + (g) a citation referred to in Rule 21-5;
  + (h) a notice of intention to withdraw under Rule 22-6 if that notice is being served on the person who was being represented by the lawyer who filed the notice;
  + (i) any notice of application under Rule 22-8 for an order for contempt;
  + (j) any document not mentioned in paragraphs (a) to (i) of this subrule that is to be served on a person who is not a party of record to the proceeding or who has not provided an address for service in the proceeding under Rule 8-1(11);
  + (k) any other document that under these Rules is to be served by personal service.
* **(2)** – **How** to serve documents by personal service
  + Unless the court otherwise orders, personal service of a document is to be effected as follows:
  + **(a) on an individual, by leaving a document with him or her;**
  + (b) on a **corporation**,
    - (i) by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation,
    - (ii) by leaving a copy of the document with the city clerk or municipal clerk,
    - (iii) by leaving a copy of the document with the manager, cashier, superintendent, treasurer, secretary, clerk or agent of the corporation or any branch of agency of the corporation in BC, or
    - (iv) in the manner provided by the Business Corporations Act *…*
  + (e) on an **infant**
* **4-4 Alternative Methods of Service**
  + (1) if it is **impracticable** to serve a document by personal service or if the person to be served by personal service
    - (a) cannot be found after a diligent search, or
    - (b) is evading service of the documents, the court may, on application without notice, make an order for substituted service granting permission to use an alternative method of service.
  + **(2)** if alternative service method is permitted
  + **(3)** service by advertisement
* **4-5** – Service Outside British Columbia
  + (1) – Service outside British Columbia without leave
  + *An originating pleading, petition or other document may be served on a person outside BC without leave in any of the circumstances enumerated in section 10 of the Court Jurisdiction and Proceedings Transfer Act.*
  + **(3)** any case not provided for in (1) – need to obtain **leave of the court**
* **4-6 Proving Service**
  + (1) – Proof of service
    - By filing an affidavit of personal service in Form 15 or ordinary service in Form 16, or by the person filing a response
  + (2) – Proof of service by sheriff
  + (3) – Service on a member of Canadian Armed Forces
  + (4) – Admissibility of other evidence of service
* **4-7 Relief** – if service is alleged to be **ineffective**
  + If a document has been served in accordance with this Part but a person can show that the document
    - (a) did not come to his or her notice,
    - (b) came to his or her notice later than when it was served, or
    - (c) was incomplete or illegible, the court may set aside an order, extended time, order an adjournment or make such other order as it considers will further the object of these Rules.

RESPONDING TO AN ACTION

* RESPONSE TO NOCC AND COUNTERCLAIMS D has two options – respond to civil claim, and counterclaims
* **Response** – statement of defence
* **Counterclaim** – when D is making own claim against P and potentially others
  + Counterclaim does NOT need to be **connected** to NOCC
  + Rationale is to avoid multiplicity of proceedings involving same people
* Set-off = as defendant, can claim right to set-off some claim what would allow you to reduce the amount of the plaintiff’s claim
  + Pled in response to civil claim **and must be connected** to the claim of the plaintiff
  + If it is not connected to the plaintiff’s claim, must start counterclaim
* Difference between set-off and counterclaim:
  + Counterclaim always has capacity to be its own independent claim – it does not need a connection to the original claim
  + Set-off always has a *direct* connection to the facts of the original claim
* **Rule 3-3** **RESPONDING to a NOCC**
* **3-3(3)** After service of NOCC, D has **21 days to respond**
  + Includes any new facts important to adjudicating the claim and a response to the claim
* **Admissions** - most people will “over deny”
  + Deny everything *except* uncontroversial matters
  + Because any admissions can be used at trial
* **3-3(8)** any facts in NOCC that are NOT admitted, denied or stated to be outside the knowledge of the D, are **deemed to be outside D’s knowledge**
* The response **frames your case**
* If you do not raise the issue in your response, you usually cannot raise it at trial
  + Because its unfair to the other side, they need to know
* **Parts**:
  + 1. Response to civil claim facts
    - Which are you admitting /denying
      * Be careful about what you admit – once you admit something it’s hard to go back
      * If you deny facts you don’t need to deny so the plaintiff has to prove things they shouldn’t (e.g. address, date of accident), the court may award extra costs against you if you are making things difficult
      * When you deny, you have to give your denied version of those facts (3-3(2)(a)(ii))
    - Any facts you have no knowledge of
    - May be additional facts you want to put forward (3-3(2)(a)(iii))
  + 2. Response to relief
  + 3. Response to legal basis
* **Rule 3-3 (1)** to respond to NOCC, D must file a response and serve it on P
* **(2)** – **Contents** of response to civil claim
  + A response to civil claim under subrule (1)
    - (a) must
      * (i) indicate, for each fact set out in Part 1 of the notice of civil claim, whether the fact is
        + (A) **admitted**,
        + (B) **denied**, or
        + (C) **outside** the knowledge of the defendant,
      * (ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant’s version of that fact, and
      * (iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim,
    - (b) must indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,
    - (c) must, if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, and
    - (d) must otherwise comply with Rule 3-7.
* Rule 3-4 COUNTERCLAIM
  + (1) must file counterclaim within the time set out for filing of a response
  + (2) if counterclaim raises questions about *someone other than P*, D can join them as a party in the counterclaim
  + (3) P will still be called P, D will still be D, and any other person joined will be called **“defendant by way of counterclaim”**
  + (4)(a)must serve it within time set out for filing and service of response
    - (b)(i) and (ii) if adding another person, must serve them a copy of the filed CC and a copy of the filed NOCC within 60 days
  + (5) – Response to counterclaim
  + (6) – Application of rules
  + (7) – if P’s claim is stayed or dismissed, **D’s counterclaim can still proceed**
  + (7.1) – apply for **severance** if it appears CC ought to be dealt with separately from NOCC
  + (8) – Judgment
* DEFAULT JUDGEMENT – Rule 3-8
* When one side does not provide a **response**
  + D doesn’t file response to NOCC
  + P doesn’t file a response to CC
  + If fail to reply to 3rd party notice
* If you fail to respond, the other side can take **default judgement** against you once 21 days expires
* But lawyers have a **professional responsibility** – ***Code of PC* – CH 7 – *responsibility to other lawyers***
* **7.2-2** A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client’s rights
  + If you are planning on taking default judgement you have to **notify the other side!**
  + Tell them you are relying on the 21 day period
* Results of the default judgement is based on the NOCC – so make sure it is accurate
  + If relief requested in NOCC is a **fixed amount** that is what you get **(3-8(3))**
  + If it is not ascertainable/fixed/specified, it must be assessed **(3-8(5))**
* This is commonly used against unrepresented people who are being difficult
* **(1)** P may proceed against D if (a) D has not filed and served a response, and (b) the period for filing and serving has expired
* **(2)** in order to proceed, P must show:
  + (a) proof of **service** of NOCC on that D
  + (b) proof that D has **failed** to serve a response
  + (c) a requisition endorsed by **registrar** with a notation that no response to CC has been filed by D, and
  + (d) a draft default judgement in form 8
* (3) – Claim for specified or ascertainable amount
* (4) – Interest
* (5) – Claim for damages to be assessed
* (6) – Claim for detention of goods
* (7) – Repealed
* (8) – Application to judge or master
* (9) – Judgment in other actions
* (10) – Application for judgment
* (11) – Court may set aside or vary default judgment
* (12) – Method of assessment
* (13) – Alternative methods of assessment
* PARTIES

### CHANGE OF PARTIES – Rule 6-2

* + Can add, remove, or substitute parties by agreement or by application to the court
  + ANY party can apply to have someone added or removed **(7)** but may only add a plaintiff with their **consent** **(10)**
  + (1) if party dies or becomes bankrupt, or corporate party is wound up 🡪 the proceeding may still continue
  + (2) effect of death
  + (7) – Adding, removing or substituting parties by order
    - At any stage of the proceeding, the court, on application by any person, may subject to subrules (9) and (10),
      * (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
      * (b) order that a person be added or substituted as a party if
        + (i) that person ought to have been joined as a party, or
        + (ii) that person’s participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
      * (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
        + (i) any relief claims in the proceeding, or
        + (ii) the subject matter of the proceeding
      * that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.
  + **(8)** procedure if party added, **(11)** effect of order

### PARTNERSHIPS – Rule 20-1

* + (1) partners may sue or be sued in the firm name 🡪 if they were partners at the time the alleged right or liability arose
  + (2) service is effected by leaving the doc with (a) a person who was a partner at the time the right arose, or (b) leaving it with someone at the firm who appears to manage the partnership business
  + (3) a response by a partnership **must be in the name of the firm**, but a partner or a person served as a partner may file a response and defend in the person’s **own name, whether or not names in the original pleading or petition**

### PERSONS UNDER DISABILITY – Rule 20-2

* + This provision deals with mentally incompetent and minors
  + (2) proceedings must be brought by ***litigation guardian***
  + (3) anything required to be done by or invoked against a party under disability must (a) be done by LG on party’s behalf, or (b) be invoked against them through LG
  + (4) unless LG is the Public Guardian and trustee, they must act through a **lawyer**
  + (10) if a party **becomes mentally incompetent** court will appoint LG
  + (12) if a party attains legal age of majority and is therefore no longer under a disability they (a) file an affidavit confirming this, and (b) serve it on all parties
  + (13) that filed affidavit under (12) means (a) party assumes conduct of their claim or defence and (b) style of proceeding must no longer refer to a LG
  + (17) no settlement or compromise of the claim is binding without **court approval**
* MULTIPLE CLAIMS AND PARTIES – Rule 22-5
* Able to combines cases if suing 2 or more people for the same thing
  + **Policy:** court wants to avoid multiplicity of proceedings
* **Joint liability** – parties committed the act together so you can’t split proceedings
* **Several liability** – can go after one D, and that D has to then recover against other Ds
* The court must apportion liability between defendants
* **(1) Multiple Claims**
  + subject to (6), a person may join several claims in the same proceeding
* **(2) Multiple Parties**
  + Subject to subrule (6), a proceeding may be started by or against 2 or more persons in any of the following circumstances:
    - (a) if separate proceedings were brought by or against each of those persons, **a common question of law or fact** would arise in all the proceedings;
    - (b) a right to relief claimed in the proceedings, whether it is joint, several or alternative, is in respect of or **arises out of the same transaction or series of transactions**;
    - (c) the court grants **leave** to do so.
* **(3)** if someone else is entitled to the relief P is claiming, P MUST join them as parties to the proceeding, and if they don’t consent to be plaintiff/petitioner, must be joined as **defendant / respondent**
* (4) – If persons are jointly liable
* (5) – Party need not be interested in all relief
* (6) – Separation - If a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it considers will further the object of these Rules.
* ***Shah v. bakken*** BCSC 1996 – **factors** to consider in discretion under this rule
  + Whether there is a common question of law or fact so that it is desirable to dispose of both at the same time
  + Avoidance of multiplicity of proceedings
  + Saving of time and expense
  + Inconvenience to the parties
  + Whether one action is at a more advanced state
  + Whether an order results in delay of trial and so to prejudice one party
* ***Merritt v. Imasco Enterprises*** BCSC 1992 – 2 questions to consider for applications
  + ***1.*** Do common claims, disputes and relationships exist between the parties?
    - This is disclosed by pleadings
  + 2. Are they so interwoven as to make separate trials **undesirable and fraught with economic expenses?**
    - Determined by reference to the pleadings and matters outside the pleadings including savings in pre-trial procedure, reduction in trial days, inconvenience to parties, and savings in witness time and fees
* REPLY – Rule 3-6
* Plaintiff ONLY replies to D’s response if it brings up something **NEW** that warrants a reply
* (1) P may, within **7 days after response to NOCC has been served,** file and serve on all parties a **reply**
* ***Certus v ICBC*** – pleadings subsequent to the response are discouraged except a reply that necessarily and relevantly confronts the defence
* THIRD PARTY PROCEEDINGS – Rule 3-5
* If D thinks someone else should be involved in proceedings, they can file a 3rd party notice
* Used when you are claiming against someone for **contribution or indemnification**
  + 1. **Contributing** to what D has to pay (share of the damages)
  + 2. **Indemnifying** the D from what he has to pay (pay all damages)
* Sets out claims against 3rd party and why they should be involved
  + Ex material facts that justify indemnification like an insurance agreement
* Only comes into play, outside of costs, if **plaintiff is successful**
  + If claim fails, 3rd party notice falls away
* If you are served with a 3rd party notice, you are entitled to file a response
* (1) **– Making a third party claim**
  + A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
  + (a) the party is *entitled to contribution or indemnity* from the person in relation to any relief that is being sought against the party in the action,
  + (b) the party is entitled to relief against the person and that *relief relates to or is connected with the subject matter of the action,* or
  + (c) a question or issue between the party and the person
    - (i) is substantially the same as a question or issue that relates to or is connected with
      * (A) relief claimed in the action, or
      * (B) the subject matter of the action, and
    - (ii) should properly be determined in the action.
* (1.1) P is allowed to make a third party claim if they are a defendant to a counterclaim
* (2) 3rd party does not have to already be a party to the original action
* (4) **leave** – can always file (a) with leave of court, (b) **42 days** after receiving NOCC or CC
* (7) 3rd party notice must be served on them **within 60 days** of filing
* (9) if 3rd party wants to dispute, they must (a) file a response to the 3rd party notice, and (b) serve a copy of the filed response on all parties of record
* (10) when response to 3rd party notice NOT required
* PARTICULARS – Rule 3-7(18-24)
* If claims is not specific enough, D can **demand particulars** needed to make a full response
* What is the nature of the case D has to meet
  + Ex does D have to call a witness to say they weren’t speeding
* Particulars are not evidence, they are information that allows D to know the case to meet
* Claim for particulars should be made **early**
  + Can make a general response, then demand particulars
  + If you do it closer to trial, when disclosure etc has already started, court will likely not order it
* (18) particulars are **necessary** when - party pleading relies on **misinterpretation, fraud, breach of trust, wilful default or undue influence**, or if particulars may be necessary, full particulars with dates and items if applicable, must be stated in the pleading.
* (19) – If the particulars required are **lengthy**, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in separate document before or with the pleading.
* (20) – Particulars need only be pleaded to the *extent that they are known at the date of pleading*, but **further particulars**
  + - (a) may be served after they become known, and
    - (b) must be served within 10 days after the demand is made in writing*.*
* (21) – Particulars in libel or slander
* (22) –The court may **order** party to serve further and better particulars of a matter stated in a pleading
* (23) – *Before* applying to the court of particulars, a party must **demand them in writing** from the other party.
* (24) demand for particulars **does not operate as a stay of proceedings or give an extension of time**, but a party *may apply for an extension of time for serving a responding pleading on the ground that the party cannot answer the originating pleading until particulars are provided.*
  + **\*\*Still have to file your response within 21 days\*\***
  + can file a general one if still waiting for particulars
* ***Hayes Heli-Log Services*** BCCA 2006
  + Particulars will be ordered when it is necessary to **delineate the issues between the parties**.
  + Different form discovery because particulars are not used to obtain information about how an issue will be *proven*
  + The purpose of particulars is to **inform the other side of the nature of the case it has to meet, to prevent surprise at trial, to enable the other side to determine what evidence is necessary to prepare for trial, to limit the generality of pleadings, to limit and decide issues for purposes of discovery and trial, and to tie the hands of the party providing particulars**
* SCANDALOUS, FRIVOLOUS OR VEXATIOUS MATTERS – Rule 9-5
* If D believes P’s claim is scandalous, frivolous or vexatious 🡪 can apply to have all or part struck
* **(1)** **Striking Pleadings -** At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
  + - (a) it discloses **no reasonable claim or defence**, as the case may be,
    - (b) it is **unnecessary, scandalous, frivolous, or vexatious**,
    - (c) it may **prejudice, embarrass or delay the fair trial** or hearing of the proceeding, or
    - (d) it is otherwise an **abuse of the process of the court.**
  + And the court **may pronounce judgment** OR **order the proceeding to be stayed or dismissed** and may order the costs of the application to be paid as special costs
* **(3)** if **registrar**, on filing a document, thinks it may be subject to an order under (1) 🡪 can (a)(i) retain all copies, and (a)(ii) refer the doc to the court, and (2) court may make order under (1)
* **(4)** if court makes order under **3(b),** (a) **registrar** must notify the person who filed the document, (b) the person has **7 days** to apply to the court, and (c) the court may confirm, vary or rescind the order
* **\***may also strike pleadings under **rule 3-7** 🡪 specifies where you MUST have particulars, failure to provide may result in a claim being struck
* ***Citizens for Foreign Aid Reform*** BCSC 1999
  + Any doubt on the plain and obvious test must be **resolved in favour of permitting the pleading to stand**
  + The court proceeds on the assumption that all facts pleaded are true. Weakness of the case is no ground to strike. The sole question is whether the plaintiff presents a question fit to be tried
  + A scandalous allegation will not be struck if it is relevant to the proceedings.
  + A pleading is ‘**unnecessary’** or ‘**vexatious’** if it does not go to establishing the plaintiff’s cause of action or does not advance a claim known in law
  + A pleading is ‘**frivolous’** if it is unsustainable because of the doctrine of estoppel
* ***TNR Gold Corp*** BCSC 2011
  + It must be **clear** that the facts do not present a reasonable cause of action or defence
* AMENDING PLEADINGS – Rule 6-1
* Amendments are usually *liberally* granted
* If amendment is **reasonable**, onus shifts to other side to say why it should not be granteed
  + This is a **high threshold**
  + (a) it would be prejudicial
  + (b) it is unnecessary
* (1)(a) Until notice of trial is set or case planning conference is held, you are entitled to one free amendment
  + (b) After that, has to be by (i) court leave, or (ii) consent/agreement
* (4) **service** – party who amended must (a) serve, via ordinary service, the amended pleadings on all parties, and (b) if it is the *originating* pleading, must file, by *personal service,* a copy on any person (i) served the original, and (ii) who has not filed a responding pleading
* (5)(a) party served with amended pleadings may amend **any pleadings he filed in response to the original version, but only with respect to any matter raised by amendments**
  + (b)must file and serve amended response within **14 days of being served**
* DISCONTINUANCE AND WITHDRAWAL – Rule 9-8
* **Discontinue** – when you drop your claim (NOCC)
  + Any time before notice of trial is filed, P may discontinue *whole or part* of their claim by filing a notice of discontinuance (1)
    - Once notice of trial *is* filed, need to get consent of parties or with leave of court (2)
* **Withdrawal** – when you withdraw your defence (R to NOCC)
  + D can withdraw defence any time they want by filing notice of withdrawal and serving it (3)
  + Once D withdraws whole/part response, P can continue as if D never served a response or only a partial response (7)
* (8) Alone, discontinuance is NOT a defence in a subsequent proceeding
  + ie D cannot say “since P dropped the case before, I didn’t do it”
* These are different than **dismissal** – done with prejudice, cannot bring the case again
  + Dismissal IS a defence in the future
* **Costs** – generally, whomever discontinues/withdraws has to **pay the other sides costs up to the time of service (4)**
  + If they try to start up the same claim again *before* they have paid those costs, court may order a stay until the costs are paid
  + \*so P can start the claim again, just might have to pay
* (5) if P discontinues whole/part of an action to which 3rd party has been joined, the 3rd party is entitled to costs and may apply to court for direction as to who should pay them

BUILDING YOUR CASE

* DISCOVERY AND INSPECTION OF DOCUMENTS - Rule 7-1
* You have to disclose ALL documents, even those that will hurt your case
* As a lawyer, can never be positive that your client has given you all of the documents
* **Professional Responsibility:**
  + Must ensure you are meeting your production obligations
    - Lawyer is ultimately responsible for what is disclosed
  + Must educate your client on the scope of production and their obligations
    - Smart to put client’s obligations in writing (e.g. includes electronic documents, cannot destroy documents (obligation to preserve), must include all docs not just helpful ones
  + Serious consequences to you and your client if you fail to met disclosure obligations
  + Counsel must be an active party of disclosure – must monitor production and compliance
    - Also, lawyers are the best judge of what is or is not relevant
* **Disclosure is an ONGOING RESPONSIBILITY** 
  + If something comes to your attention that is material, you have to disclose it
* **Old test for discovery**
  + ***Peruvian Guano test***: you are obligated to produce every document related to a matter in question in the action OR any document that **may lead to a train of inquiry** enabling a party to advance that party’s case or damage the case of that party’s opponent
* New test is the **material fact TEST**
* **7-1(1)** unless all parties consent, each party must, within **35 days**,
  + (a) prepare a list of documents that lists
    - (i) all documents that are or have been in the party’s possession or control and that could, if available, be used by any party of record at trial to prove or disprove a **material fact**, and
    - (ii) all other documents to which the party intends to refer at trial, and
  + (b) serve the list on all parties of record
* (6) if party claims a document is **privileged,** that claim must be in the list of docs with a statement of grounds for the privilege
  + (20) court can inspect an allegedly “privileged” document to see if the objection is valid
* (8) Court may order party to **swear an affidavit** verifying a list of documents
  + This is rare 🡪 usually only done when there has been **constant obstruction and delays (*viridis)***
* **(10)** If a party who has received documents believes that the list omits documents or a class of documents that *should* have been disclosed under (1), the party may, **by written demand**, require the party who prepared the list to:
  + (a) amend the list of documents
  + (b) serve on the demanding party the amended list
  + (c) make originals ready for inspection
* (11) **Demand additional docs** - if a party who has received a list of documents believes that the list should include documents or classes of documents that
  + - (a) are within the listing party’s **possession**, power or control,
    - (b) relate to **any or all matters in question** in the action, and
    - (c) are additional to the documents or classes of documents required under ..
  + the party, **by written demand** that identifies the additional documents or classes of documents with **reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed**, may require the listing party to
    - (d) amend the list of documents,
    - (e) serve on the demanding party the amended list of documents, and
    - (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).
* (12) **response** **to demand for docs or additional docs** – 35 days to:
  + (a) comply
  + (b) comply with some documents, and with respect to the others indicate:
    - (i) why an amended list with those documents is not being prepared, and
    - (ii) why those docs are not being made available
  + (c) not comply, and indicate:
    - (i) why an amended list with those documents is not being prepared, and
    - (ii) why those docs are not being made available
* (13) if demand for docs under (10) or (11) is not complied with within **35 days of receipt**, can apply for court order
* (14) court may broaden compliance, or excuse someone from compliance
  + **evidence** is required to broaden the scope of document production (***more marine)***
* (18) Non-Party Documents\*\*
  + When a document is needed, but is not in a party’s possession, power or control
  + Ex need to get documents from city about road conditions
  + Under this section, court can order production of the docs for (a) inspection and copying, and/or (b) a **certified copy** to be used instead of the original
  + ***Halliday v. McCulloch*** BCCA 1986 – production of **medical records**
    - **Halliday order** to produce medical records (e.g. if D wants to look for pre-existing injuries)
    - Rather than just disclosing everything to the defendant (which are personal and not relevant), disclose records to plaintiff who then looks to determine what is privileged and discloses the rest
    - When an order is granted under **Rule 7-1(18)** for the production of medical records and the patient-litigant asserts privilege, the court may order a compilation from the required records of a list of documents in accordance with Rule 7-1
    - If the court considers it desirable, an affidavit verifying the list of documents may be ordered when privilege is claimed with respect to medical records in the possession of third parties
    - The following set of mechanics is intended to deal with ‘certified copies’ of hospital records and claims to privilege with respect to the same – pg. 144 (if needed)
  + ***Kaladjian v. Jose*** 2012 BCSC 357 **test for non-party disclosure (7-18)**
    - D wanted P’s MSP records after car accident, said standard for **non-party disclosure** was old potential relevance test
    - **It would be inconsistent with Rules if test for disclosure was narrower materiality test, but for non-parties it was the old relevance test.**
    - The **pleadings** generally govern initial disclosure obligations as to what is material
    - **To obtain broader relevance disclosure under 7-1(11) or (18),** removal of old *Peruvian guano* test means that D will generally be required to provide some **evidence in support of application**
    - **Restricts “fishing expeditions”**
    - Privacy rights should not be abridged without cogent reasons
* (21) if party fails to make discovery of a document (fail to present for copying, inspection etc) then they may **NOT use that document as evidence in the proceeding or on examination or cross**
* ***Doucette*** SCC 2008 – **implied undertaking not to use documents for anything else**
  + If breached, other lawyer is obligated to report it to the law society
  + Information obtained on discovery is subject to an **implied undertaking that it will not be used by the other parties except for the purpose of that litigation** unless and until the scope of the undertaking is varied by court order **or a situation of immediate and serious danger** occurs
  + The undertaking continues after settlement or until trial if the adverse party incorporates answers or documents obtained on discovery as part of the court record. This undertaking is subject to legislative override
  + **Breach** = a stay or dismissal of a proceeding, striking a defence, or contempt proceedings
* ***Jones v. Donaghey*** BCCA 2011 – **“material fact”** is the ultimate fact, sometimes called the ultimate issue, to the proof of which evidence is directed…the fact that is put at issue in the proceeding
* ***Wolansky v. Davidson*** BCSC 1992 – **control** means an enforceable right to obtain documents from a person who has possession
* ***Sumnar v. U-haul*** BCSC 1998 – **power** includes right to access
  + A party will only be held to have documents within its power or possession and control if it holds a **majority interest in a company**. However, ‘power’ is broader than ‘control’, and includes the **right of access** to documents of a sibling company within a broad corporate structure
* ***Edwards v. Ganzer***2012 BCSC 138
  + D wanted P’s MSP records 🡪 ICBC wants to know if you are faking
  + Chief principle is **Proportionality** – request for documents has to be proportional to the case
    - Argued asking for MSP *and* medical records was unnecessary
  + There must be some “air of reality” between the documents and the issues
  + **Initial production under 7-1 is limited to what is required**
* ***Fric v. Gershman*** 2012 BCSC 614 – **privacy in disclosure**
  + Law student in car crash, D wants to prove her injuries are fake 🡪 wanted all her **facebook pictures and info disclosed**
  + Court narrowed the scope – limited it to only photos from law games and those since the accident showing physical activity 🡪 **proportionality**
  + Court can use proportionality to **narrow the scope of disclosure**
* LISTS OF DOCUMENTS – *Confidentiality, Solicitor’s Files and Implied Undertaking*
* *Hunt v. T & N Plc* (BCCA, 1995) – **undertaking continues**
  + The undertakingapplies even if the documents were disclosed voluntarily without necessity of a court order
  + The **undertaking upon a party not to disclose documents for collateral purposes continues regardless of whether the documents have been disclosed in open court** in the absence of the court lifting this undertaking. Unlike other provinces, BC does not have a rule of court that ends the undertaking upon filing or reading in open court
* PRIVILEGE – Rule 7-1(6)
* BC is lax on disclosure of privilege lists
* Privileged docs DO NOT have to be produced, but there is an obligation to list privileged docs
* **7-1(6)** if you claim a document is privileged, you have to claim that in the list of documents with a statement on the grounds for the privilege
* If there is a dispute, judge will look at it and determine whether privilege is **valid (20)**
* Main grounds for privilege
  + **(1)** **solicitor-client privilege**
    - Just having a lawyer present is not enough for privilege
  + **(2)** **litigation privilege**
    - Protects work done by counsel, work done by counsel in the litigation process, includes communication with 3rd parties, letters/emails between client and lawyer, exerts, claims analysts etc
  + **(3) Without prejudice communication** – when you give an offer to settle to the other side “without prejudice,” it means they cannot show that offer in court
* **Look for:** letters/emails between lawyer and client, letters/emails between client and insurance brokers, letters to own experts (final report is not privileged)
* ***Hodgkinson v. Simms***
  + **The need for full disclosure will rarely displace privilege**
  + Where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled and required, unless the client consents, to claim privilege for such collection and refuse production
  + Copies of documents which were created for the dominant purpose of litigation may be privileged even though, in some cases, the originals are not
* ***Gardner v. Viridis Energy INC*** 2012 BCSC 1816 – **privileged lists**
  + principles of listing privileged docs
    - doc must be sufficiently described so that if challenged it can be considered by a judge in chambers
    - cannot “bundle” documents – have to list each separately
* EXAMINATIONS FOR DISCOVERY – Rule 7-2
* (1) each party to an action must (a) make himself available or (b) any person from subrules (5) – (10) available for examination
* (4) This is **oral examination** under oath, in front of the court reporter
  + Occurs AFTER document production has taken place
* **(5)** Examination of a party that is NOT an **individual**
  + Examining party gets to chose who the representative is (b)(i) and (ii), but other side usually nominates (b)
  + ***Westcoast Transmission*** BCSC 1985 – choice of representative
    - Nomination of a representative by a corporate party does not remove the adverse party’s privilege to examine the representative of its choice; however, the selection by the adverse party of a representative may disentitle it to examine a further representative later if the first should prove unsatisfactory - (5)(b)
    - Admissions on examination for discovery based upon hearsay may be admissible at trial if the witness expressly adopts or accepts the truth of that information - (5)(c)
  + ***Rainbow Industrial Caterers*** BCSC 1986 – court can override *prima facie* right to examine a representative of choice in order to achieve fairness and balance between parties
* (26) Must be in the form of **question and answer**
* (2) cannot exceed (a**) 7 hours**, or (b) any time to which the person being examined **consents**
  + Rule is **one** examination – can apply to court for a second
* **(3)** court may grant an **extension** on time 🡪 consider:
  + (a) the conduct of a person who has been or is being examined, including
    - (i) the person’s **unresponsiveness** in any examination for discovery held in the action,
    - (ii) the person’s **failure to provide complete answers** to questions, or
    - (iii) provision of answers that are **evasive, irrelevant, unresponsive** or unduly lengthy;
  + (b) any **denial or refusal to admit**, by a person who has been or is to be examined, anything that should have been admitted;
  + (c) the **conduct** of the examining party;
  + (d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);
  + (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.
  + ***Gardner v. Viridis Energy INC*** 2012 BCSC 1816 – considerations for **extension** under **7-2(3)**
    - **Overarching TEST –** whether it is **reasonably practicable** to complete the examination for discovery in 7 hours
      * **Considering everything under 7-**2(3)
    - if lack of preparation compromises efficient conduct of discovery – may get extension
    - must consider **proportionality** and obligation of P’s counsel to be efficient in their examination of D
    - here, the witness was unprepared and didn’t answer many questions, plus there were many breaches to go through 🡪 extra 4 hours
* (13)(a) Party wishing to conduct examination for discovery **must serve notice** by way of appointment (form 23) on the person being examined (or their lawyer)
* (18) **SCOPE** of examination is broad
  + Broader than document discovery – not limited to **material issues**
  + (a) party must answer any questions within their knowledge except privilege
  + (b) may be compelled to give names and addresses of people who might reasonably be expected to have knowledge
* (22) if person being examined has to **inform himself** on a matter being questioned, examination may be adjourned for that purpose
  + (23) examining party can request that party informing himself respond by **letter**
* (25) **Objections:**
  + Counsel of party being examined CAN object to a question
  + If witness does not understand a question, it is up to them to say so
  + (25) court may (a) decide validity of objection and (b) order the person to submit to further examination
  + Objections should be stated on the record
    - Irrelevance – different contract, event (most common)
    - Privilege – what they told their lawyer
    - Opinion/speculation – just the facts
    - Misleading question – “you said this…”
    - Vagueness – if need clarification of what they’re asking
* **Purposes of examination:**
  + Opportunity for counsel to learn about the other side’s case
    - so don’t volunteer information by answering questions that weren’t asked
  + To get admissions
  + To impeach
  + Pin down the other side’s case so there are no surprises at trial
* Counsel usually start with general, open ended questions on who, what, where, when, why etc
  + Then ask more closed Qs to lock down their story and try to impeach them
* **Only the party doing the examining can use the transcript for discovery**
* **Purposes of discovery**
  + 1. Read in that evidence at trial
  + 2. Impeach the witness if they take the stand at trial
* Answers can be used as evidence
  + at summary and full trial
  + if person dies, lies
  + put in to evident via a “read in”
* Transcript should include:
  + Will you state your name for the record?
  + You have sworn to tell the truth?
  + Identify the individual to the particular action – this is the right person
    - You are the pl, df etc. in this action
  + Do you know why you are here today?
    - To talk about the car accident etc…
  + Confirm with the witness if you’ve asked them anything that is not clear
  + Put any acronyms or short names you will be using on the record
* Generally, counsel should NOT talk with their client about the case when they are under examination
  + May be able to discuss the case with your client during break
* ***Rogers v. Bank of Montreal*** BCSC 1986 – examination of representative
  + Outside legal counsel retained by a bank is not examinable as an officer or agent of the bank.” (5)
  + On an application to examine a **second representative**, the court should consider: (1) the circumstances of the case, (2) the responsiveness of the first witness, (3) the nature and relevance of the evidence sought, and (4) the most practical, convenient and expeditious result.” (5)(c)
  + Parties have the right to attend each other’s examinations for discovery unless justice demands otherwise. Exclusion may be ordered if evidence covers the same ground and credibility is a factor. In such situations, transcripts should not be produced until both examinations are complete (26)
* ***Fraser River Pile & Dredge Ltd v. Can-Dive Services Ltd*** (BCSC, 1992) – **limits on contact with lawyer**
  + Suggested limitations on right of attending counsel at oral discovery to discuss with his witness:
  + (a) if the discovery is to last **one day**, counsel should not have any discussion with the witness;
  + (b) if discovery is to be **longer than one day**, counsel may discuss all issues relating to the case, including evidence, at the conclusion of the day provided counsel has advised the other side of his or her intention to do so in advance;
  + (c) counsel **should not seek an adjournment during the examination** to discuss evidence that was given by the witness
* ***More Marine Ltd v. Shearwater Marine Ltd***(BCSC, 2011) – difference in scope; extension of time
  + Discusses the difference btwn scope of discovery and document production
  + Court views the difference as appropriate, because counsel has to be able to explore widely to determine what evidence might be relevant and appropriate to bring to trial and also to assess document production issues
  + Can extend time for examination if witness is being obstructionist (proportionality)
* ***Gardner v. Viridis*** 2012 BCSC 1816 – **duty to prepare for examination**
  + in BC – no **express** rule imposes an obligation on witness to prepare in advance
  + but considering principles of efficiency, just speedy trial etc 🡪 makes sense that there is an obligation to prapre for the examination for discovery
  + what constitutes reasonable preparation will vary with circumstances of particular case:
    - nature of the case
    - amount involved
    - importance of issues in dispute
    - complexity of proceedings
  + **Where a person to be examined for discovery has the means at hand to inform himself respecting the matters in issue in an action, the efficient conduct of litigation requires that he make reasonable efforts to inform himself before his discovery.**
* ***La Prairie Crane v. Triton Projects*** 2012 BCSC 1594
  + Triton seeks additional information (documents and answers) following examination
  + LP says they have not properly applied for 7-1(11) additional documents – they didn’t cite the tule and they didn’t provide sufficient written reasons
  + The purpose of providing a detailed request is to ensure both parties know the basis for the additional doc production
    - Looking at evidence, its clear they both knew the reasons why
  + Just because duty to answer Qs on examination is broader than duty to disclose documents, does NOT mean you can get around the narrow rule by asking for docs *at the examination*
    - Still need to provide EVIDENCE to support broader disclosure under rule 7-1(11)
* ***Dann v. Dhaliwal*** 2012 BCSC 1817
  + 1 car crash, 2 plaintiffs. D says they should be able to put forth same corporate representative for each, Ps say they should be able to choose
  + rule 7-2 does not give a party an unlimited right to discover the rep of its choice
  + in the case of multiple parties with a commonality of interest, they will usually be restricted to examining a single representative. If that rep fails to provide adequate info, they may apply for leave to examine a second rep
* ***First Majestic Silver v. Santos*** 2012 BCSC 223
  + [8] application for discovery of a **second representative**
  + key factor in determining whether to allow a second discovery is the **nature and materiality** of the evidence sought to be canvassed
  + pre-condition = showing the responses from 1st rep were insufficient

FILLING IN THE GAPS

* PRE-TRIAL EXAMINATION OF WITNESSES – Rule 7-5
* First, should just try to contact a **non-party** **witness** and see if they are friendly and willing to talk
  + If not, can apply to court
* (1) Can examine non-parties that may have material evidence
  + (a) court may order they be examined on oath
  + (b) may order examining party pay witnesses legal costs
* \*\*\*An application under this section **presupposes** that the witness is **refusing** to give a statement, answer in writing, or is giving conflicting statements
  + So you have to try to get a statement ***voluntarily*** first
* (3) application under (1) must also have an affidavit setting out (a) the issue on which witness may have material evidence…**AND** (c) that the witness (i) has **refused or neglected** to give a statement, or (ii) has given **conflicting** statements
* (5) **subpoena -** can require witness to bring (a) any relevant document in their possession or control, and (b) any physical object in their possession or control that a party might want to enter as an exhibit at trial
* (2) cannot examine **expert** who is ***retained or specially employed*** by another party under this rule unless there is no other way to obtain facts and opinions on the same subject
* ***Sinclair v. March*** 
  + The **scope** of inquiry under Rule 7-5 is not limited to the issues between the parties as defined by the pleadings, but includes all that is *generally relevant* between the parties
  + An expert **not retained by any party** who has material evidence to the litigation may be examined as to facts and opinions. The examination is limited to previously formed opinions and knowledge without expectation of engagement of out-of-court preparation or research except for review
* ***Yemen Salt Mining*** BCSC 1977
  + The scope of inquiry is broader under this rule than under examinations for **discovery** (Rule 7-2)
  + It is not limited to matters in issue between the parties in question but covers all that is relevant to all parties in the action including other defendants or third parties
  + Questions may be directed to the witness even though the answer may be in the nature of an opinion as given by an expert
  + In the ordinary case, only the applicant and the proposed witness may speak to an application under this rule
  + Officers and employees of parties may be examined under this rule provided there are reasonable grounds to show the witness has material evidence and there is no harassment. Notice of application under this rule must be served on all interested parties
* ***Virk v. Brar***
  + Rule is to be given liberal interpretation 🡪 material relevant to litigation should not be withheld
  + As long as the evidence is material, doesn’t matter if its similar fact etc
  + \*decided under old rules
* DISCOVERY BY INTERROGATORIES – Rule 7-3
* Essentially written questions from one party to another
* More limited in scope than discovery and a cheaper method
* Used as evidence at trial just like discovery
  + Answers sworn under oath
  + Answers can be used as evidence at summary and full trial
* Purpose 🡪 to obtain admissions of fact
* (1) Only permitted on (a) consent or (b) with leave of court
* (3) if court granting order 🡪 it can set terms and conditions on the interrogatories (a) number/length, (b) matters covered, (c) timing of response, and (d) notification of other parties
* (4) party must respond **within 21 days**
* (6) if party **objects** to interrogatories on grounds of irrelevance or privilege, they may object in affidavit
* (7) if they answer **insufficiently**, court can require further answer via oral examination or affidavit
* (11) There is a **continuing obligation** to answer interrogatories
  + If you learn your answer was incomplete, you have to provide a supplementary affidavit updating your previous answer
* Appropriate when you need a list of information
* ***Tse-Ching*** BCSC 1994 - requirements and limitations of interrogatories
  + The rule with respect to interrogatories is to be interpreted in accordance with the general purpose to secure the just, speedy and inexpensive determination of a proceeding on its merits. The authorities have established requirements and limitations on interrogatories as follows:
  + their only use is to obtain **admissions of fact** that are necessary to prove in order to establish one’s case and to provide a foundation for cross-examination at discovery;
  + they must be relevant;
  + they must not be in the nature of cross-examination; **open ended questions** only
  + they should **not include demand for discovery documents**;
  + they should not duplicate particulars
  + they should not be used to obtain the names of witnesses
  + they are **narrower in scope** than examination for discovery
  + court may allow responses to be deferred until after examination for discovery
* PHYSICAL EXAMINATION AND INSPECTION – Rule 7-6
* Usually regarding **independent medical examination (IME)**
* Usually the party *making the application* gets to choose the doctor
* Can also be used for physical property 🡪 **test, examine, preserve**
  + Can put otherside on notice of property – so if it disappears court may draw an adverse inference
* (1) if a party’s physical or mental condition is **in issue**, court can order they submit to a medical exam
* (4) **property** - If the court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may
  + (a) order the production, inspection and preservation of any property, or
  + (b) authorize
    - (i) samples to be taken or observations to be made or the property, or
    - (ii) experiments to be conducted on or with the property
* **(5)** in order to effect these rules, court may authorize a person **to enter any land or building**
* NOTICES TO ADMIT / ADMISSIONS – Rule 7-7
* Used to establish facts / authenticity of documents
* Helpful for **uncontested issues**
* Will be read in as testimony
* Exception to rule requiring witnesses to give oral evidence at trial
  + Admissions
  + Read-ins from discovery
  + Interrogatories
* (1) party may serve other party – request they admit the truth of a fact or authenticity of doc
* (2) the admission is **deemed to be admitted unless, within 14 days after service,** the party receiving notice serves a notice to admit a written statement that
  + (a) specifically denies the truth of a fact or authenticity of a doc
  + (b) sets out in detail the reasons why the party cannot make the admission, or
  + (c) states that refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of **privilege** or **irrelevancy** or that the request is otherwise improper, and sets out in detail the reasons for the refusal.
* ***Skillings v. Seasons*** BCSC 1992 – a reply to the notice to admit is **improper and inadequate** if it foes not deny the truth of the facts sought to be admitted nor set out reasons in detail for not making the admissions
  + An inadequate reply will mean the facts are deemed admitted
* (4) If a responding party **unreasonably denies or refuses to admit** the truth of a fact or the authenticity of a document specified in a notice to admit, the court **may order the party to pay the costs** of proving the truth of the fact or the authenticity of the document and **may award as a penalty** additional costs, or deprive the party of costs, as the court considers appropriate.
* (5) party may only **withdraw admission** with leave of the court

INTERLOCUTORY PROCEDURES – Keeping Proceedings on Track

* INTERLOCUTORY APPLICATIONS – Rule 8-1
* These applications can happen any time between NOCC and trial
* Goal of an application is to get the court to order what you want
* Used when other party is not giving you what you need
  + Can also use **rule 22-7 Non-Compliance**
* Can make **cross-applications**
  + You will want yours heard first
  + Ex if you want the claim struck and other side wants discovery, you may have to disclose a bunch of stuff only to later have it struck out
* **(3) Notice of application** – sets out what you are seeking
  + A party wishing to apply under this rule must file
    - (a) a notice of application, and
    - (b) the original of every affidavit, and of every other document, that
      * (i) is to be referred to by the applicant at the hearing, and
      * (ii) has not already been filed in the proceeding.
* (4) – **Contents** of notice of application
  + A notice of application must be in Form 32 and must
  + (a) set out the orders sought or attach a draft of the order sought,
  + (b) briefly *summarize the factual basis* for the application,
  + (c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted,
  + (d) list the affidavits and other documents on which the applicant intends to rely at the hearing of the application,
  + (e) set out the applicant’s estimate of the time the application will take for hearing,
  + (f) subject to subrules (5) and (6), set out the date and time of the hearing of the application,
  + (g) set out the place for the hearing of the application in accordance with Rule 8-2, and
  + (h) provide the data collection information required in the appendix to the form,
  + and the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length.
* (7) service
* (9) **response** – within 5 business days of service, or if under 9-7, 8 business days
  + (a) file an application response
  + (b) file the original of every affidavit, and of every doc, that
    - (i) is to be referred to by responding person at hearing, and
    - (ii) has not already been filed in the proceeding
  + (C) serve on applicant 2 copies of, and on all parties one copy of:
    - (i) a copy of the filed application response
    - (ii) copy of each filed affidavit and document
    - (iii) if brought under 9-7, any notice they are required to give
  + *Interpretation Act* **s.25** – “within 5 business days” does not count the business day that it is served
* (10) **contents** of response - An application response must be in Form 33, must not exceed 10 pages in length and must
  + (a) indicate, for each order sought in the application, whether the application respondent **consents to, opposes or takes no position on the order**, and
  + (b) if the application respondent wishes to oppose any of the relief sought in the application,
    - (i) briefly summarize the factual and legal bases on which the orders sought should not be granted,
    - (ii) list the affidavits and other documents on which the application respondent intends to refer at the hearing of the application, and
    - (iii) set out the application respondent’s estimate of the time the application will take for hearing
* (13) applicant may respond to the response – must file and serve **no later than 4pm on the business day that is ONE FULL BUSINESS day before the hearing date**
  + ex if hearing set for 8th, you have to file and serve on the **6th**
* (15) no later than **4pm on the business day that is one full business day before the date set for the hearing** applicant must give registry an application record

### CONSENT APPLICATIONS – Rule 8-3

* Parties can **agree** to an application and send over an application to the court
* Common application is an agreement to dismiss the case
* **Process** – prepare the order, all parties sign it, then prepare a 1 page requisition (request to court) and attach it – send to court and provided court approves, the court enters it and issues the order
* (1) Subject to subrule (2), an application for an order by **consent** may be made by filing
  + - (a) a requisition in Form 31,
    - (b) a draft of the proposed order in Form 34,
    - (c) evidence, in accordance with Rule 13-1 (10), that the application is consented to, and
    - (d) any consent or comments of the Public Guardian and Trustee required under section 40 of the Infants Act.
* (2) – Consent order – registrar (a) refers application to judge or master, or (b) grants order

### WITHOUT NOTICE APPLICATIONS – Rule 8-4

* Used to be called *ex parte* applications – only one party proceeding
* Need to exercise full and frank disclosure
  + You have to make sure you present the other party’s case too 🡪 have to disclose all relevant facts
* **Must justify why you should argue before the court without the other side there**
  + Usually because giving notice to the other side will result in prejudice
  + Ex other side will do something *before* you get your order 🡪 often if you are seeking specific performance
  + Ex you want to get evidence, if other party knows you are seeking it they may destroy it

### URGENT APPLICATIONS – Rule 8-5

* Ability of court to shorten or remove time periods – ask for “short leave”
* Have to provide **evidence to justify the urgency**
* (2) A short notice app may be made by requisition in Form 17, without notice, and in a summary way.
* (3) on a short notice app, normal time and notice rules DO NOT APPLY
* (4) On a short notice application, the court or registrar may
  + - (a) order that the main application be heard on short notice,
    - (b) fix the date and time for the main application to be heard,
    - (c) fix the date and time before which service of documents applicable to the main application must be made,
    - (d) give any other directions that the court or registrar considers will further the object of these Rules.
* (7) after obtaining the order without notice because of urgency, must **serve a copy of entered order on each person affected**

**Rule 8-6 Applications Made by Written Submission**

* If ordered at a case planning conference
* CHAMBERS – Rule 22-1
* Applications, petitions and requisitions are heard in chambers
* (1) definition of “chambers proceeding” and what it includes
  + (a) a **petition** by proceeding;
  + (b) a **requisition** proceeding that has been set for hearing under Rule 17-1(5)(b);
  + (c) an **application**, including, without limitation, the following:
    - (i) an application to change or set aside a judgment;
    - (ii) a matter that is ordered to be disposed of other than at trial;
  + (d) an appeal from, or an application to confirm, change or set aside, an order, a report, a certificate or a recommendation of a master, registrar, special referee or other officer of the court;
  + (e)action that has, or issues in an action that have, been ordered to be proceeded with by affidavit or on documents before the court, and stated cases, special cases and hearings on point of law,
  + (f) an application for judgment under Rule 3-8, 7-7(6), 9-6 or 9-7
* **\*\*basically anything but a trial is chambers\***
* (2) if a party **fails to attend chambers**, the court may proceed if it thinks it will further the rules
* (4) evidence in chambers is given by **affidavit**, BUT court may also:
  + (a) order the **attendance** **for cross-examination** of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
  + (b) order the **examination** of a party or witness, either before the court or before another person as the court directs,
  + (c) give directions required for the discovery, inspection or production of a document or copy of that document,
  + (d) order an **inquiry**, assessment or accounting under Rule 18-1, and
  + (e) **receive other forms of evidence**
* (5) except in cases of **urgency**, chambers proceeding must be heard in a place **open to the public**
* (7) **powers of the court -** Without limiting (4), on the hearing of a chambers proceeding, the court may
  + (a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,
    - **\*you can only get what you ask for!!\***
  + (b) adjourn the chambers proceeding from time or time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days notice for further hearing,
  + (c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and
  + (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
* (8) if **notice was NOT given when it should have been**, court may
  + (a) dismiss the proceeding
  + (b) adjourn the proceeding and direct that service occur
  + (c) direct that any order made be served on that person
* AFFIDAVITS – Rule 22-2
* Follow this rule **very carefully** because the form and content of affidavit need to be perfect
* **Affidavit** – a sworn statement of facts (not opinions)
  + The factual basis that supports the application
  + Can attach as exhibits any documents you want to provide in support as well
* Most applications require affidavits
* **(13) Hearsay** is permitted in affidavits for **interlocutory apps**, but NOT for final orders
  + First paragraph will say “I have personal knowledge or if not I believe it to be true”
  + Important to identify source of hearsay
    - Who, what, where, when, why, how
* Generally affidavits are not used at trial
* (1) all affidavits must be **filed**
* (2) **Form and content:\*\*\***
  + (a) must be expressed in the first person and show the name, address and occupation of the person swearing or affirming the affidavit,
  + (b) if the person swearing or affirming the affidavit is a party or the lawyer, agent, director, officer or employee of a party, must state that fact,
  + (c) must be divided into paragraphs numbered consecutively, and
  + (d) may be in Form 109.
* (4) **making affidavit** – it is made when:
  + (a) the affidavit is **sworn or affirmed** by the person swearing or affirming the affidavit,
  + (b) the person swearing or affirming the affidavit
    - (i) **signs** the affidavit, or
    - (ii) if the person swearing or affirming the affidavit is unable to sign the affidavit, places his or her **mark** on it, and
  + (c) the person *before whom* the affidavit is sworn or affirmed completes and signs a statement in accordance with subrule (5) and identifies each exhibit, if any, to the affidavit in accordance with subrule (8).
* (5) person ***before whom*** affidavit is sworn and signed must confirm by completing a specific statement
* (6) statement if person swearing or affirming is **unable to read**
* (7) if person swearing or affirming **doesn’t understand English**
* (11) alterations must be initialled by **the person before whom it was sworn**
* ***Code of Professional Conduct –* Appendix A**
  + 1. A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:
    - is physically present before the lawyer
    - acknowledges that he or she is the deponent
    - understands or appears to understand the statement contained in the document
    - in the case of an affidavit, swears, declares or affirms[5](http://www.lawsociety.bc.ca/page.cfm?cid=1046&t=Professional-Conduct-Handbook-Appendix-1-Affidavits,-Solemn-Declarations-and-Officer-Certifications#F5) that the contents of the document are true
    - in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath
    - signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent
* CASE PLANNING CONFERENCE – Rule 5
* 30 minute meeting with judge or master
* Goal is a case plan order
* Judicial management of the case process is intended to reduce costs and make litigation process easier
* Only available for NOCC
* Useful when facing an unrepresented person
  + Gets the unrepresented person into court before a judge or master who explains the process and makes an order – if an order is made and they don’t comply you have other rules that can kick in (dismiss case, contempt etc)
* Attended by the party, their lawyer or both
  + Someone on behalf of each party has to be there
  + The court can order a party to be there
* No application that involves affidavit evidence can be heard at a CPC
  + However, an application for document disclosure which does not require an affidavit, for example, can be heard
  + But only applications that involve no affidavits – limits the fights you can have
  + However, the judge or master still has the power under Rule 5-3 to order how things are going to go along the way, which gives certainty
* A transcript is made of what took place during the CPC
  + Not available to the parties without a court order
  + Point of a CPC is to have full and frank disclosure of all issues so they court can make an appropriate order
  + Only available when there is a clear reason why it should be produced
* Can have **multiple** CPCs
* **Requesting a CPC – Rule 5-1**
  + (1) *either* party can request CPC
  + (2) court may *order* CPC
  + (5) case plan proposal required – within 14 days
  + (6) **contents of CP proposal**
    - A party’s case plan proposal referred to in subrule (5) must be in form 20 and must, in a summary manner, indicate the party’s proposal with respect to the following steps:
      * (a) discovery of documents;
      * (b) examinations for discovery;
      * (c) dispute resolution procedures;
      * (d) expert witnesses;
      * (e) witness lists;
      * (f) trial type, estimated trial length and preferred periods for the trial date
* **Conduct of CPC – Rule 5-2**
  + (1) must be conducted by judge or master
  + (2) must be attended by (a) lawyer or (b) party if (i) unrepresented or (ii) ordered to be there
  + (5) court can exempt someone from attending CPC
  + (6) if a person **fails to attend CPC**, the judge can (a) proceed in their absence, (b) adjourn, (c) order the no-show to pay costs
  + (7) must be recorded but no party can get them without court order
  + ***Parti v. Pokomy*** BCSC 2011 – there must be **real and reasonable grounds** before transcript will be produced
* **CPC Orders – Rule 5-3**
  + (1) CPC judge/master can make the following orders, whether or not on application of party
    - (a) set timetable for steps to be taken
    - (b) amend previous case plan order
    - (c) any order under 22-4(2)
    - (d) require amendments of pleadings
    - (e) respecting length and content of pleadings
    - (f) respecting discovery, listing, production, preservation etc of documents or exhibits, including
      * (i) electronically stored info
      * (ii) that discovery, listing, production etc be limited
    - …..MANY MORE LOOK AT SECTION
  + ***Leer and Four L*** 2011 BCSC 930 – rule 5-3(1)(k)(i) says that at CPC, a judge or master may order that expert evidence on any one or more issues be given by one jointly instructed expert
    - Court used discretion to allow it in this case…no idea what else it stands for
  + (2) at CPC, judge or master **MUST NOT**
    - (a) hear any application supported by affidavit evidence except under (6)
    - (b) make an order for final judgement, except by **consent** or under (6)
  + (3) an order **must be made**
  + (6) if a party **fails to comply with the order,** court may
    - (a) make an order under 22-7
    - (b) (i) award costs, (ii) set the period in which costs must be paid
    - \*under this section court can hear affidavit evidence??

**- 5-4 – Applications to Amend Case Plan Orders**

* + (1) – Requesting amendments to case plan orders
  + (2) – Party may respond
  + (3) – Powers of the court
* MASTERS AND APPEALS FROM MASTERS – Rule 23-6
* **Master** – appointed employees of the court who deal with interlocutory matters
  + not a judge, they have limited powers, more administrative
  + Can deal with *interlocutory* issues, but NOT final judgement
* Do not have the inherent jurisdiction that a judge has
  + Judges have further jurisdiction to hear trials (both summary and full)
  + Judges make final orders
  + Only judges can hear petitions b/c they are final orders
  + Generally only judges can grant injunctions b/c injunctions are granted under the inherent jurisdiction of the court
  + Judges and/or masters make interlocutory orders
* (6) master can refer a matter to a judge
* **Appeals: (8) – (11)**
* (8) can **appeal** decision of master, registrar, or special referee
* (9) must file notice of appeal in form 121 within **14 days** after the order
* (10) must be **3 days between** service of the notice of appeal and the hearing
* (11) an appeal from the decision of a master is NOT a **stay of proceeding** unless so ordered by the court or the master
  + \***so as lawyer, you will want to request a stay pending appeal**
* **Practice Directions – Master’s Jurisdiction (p 621)**
  + List of things master is NOT to exercise discretion on
  + List of matters within a master’s jurisdiction
    - 4. Interlocutory applications
    - 5. Interim orders in family law cases
    - 6. Final orders
      * (a) orders by consent;
      * (b) orders under Rule 22-7;
      * (c) orders for summary judgment under Rule 9-6 where there is no triable issue
      * (d) orders striking out pleadings under Rule 9-5(1) provided there is no determination of a question of law relating to the issues of the action;
      * (e) orders granting judgment in default
      * (f) orders under Rule 21-7(5) where no matter is contested or where there is no triable issue;
      * (g) orders in respect of the Administration of Estates under Rule 21-5; and
      * (h) declaratory orders under s.44 of FRA where there is no dispute.
    - 7. Enforcement of orders

ORDERS AND INJUNCTIONS

* ORDERS – Rule 13-1
* The order is the **end result**, not the reasons for judgement
  + The court gives the reason for judgement and order, the successful party then drafts the order
  + For interlocutory applications, judge or master often gives oral reasons
* Order is binding from the moment it is pronounced
  + But still need to prepare the written document so it can be relied on later if necessary for enforcement purposes
* Usually the successful party prepares the order, circulates it and gets it entered
  + However, either party can write it **(1)(a)**
* Everyone who took a position must sign the order (1)(b)
  + But court can order that a party does not have to sign an order – usually happens if a party is unrepresented and just won’t sign the order
* Does NOT have to be approved by a party who has **not consented to it** and who did not attend / was not represented (1)(c)
* If a party won’t sign it, the first step is to apply to go before the registrar to “settle the order”
  + You say what your version of the order should be and get a copy of the clerk’s notes
  + Registrar looks at this and determines what the order should be
  + If not clear, the registrar can send it back to the judge or master to decide
* (2) – When approval in writing not required – if signed or initialled by the presiding judge or master
* (3) **– Form of order** – if by consent, Form 34; if after trial, Form 48; any other, Form 35
* (4) – Endorsement of order on application sufficient in certain cases
* (5) – Order granted conditionally on document to be filed
* (6) – Waiver of order obtained on condition
* (7) – Order of judge or master
* (8) – Date or order
* (9) – Approval of order
* (10) – Requirement of consent order
* (11) – Settlement of orders
  + *An order must be settled, when necessary, by a registrar, who may refer the draft to the judge or master who made the order.*
* (12) – Appointment to settle
* (13) – Party failing to attend appointment to settle
* (14) – Review of settlement
* (15) – Registrar may draw order
* (16) – Special directions for entry or service
* (17) – **Correction of orders**
* (18) – Opinions, advice and directions of the court
* (19) – Orders on terms and conditions
* ENFORCEMENT OF ORDERS – Rule 13-2
* The court will only enforce clear orders 🡪 will not enforce if there is ambiguity
* Entitled to costs for enforcement
  + Not actual costs; set out under a tariff
* (1) – Order to pay **money** to a person – enforced by writ of seizure and sale
* (2) – Order to pay **money** into court – enforced by writ of sequestration
* (3) – Order for **recovery or delivery of land** – enforced by writ of possession
* (4) – Order for **recovery of delivery of property** other than land – enforced by writ of delivery
* (5) – Appointment of receiver
* (6) – Execution by or against person not a party
* (7) – Remedy on non-compliance with mandatory order
  + *If a mandatory order or an order for the specific performance of a contract is not obeyed, the court, in addition to or instead of proceeding against the disobedient person for contempt, may direct that the act required to be done may be done so far as practicable by the person who obtained the other, or by some other person appointed by the court, at the expense of the disobedient person, and on the act being done, the expenses incurred may be ascertained in such a manner as the court may direct, and execution may issue for the amount so ascertained and costs.*
* INTERLOCUTORY INJUNCTIONS – Rule 10-4
* **Injunction** – an order by the court that **prohibits or restrains something**, or **requires** something be done
* 2 types:
  + 1. **Prohibitory** – stops you
    - most common
  + 2. **Mandatory** – requires you to do something
* 3 Sub-Types
  + 1. **Interlocutory** – up until trial
  + 2. **Interim** – for a set period of time
  + 3. **Permanent** – outcome of hearing
* **General 3-part TEST – *RJR MacDonald*** 
  + 1. **Serious question to be tried** (a *bona fide* issue)
    - Is there a fair/legitimate question to be answered?
    - Generally a pretty easy hurdle
  + 2. **Irreparable harm** 
    - If an injunction is not ordered, the party will suffer irreparable harm
    - Courts have said that driving someone out of business is irreparable harm
    - **Nature**, not magnitude of the harm
  + **3. Balance of convenience**
    - Factors to consider when considering whether to grant the injunction
  + Must have all of these! Use **affidavit evidence** to show you meet the test
* Injunctions are **equitable** so must be heard by a judge
  + Based on the inherent jurisdiction of the court
  + Discretionary
  + Appeal courts don’t generally interfere with injunctions
* (1) party is allowed to apply for injunction whether or not a claim for an injunction was included in the relief claimed
* (5) **Undertaking** as to damages
  + Applicant must add a paragraph in evidence that they **undertake to abide by any order for damages**
    - You do not need this undertaking as to damages from the respondent if you are the applicant – if the injunction is not granted and should have been, and the respondent is still doing the action, than the action is your cause of action to sue – do not need the undertaking
  + Creates a cause of action for the respondent for the wrong granting of an interlocutory injunction
* ***RJR MacDonald Inc v. Canada (AG)*** **(SCC, 1994) – irreparable harm**
  + The factors to be considered in assessing the balance of convenience ‘are numerous and will vary in each individual case’, as will be the ‘weight attached to them’
  + Irreparable’ [harm] refers to the nature of the harm suffered rather than its magnitude. It is **harm which either cannot be quantified in monetary terms or which cannot be cured**, usually because one party cannot collect damages from the other
  + [NOTE FOR EXAM – use this case if you want to argue against injunction b/c irreparable harm is difficult to prove – both *RJR* and *Oneka* tests are valid in BC courts]
* ***Onkea Interactive Ltd v. Smith*** **(BCCA, 2006) – two-part test**
  + In BC, irreparable harm may be rolled into balance of convenience and made into a 2 part test
* ***Edward Jones v. Voldeng*** 2012 BCCA 295
  + No factors are **determinative** when ordering an interlocutory injunction
  + Need considerable flexibility
  + It is an **extraordinary remedy**
* WITHOUT NOTICE ORDERS
* ***Code of Professional Conduct* – CH 5 The Lawyer as Advocate**
* **5..1-1[6]** When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client’s case so as to ensure that the tribunal is not misled
* **5.1-2**  When acting as an advocate, a lawyer must not:
  + (a)  abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
* Required to put forth both sides when seeking an injunction without notice
* When you do a without notice application, eventually the other side gets to come back to the court and argue why the injunction should be set aside
* RECOVERY OR PRESERVATION OF PROPERTY ORDERS – Rule 10-1
* (1) Court may order for detention, custody, or preservation of any property that is the subject matter of a proceeding or *as to which a question may arise*, and the court may **authorize a person to enter on any land or building**
* (2) – Fund that is the subject matter of a proceeding – can order paid into court or otherwise preserved
* (3) – Allowance of income from property
* (4) – If a party claims the **recovery of specific property other than land**, the court may order that the property claimed be given up to the party, pending the outcome of the proceeding, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.
* (5) if order is made under (4), the order must contain the **party’s undertaking to abide by any order that the court may make as to damages** arising out of delivery of the property to the party or compliance with any other order.
* **ANTON PILLAR ORDERS – Rule 10-1**
* Known as a civil search warrant – a type of injunctive relief
* Use when you want to **preserve property** – particularly evidence
* Enables you to take action to retain, preserve or obtain the subject matter
* Very high threshold – only granted in exceptional circumstances
* Must be evidence that, without the order, the object may be destroyed
* ***Anton pillar*** – one step further than a regular injunction. **An AP order is always done without notice**
* ***Celanese Canada*** 2006 SCC – anton pillar orders, like all injunctions, are **equitable tools**
  + AP orders are especially important in the modern era of **heavy dependence on computer technology**, where documents are easily deleted, moved or destroyed
  + Parties against whom *Anton Pillar* orders are made need to be protected in three ways
    - (a) by ensuring that the orders identify the things to be seized and provide safeguards for dealing with privileged documents, among other things;
    - (b) requiring appointment of **vigilant, independent solicitors to supervise the execution** of orders; and
    - (c) by expecting parties executing the orders to show self-restraint
  + should only be made in ‘truly…**exceptional’ circumstances** 🡪 extreme case where there is a ***grave danger of property being smuggled away or of vital evidence being destroyed***
  + **\*\*TEST\*\***: **An *Anton Piller* order should only be made if:**
    - (a) the applicant has demonstrated ‘**a strong prima facie case’**;
    - (b) the damage the applicant will suffer from the target’s alleged misconduct is ‘**serious’**;
    - (c) there is ‘**convincing evidence’** that the target ‘possesses incriminating documents or things’; and
    - (d) there is a **real possibility that the target may destroy** documents or things before the court discovery process can do its work.”
  + Guidelines for AP orders:
  + (a) independent solicitor should be appointed to supervise the search to ensure that it is conducted as carefully as possible and with due consideration for the rights and interests of all concerned;
  + (b) except in ‘unusual circumstances’, the applicant must undertake to pay or must secure the payment of damages to the target should it be determined that the order was ‘unwarranted or wrongfully executed’;
  + (c) **the scope of the order must be no wider than necessary;**
  + (d) no property may be taken that is not **clearly covered** by the order;
  + (e) the order should include a term setting out a procedure for dealing with solicitor-client privilege and enabling the target to claim confidentiality before the applicant or its counsel takes possession of documents, or to deal with disputes that arise, such term, perhaps, to reflect procedures developed with reference to the *Criminal Code* search warrants to standards articulated in England, including provision for the supervising solicitor to take possession of documents over which a claim of privilege is made and to ascertain whether the privilege is properly claimed, or to hold the documents pending a determination of the claim by the court, the court to decide, when the *Anton Piller* order is made, how much time the target should be given before the property to which the order relates must be delivered up, remembering that the search should proceed as expeditiously as circumstances permit and that unnecessary delay may open the door to mischief;
  + (f) the order should provide that the seized property may only be used for the purposes of the proceeding in which the order was made;
  + (g) the order should provide that the target may apply on short notice to discharge the order or to vary the ordered security;
  + (h) the order should provide that the seized property must be returned to the target as soon as practicable;
  + (i) order should provide that search should begin during normal business hours when target’s counsel is likely to be available for consultation;
  + (j) the search should be conducted and property removed only in the presence of the target or of a responsible employee of the target;
  + (k) the order should specify who may search and seize or should limit the number of people who can attend for the search and seizure;
  + (l) before the search begins, the applicant’s counsel or the supervising solicitor should serve the target or its authorized or responsible representative with the applicant’s Statement of Claim and the *Anton Piller* order and should explain the nature and effect of the order in plain language;
  + (m) the target or its representative should be given a reasonable time to take advice from counsel before the search begins;
  + (n) all seized property should be recorded in a detailed list and the supervising solicitor should give the list to the target for verification before any property I removed; provided, however, that where listing and verification is not practicable, seized property should be left in the custody of the supervising solicitor who should then give the target a reasonable opportunity to review the property and to claim privilege before the property is released to the applicant;
  + (o) the order should provide that seized property whose ownership is disputed should be left in the custody of the supervising solicitor or of the target’s counsel;
  + (p) the order should provide that the supervising solicitor has the post-search responsibility to deal with matters arising out of the search, subject to the right of the applicant or target to apply to court for resolution;
  + (q) the order should provide that the supervising solicitor should report to the court, within a prescribed time, about who attended on the ordered search and what was seized; and
  + (r) consideration should be given to the question of whether the applicant should be required to apply for an order for the early review by the court of the report of the supervising solicitor and of the implementation of the order, even if the target has sought a review.”
* MAREVA INJUNCTIONS
* Equitable remedy designed to **freeze the assets or income** of the other party
* If there is a **real risk that the party will be relocating their assets outside of the jurisdiction,** you can get a Mareva injunction that **restrains them from dealing with all or some of their assets until the outcome of the case**
  + EX when a person is trying to make themselves judgment-proof by moving all of their assets off-shore
* Generally done **without notice**
* Was originally designed to only freeze the assets in the jurisdiction, but now there are **world-wide** Mareva injunctions
  + Recognize enforcement is dependent on cooperation from the other jurisdiction
  + But if do something in another jurisdiction, can get relief in this jurisdiction
* **High threshold – extraordinary relief**
  + **Restraining someone’s use of their own assets – very intrusive**
* Court must be satisfied on **balance of convenience** that this is necessary
  + **Same TEST as for an injunction**
  + 1. **Strong *prima facie* case**
    - Is there a **“real risk”** the person will relocate their assets?
  + 2. **Irreparable harm** 
    - If an injunction is not ordered, the party will suffer irreparable harm because the assets will be gone
  + **3. Balance of convenience**
    - Factors to consider when considering whether to grant the injunction
  + ***Rissman, Hendricks & Oliverio, LLP v. Chen:*** The test for a **Mareva injunction** is more onerous than 10-1**.** The “overarching consideration” on an application for a *Mareva* Injunction is “the balance of justice and convenience between the parties”. Key: **distinguish between mareva and 10-1.**
* NOT meant to give you security for potential damages
  + Meant to protect assets when there is a real risk of diminishment
  + Court may make exceptions for cash going in and out of a business – don’t want to cripple a business
* **\*Different from pre-judgment garnishing order b/c its for overall assets (rather than for a liquidated sum)**
* Must serve it broadly to those who handle party’s assets
* PRE-JUDGEMENT GARNISHING ORDERS
* Typically, P has no recourse against D until judgement, but PJGOs are an **exception**
* Provided for in the ***Court Order Enforcement Act***
* An extraordinary type of relief because it allows execution *before verdict* to ensure security of payment
* No requirement that assets will be moved or minimized
* This is a **without notice** application
* Allows you to get security for your claim
* Ex if A owes you money and you know he has $ in the bank, get an order against the bank and the bank pays into court – money remains in court as security for your claim
* Used in cases where damages are a **liquidated, objective amount** – easily identifiable
  + Cannot be for something that has to be assessed because then you won’t know how much you are entitled to
* Unlike Mareva and Anton Pillar orders, you **do not have to go to court**
  + PJGOs are done by way of **affidavit** (COEA s.3(2))
  + Affidavit must include: (i) than an action is pending, (ii) the time of its commencement, (iii) the nature of the cause of action, (iv) the actual amount of debt, claim or demand, (v) that it is justly due and owing, after making all just discounts (**COEA s.3(2)(d))**
  + State **garnishee** is indebted or liable to the defendant and is in the jurisdiction of the court, and with reasonable certainty, the garnishees place of residence (**COEA s. 3(2)(e) and (f))**
  + Also provide a draft order – then serve the order on the garnishee and defendant
  + You  then  **serve  the  order**  to  the  garnishee,  and  then  the  defendant.
* **D can apply to have the order set aside**
  + 1. There was not **meticulous compliance** with the requirements of the Act
  + 2. Just and equitable
* can also get a **post-judgement garnishing order**
  + just show you have an order for payment and the debt is still owing
  + \*this is more common
* **COEA - S. 3(2)** A judge or registrar may, in an application made **without notice** to any person by
  + (a) a plaintiff in an action, or
  + (b) a judgment creditor or person entitled to enforce a judgment or other for the payment of money,
* **on affidavit** by himself or herself or his or her solicitor or some other person aware of the facts, stating,
  + (c) if a judgment has been recovered or an order made,
    - (i) that it has been recovered or made, and
    - (ii) the amount unsatisfied, or
  + (d) if a judgment has not been recovered,
    - (i) that an action is pending,
    - (ii) the time of its commencement,
    - (iii) the nature of the cause of action,
    - (iv) the actual amount of the debt, claim or demand, and
    - (v) that is justly due and owing, after making just discounts,
* and **stating** in either case
  + (e) that any other person, hereafter called the **garnishee, is indebted or liable to the defendant**, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and
  + (f) with reasonable certainty, the place of residence of the garnishee,
* order that all debts due from the garnishee to the defendant, or judgment debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the other made, as the case may be.
* **3(4) An order must not be made under this Part for the attachment of a debt due to an employee for the employee's salary or wages before a judgment or order for the payment of money has been obtained against the employee in the proceeding**
* **3(5)**Except as otherwise provided in this Part, 70% of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order issued by a judge or registrar, but the amount of the exemption allowed under this subsection must not be less than
  + (a) in the case of a person without dependants, $100 per month, or proportionately for a shorter period, and
  + (b) in the case of a person with one or more dependants, $200 per month, or proportionately for a shorter period
* **12**  (1) An order must not be made for **payment out of court** of money paid in by the garnishee or for payment by the garnishee to the person entitled, without notice to the defendant, judgment debtor, or person liable on the principal judgment or order, unless a judge, under special circumstances, dispenses with notice
  + (2) If it is made to appear to the judge that prompt personal service of the notice required under subsection (1) cannot be effected, the judge may make an order for substituted or other service, by letter, public advertisement or otherwise, as may be just
* **13**  (1) Money paid into court under garnishing proceedings may be paid out to a judgment creditor or his or her solicitor without any order of the court if
  + (a) 10 days' notice of the intended payment out is given to the judgment debtor and the judgment debtor has not, on or before the day on which the 10 days expire, filed notice of his or her intention to dispute the payment out, or
  + (b) the judgment was obtained by default and 3 months have expired from the day on which the money was paid into court.
* (2) Notice of an intended payment out under subsection (1) (a) must be served personally on the judgment debtor, or if an order for substituted or other service has been made under section 9 (5), the notice may be served in the same manner as provided in the order
* (3) Notice of an intended payment out under subsection (1) (a) of money paid into court under a garnishing order issued out of the Provincial Court in respect of a proceeding under the Small Claims Act may be served by mailing a copy to the person to be served by registered mail to the last known post office address of that person
* (4) Money paid into court under garnishing proceedings may be paid out to a plaintiff or his or her solicitor without any order of the court if the consent in writing of the defendant to the payment out is filed with the registrar or judge, setting out the exact amount to be paid out
* (5) Payment out must not be made under subsection (1) or (4) if it is suggested in the course of the garnishing proceedings that the money belongs to or is claimed by a third person, or that any third person has a lien or charge on it

SUMMARY PROCEEDINGS

* Court is generally interested in avoiding a full trial – so encourages summary proceedings (***inspiration management)***
* Used when you don’t need live oral testimony
* **\*ALTERNATIVES TO FULL TRIAL that involve a decision**
* **Masters** can hear summary judgement even though it is a final order, but NOT a summary trial
* You can apply for both summary judgement and summary trial – alternatives
  + Ex if judge doesn’t buy your argument that the is no issue, can argue under 9-7 that the issue will obviously be resolved in your favour and you should go to summary trial
* SUMMARY JUDGEMENT – Rule 9-6
* Designed for cases where there is **no genuine issue to be tried** – asking for early judgement
* Ex I brought my claim, they have provided no defence, so there is no issue for trial and I want judgement
* This is brought on **application**
* **\*the judge can rule in EITHER PARTY’S favour**
  + risk you take in applying
* So if P says D didn’t provide a defence, D can say the didn’t respond because the claim had no case (**9-6(3)(a))**
* (2) – Claimant may, after the other party responds, apply for judgement on all or part of claim
  + **TEST – are you bound to succeed *(skybridge)***
* **(3)** An answering party may respond to an application for judgment under subrule (2) as follows:
  + (a) allege that the claiming party’s originating pleading **does not raise a cause of action** against the answering party;
  + (b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that **there is a genuine issue for trial**
* (4) – D can **ALSO** apply for judgement **dismissing** all or part of a claim – after serving their response
  + **TEST** – is claim **bound to fail *(skybridge)***
* (5) – On a hearing application under subrule (2) or (4), the **court,**
  + - (a) if satisfied that there **is no genuine issue for trial** with respect to a claim or defence, **must** pronounce judgment or dismiss the claim accordingly,
    - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may **order a trial of that issue or pronounce judgment** with a reference or an accounting to determine the amount,
    - (c) is satisfied that **the only genuine issue is a question of law,** may determine the question and pronounce judgment accordingly, and
      * \***if meaningful question of law – will most likely go to summary trial or trial**
    - (d) may make an order it considers will further the object of these Rules.
* (6) – if C gets judgement on part of a claim, they can still pursue (a) any other claim in the action against D, and (b) action against any other person in the original claim
* (7) – if applicant gets **no relief** they may be ordered to (a) pay the other party’s **costs (b)** within a fixed time
* (8) – Court may decline to fix costs
* (9) – Bad faith or delay – can award special costs
* The **TEST** under **both Rules 9-6(2) and Rule 9-6(4)** is whether there is **a *bona fide* triable issue of fact or law (*skybridge****)*
  + Prove no issues of fact or law can be determined. If in any doubt, the applications has to be **dismissed**
* ***Memphis*** BCCA 1982 – if there is **any doubt** that there is a trial issue, the application will fail
  + P must be **bound to lose**, or D must have **no defence**
* **\*\*if there IS a doubt, cannot succeed for summary judgement, but should ask for summary trial\*\*\***
* ***Drummond*** – rule 9-6 does not require affidavit evidence, but it is highly desirable
* SUMMARY TRIAL – Rule 9-7
* Used when there IS a *bona fide* issue to be tried, but it is an **alternative to a full trial** that is based mostly on **affidavits**
* It is still a trial so you have to prove all of your claims
* You *can* seek summary trial on **specific issues**
  + Courts are wary of this unless solving the one issue will likely take care of the whole case
* Have to apply for summary trial **at least 42 days before the scheduled trial date** (**9-7(3))**
* **Timing** – normal notice of application – 8 days before hearing, respond within 5 days of service.
  + **Summary trial app** - must serve **12 days before hearing,** respond within **8 days** (**8-1(8) and (9))**
* Defendant can
  + 1. Agree it is appropriate for summary trial
    - Still within the discretion of the judge to kick it over for full trial
  + 2. Object to the appropriateness of the summary trial
  + 3. Object but prepare to argue anyways (common)
* An application DOES NOT act as a **stay of proceedings (*roynat)***
* Where there is either an order to produce further documents or a demand for discovery that remains outstanding against a party, that party may not succeed on an application to stay proceedings under this rule (***hunt v. T&N)***
* (2) party can **apply** for summary trial in any of the following:
  + (a) an action in which a response to civil claim has been filed;
  + (b) a proceeding that has been transferred to the trial list under Rule 22-7(d);
  + (c) a third party proceeding in which a response to third party notice has been filed;
  + (d) an action by way of counterclaim in which a response to counterclaim has been filed
* Once you apply for summary trial, you cannot withdraw without leave of the court (***kassam)***
* Other party does NOT have to **consent 🡪** if its suitable for ST judge can continue **(*inspiration management)***
* **TEST for suitability:**
  + (a) Court will look at whether there are **conflicts on important parts of the evidence** that require **witnesses**
    - Is it a case that can be solved just by looking at facts and reading affidavits?
    - Is **credibility** an issue? – then will need witnesses and summary trial is probably not right
    - \***if there is a contradiction on only ONE point – court may order cross-examination on the affidavit**
    - if the truth comes out 🡪 can continue with summary trial
    - Court will look at actual **documents** in determining whether there is conflicting evidence, not just rely on party response (***cara v. qtrade)***
      * In this case, C filed a very long application contradicting each point – clearly intent was to force a full trial
    - An outright denial that is just designed to defeat an application for summary trial will not have weight unless substantiated by documents (***cara v. qtrade)***
  + (b) Have the parties had the opportunity to gather the facts necessary for summary trial
    - Has there been document disclosure and examinations for discovery
    - Usually if one party wants to do examination for discovery, ST will be denied
    - If a party is given **adequate notice** of summary trial app, they have an obligation to take **every reasonable step to complete as many of the pre-trial procedures** as are necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard (***anglo Canadian shipping)***
  + (c) Can the judge get all relevant info through affidavits?
    - You can read in certain things but not others
    - Ex 3rd party witness who does not want to give affidavit 🡪 the only way to get their evidence is a sub poena at trial
    - Need to make sure you can prove all aspects of your case in **writing**
    - Need to *anticipate* what other side will be saying
  + (d) will the issue sought to be resolved dispose of the WHOLE case?
    - If not, court is reluctant to do ST 🡪 want to avoid multiplicity of proceedings
* ***Fraser v. Abma -*** suitable to be tried summarily: (1) Are there sufficient facts before the Court in which to make the necessary findings of fact? (2) Is it unjust to decide the case on a summary trial application? Consider factors from 9-7(11). In deciding whether the case is an appropriate for summary trial give full consideration to all of the evidence and ask whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue
* Goal of summary trial is **efficiency** so if there are stacks of affidavits and lots of evidence, summary trial is not suitable (***colosimo)***
* When summary trial will be **inefficient: (*Western Delta Lands Partnership)***
  + 1. The litigation is expensive and the summary trial will take considerable time in relation to what a full trial will take
  + 2. Unsuitability of a summary trial is obvious
  + 3. Real risk of substantial wasting of time and effort
  + 4. Issues are not completely determined by the litigation and are interwoven with other issues not being determined (must take care of most or all of the issues – don’t want to carve parts out, especially if going to need full trial on the remaining issues)
* **(11)** – Adjournment or dismissal
  + On an application heard before or at the same time as the hearing of a summary trial application, the court may
    - (a) **adjourn** the summary trial application, or
    - (b) **dismiss** the summary trial application on the ground that
      * (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
      * (ii) the summary trial application will not assist the efficient resolution of that proceeding.
* **(5) evidence -** Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender **evidence** by any or all of the following:
  + - (a) affidavit;
    - (b) an answer, or part of an answer, to interrogatories;
    - (c) any part of the evidence taken on an examination for discovery;
    - (d) an admission under Rule 7-7;
    - (e) a report setting out the opinion of an expert, if
      * (i) the report conforms with Rule 11-6(1), or
      * (ii) the court orders that the report is admissible even though it does not conform with Rule 11-6(1)
  + ***Foy v. Rothwell*** BCSC 2001 – supports idea that *viva voce* evidence may be permitted in rare circumstances

**- (9)** party must give notice if they intend to use **specific types of evidence:**

* + (a) evidence taken on an examination for discovery,
  + (b) answers to interrogatories, or
  + (c) admissions, the party must give notice of that fact in accordance with subrule (10)
* (15) **judgement – court may**
  + (a) **grant judgment** in favour of any party, either on an issue or generally, unless
    - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
    - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
  + (b) **impose terms respecting enforcement of the judgment**, including a stay of execution, and
  + (c) **award costs**
* Party will NOT be entitled to a favourable ruling if they have not completed a list demanded under **7-1 (discover) (*roynat)***
* **(17)** if court doesn’t grant judgement, the court may order the trial of a proceeding generally or on an issue:
  + (a) order parties attend CPC
  + (b) make any order under 5-3(1), or
  + (c) make any order the court thinks will further the object of these rules
* ***Foreman v. Foster*** (BCCA, 2001) – factors to dismiss
  + Combined effect 9-7(11) and (15)
  + First I will hear the trial, then I will decide if its not suitable
* ***Lewis v. Lewis*** – fraud is not generally suitable for summary trial, if parties consent to summary trial jusdge should not insist on full trial, multi-party litigation is not usually suitable for summary trial
* ***Querfurth*** - summary trial cannot be held unless a statement of defence has been filed
* SPECIAL CASE – Rule 9-3
* A way to resolve a matter without a trial – used less than summary judgement/trial
* Go to the court with facts to seek their **opinion** on a question of law or fact
  + Ex whether the type of damage you are seeking is available
* Parties must **concur** on the question before seeking opinion (1)
* Parties must **agree** for the court to grant relief or give judgement on the question (5)
* (1) – Statement of special case - *The parties to a proceeding may concur in stating a question of law or fat, or partly of law and partly of fact, in the form of a special case for the opinion on the court.*
* (2) – Court may order special case
* (3) – Form of special case
* (4) – Hearing of special case
* (5) – Order after hearing of special case
* Before ordering an opinion to be stated separately, the court should consider whether the order would result in a saving of expense to the parties or the time of the court (***hunt)***
* A stated question of **law** must be unambiguous and must be supported by an **unambiguous statement of facts (*cie Abitibi)***
* Every material fact must be included, the court should not entertain a special case based on assumed facts (***xeni)***
* POINT OF LAW – Rule 9-4
* Another way to resolve a matter without a full trial – less common than summary proceedings
* (1) a point of law that arises may, by consent of the parties or by court order, be set down for hearing and disposed of before trial
* (2) if disposing of the point of law **substantially disposes of the whole action, ground of defence, set off or counterclaim,** the court may **dismiss** the action
* ***Alcan Smelters & Chemicals Ltd v. Canadian Association of Smelter & Allied Workers, Local 1 (No. 1)***
  + “The following **principles** had to be observed in considering an application under Rule 9-4:
  + (a) The point of law to be decided had to be **raised and clearly defined in the pleadings**
  + (b) The rule was appropriate only to cases, where, assuming allegations in a pleading of an opposite party were true, a question arises as to whether such allegations raised and supported a claim or a defence in law
  + (c) The facts relating to the point of law had to not be in dispute and the point of law had to be capable of being resolved without hearing evidence
  + (d) Whether a point of law ought to be decided before the trial of the action was discretionary, and it had to appear that the determination of the question would be decisive of the litigation or a substantial issue raised in it
  + (e) In deciding whether the question was one which ought to be determined before the trial, the court would consider whether the effect of such a decision would immeasurably shorten the trial, or result in a substantial saving of costs
* (aff’d in ***can-dive)***

ALTERNATIVES BEFORE TRIAL

* OFFERS TO SETTLE – Rule 9-1
* A way to encourage the other side to settle and resolve things before trial
* Cost / benefit analysis 🡪 if you reject an offer, then get **less** at trial, there ***may*** be COST ramifications
  + This is **discretionary\***
* At the end of the trial 🡪 parties will tell judge if there were any offers
  + Cannot disclose offers before all issues have been determined **(2)**
* \***unrepresented parties can also use this provision! Its about costs incurred 🡪 don’t need a lawyer**
* Cost options:
  + D makes offer, P refuses and gets less—D gets costs (always after point offer was made)
  + D makes offer, P refuses and case is dismissed—D gets double
  + D makes offer, P refuses and gets more than D offered—no cost consequences (D wouldn’t bring it up)
  + P makes offer, D refuses and P gets more—D pays double
  + P makes offer, D refuses and P gets less or loses – no cost consequences (P wouldn’t bring it up)
  + No offer—successful party gets their costs
* (1) – **specific form and content**
  + (1)(c) an offer to settle…
    - (i) is made in writing by a party to that proceeding,
    - (ii) has been served on all parties of record, and
    - (iii) contains the following sentence: “The…[party(ies)]…,…[name(s) of party(ies)]…, reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.”
* (3) offer to settle is NOT an admission
* (4) offer may be considered by court when exercising discretion in relation to **costs**
* (5) – **Cost options -** In a proceeding in **which an offer to settle has been made**, court **MAY** do one or more of the following:
  + (a) **deprive a party of any or all of the costs**, including any of all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding *after the date of delivery or service of the offer to settle;*
  + (b) **award double costs** of all or some of the steps taken in the proceeding *after the date of delivery or service of the offer to settle;*
  + (c) award to a party, in respect of all or some of the steps taken in the proceeding *after the date of delivery or service of the offer to settle*, **costs to which the party would have been entitled to had the offer not been made;**
  + (d) if the offer to settle was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, **award to the defendant the defendant’s costs** in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle
* One of the goals of this rule is to promote settlement by imposing consequences where offers that **should have been accepted** were refused (***giles)***
* Party who seeks to displace the usual rule of costs has the burden of showing the court why the rule should be displaced (***0759594)***
* The discretion to order the payment of double costs must be exercised in a just, principled and consistent way (***giles)***
  + Generally, unsuccessful plaintiffs should not be made to pay double costs where they have proceeded to trial in the face of offers they could reasonably refuse
* **(6)** – **Considerations of court - TEST**
  + **(a)** whether the offer to settle was one that **ought reasonably to have been accepted**, either on the date that the offer to settle was delivered or served or on a later date;
    - Not determined by reference to the award that was ultimately made (***hartshorne)***
    - The court must determine whether, **at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted**: The reasonableness of the plaintiff’s decision not to accept the offer to settle must be assessed without reference to the court’s decision (***hartshorne)***
    - The reasonableness is to be assessed by considering such factors as **the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a “nuisance offer”), whether it could be easily evaluated, and whether some rationale for the offer was provided** (***hartshorne)***
    - This factor is to be considered from the perspective of the person receiving the offer (***ward v. Klaus)***
    - Plaintiffs should not be penalized for declining an offer that did not provide a **genuine incentive to settle** in the circumstances (***0759594 BC Ltd. v. 568295 BC)***.
  + **(b)** the **relationship between the terms of settlement offered and the final judgment of the court**;
    - In ***Giles***, “when an offer made by a defendant for the purpose of achieving a settlement **is reasonably refused,** the mere fact that the action is **ultimately dismissed** in its entirety is not a consideration with respect to double costs. To take the disposition of the action into account would result in the **"hindsight analysis"**. In***Hartshorne*** the relationship of the offer to the court’s order is “an independent factor to be considered in deciding whether a double costs order should be made (***Ward v. Klaus)***
  + **(c)** the **relative financial circumstances** of the parties; (***ex little old lady vs insurance corp)***
    - in certain circumstances the existence of an insurer can be taken into account. “insurance coverage is not automatically a factor to be considered... the facts of a particular case will govern whether it should be considered, and if so, what weight should be given to it**”** (***Ward v. Klaus)***
  + **(d)** **any other factor** the court considers appropriate
    - This is the appropriate place in the analysis to consider *whether an offer was intended to encourage a settlement* (***Ward v. Klaus)***
    - can considerthe blameworthy conduct of a party or a party’s conduct during the course of the trial ***(Hartshorne v. Hartshorne)***
  + There are no mandatory factors under this subrule. Judges can take into account whatever factors they consider to be appropriate (***giles)***
* (7) costs for settlement when case is in **small claims jurisdiction**
* **(8)** an offer to settle does not expire just because a counteroffer is made
* *Ex.  Plaintiff  makes  an  offer  to  settle  for  $100,000.  The  defendant  says  no.  The  plaintiff  then  gets  a  judgment  for  $150,000.  The  defendant  clearly  should  have  accepted  that  offer.  The  plaintiff  is  already  getting  their  costs.  But  now,  they****may  get*** *double  costs  (or  any  other  order  under  9­1).  If  the  judgment  gets  to  be  less  than  the  offer,  the  offer  has  no  impact.*
* *Ex.  Defendant  makes  an  offer  to  settle  for  $100,000.  The  plaintiff  says  no.  (1)  The  plaintiff  then  gets  a  judgment  for  $75,000.  The  plaintiff  clearly  should  have  accepted  that  offer.  Because  the  plaintiff  got  judgment,  normally  they****may  get*** *their  costs.****But****because  the  defendant  made  an  offer,  the  plaintiff  gets  their  costs  up  to  the  offer,  then  the  defendant  gets  their  costs  subsequent  to  the  offer.  (2)  If  the  plaintiff’s  case  gets  dismissed,  the  defendant  would  be  getting  their  costs.  But  now,  they****may  get****double  costs.*
* **Appellate Intervention on Awards of Costs *(Hartshorne v. Hartshorne)***
  + Given discretionary nature of costs, appellate review is limited
  + An appellate court may only interfere with an award of costs if it can be demonstrated **that “the trial judge has made an error in principle or if the costs award is plainly wrong”**
  + **The purposes for which costs rules exist must be kept in mind in determining whether *appellate intervention* is warranted**: (1) deterring frivolous actions or defences (2)  to **encourage conduct that reduces the duration and expense of litigation** and to discourage conduct that has the opposite effect (3)  encouraging litigants to **settle** whenever possible, thus freeing up judicial resources for other cases. (4) to have a winnowing function in the litigation process” by “requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation”, and by “discourag[ing] the continuance of doubtful cases or defences
* JUDICIAL SETTLEMENT CONFERENCE – Rule 9-2
* Cheaper than a private mediation, private, without prejudice
* Have a judge listen to 2 sides 🡪 see whether an agreement can be made
* (1) If at any stage of an action, the parties **jointly request** a settlement conference, or a judge or master directs one, the parties must attend before a judge or master who must , in private and without hearing witnesses, explore all possibilities of settlement of the outstanding issues
* (2) must be recorded
* (3) judge who presides must not preside at trial unless all parties consent
* MEDIATION
* Without prejudice coming together of parties with an unbiased third party who will facilitate discussion
* Parties may agree to mediate, agree on mediator, split costs of mediation
* If one party serves a notice to mediate, they HAVE to attend
* **Notice  to  Mediate  Regulation**
* A  **notice  to  mediate**  (*p.  879*)  allows  one  party  to  serve  on  another  party  a  **mandatory  requirement**  that  they  attend  mediation,  which  they  still  have  to  split  the  costs  for.  **So,  you  have  an  ability  to  force  an  unreasonable  party  into  a  mediation**
* Difference from summary trial 🡪 no forced decision, parties have to agree
* ARBITRATION
* Unlike mediation, arbitration is **only available by agreement between the parties**
* you cannot force arbitration, but it is private and more flexible so can suggest it as a pre-step before a public trial
* **Advantages:**  (1)  It  is  usually  quicker  (2)  You  can  choose  the  adjudicator  (can  choose  someone  with  experience  in  the  area  of  your  dispute)  (3)  Some  argue  it  is  cheaper  (this  is  debatable,  in  arbitration,  you’re  paying  for  the  space  you’re  using,  the  arbitrator,  etc)  (4)  It  is  private  (5)  It  is  somewhat  **more  difficult  to  appeal  an  arbitration  decision**  than  a  trial  decision

# HEADED TO TRIAL

* When headed to trial, look back on the pleadings 🡪 what do you need to prove, what documents will you need, what evidence
* DEPOSITIONS – Rule 7-8
* Not common but an important tool 🡪 exception to the rule that evidence has to come from witness
* Can do it by transcript or more commonly now – video taped
* Used if a person may be unable to testify 🡪 death, sickness, outside jurisdiction
* \*even if you do a deposition, if the person is available, court may still order them to appear
* **(1) By consent of the parties of record or by the order of the court, a person may be examined on oath before or during trial in order that the record of examination may be available to be tendered as evidence at the trial**
* (3) In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account
  + (a) **convenience** of the person sought to be examined,
  + (b) possibility that the person may be **unable to testify** at the trial by reason of death, infirmity, sickness or absence,
  + (c) possibility that the person will be beyond the **jurisdiction** of the court at the time of trial,
  + (d) possibility and desirability of having person testify at trial by **video conferencing** or other electronic means, and
  + (e) the **expense** of bringing the person to trial
* if person is outside Canada, can use 7-8(11) letter of request
* TRIAL PROCEDURE – Rule 12
* Party with the **onus** goes first 🡪 open and call evidence
* Party that goes first gives an opening statement, frames issues, explain what witnesses will say
* 2 ways to get a party to testify
  + 1. Subpoena
  + 2. Notice to adverse witness
* **12-1 – how to set trial for hearing**
  + This applies to an **action**
  + Parties generally agree on trial date and trial length
  + Once you have set the trial, then you enter the fact-finding process
  + (2) file a notice of trial
  + (3) notice must contain date set out in case plan order, or date obtained from registry
* **Rule 12-3 – Trial Record**
  + Party who files notice of trial must file a trial record for the court
  + (1) contains pleadings, particulars, case plan order, documents relating to conduct of the trial
  + (3) filed between 14 & 28 days before trial
  + (4) amendments
* **Rule 12-4 – Trial Certificate**
  + (1) each party of record must file in form 42 in the registry
  + (2) filed 14-28 days before trial
  + Confirms matter is ready to go to trial – if you don’t fine, trial is struck from the list
  + (3) must contain
    - (a) statement that the party filing will be ready to proceed on trial date
    - (b) statement clarifying that examination for discovery is complete
    - (c) current estimate of trial length
    - (d) statement that trial management conference has been conducted
  + (6) party who fails to file is not able to make further applications without leave from the court
* TRIAL MANAGEMENT CONFERENCE – Rule 12-2
* Designed to make sure the trial goes ahead 🡪 mandatory
* (1) Must happen **at least 28 days before scheduled trial date**
* (3) File a brief at **least 7 days in advance**
  + Set out expected witnesses (do not have to make an undertaking, expected time, cross time, length of opening and closing submissions) – include idea about length of trial
  + Set out main issues before the court and your party’s position re: those issues
  + Frame your issues
  + Set out your authorities
* Can get the other side to give summary of their witness testimony
  + If you are surprised about a witness or not sure what they are going to say
* (2) – Trial management conference must be conducted by **judge**
* (4) – Who must **attend** the trial management conference – lawyers of and parties of record
* (5) – Absent parties must be available and accessible by **telephone** or other means
* (6) An application under subrule (4) for an order respecting the **manner in which a person is to attend** a trial management conference or exempting a person from attending a trial management conference
  + (a) must be made by requisition in Form 17, (b) must be supported by a letter signed by the person or the person’s lawyer setting out the reason why the order is sought, and (c) unless the court otherwise orders, may be made without notice.
* (7) If a person who, under subrule (4), is required to attend a trial management conference **fails to attend** at the trial management conference, the trial management conference judge may do one or more of the following:
  + (a) proceed in the absence of the person who failed to attend;
  + (b) adjourn the trial management conference;
  + (c) orderthe person, or the party on whose behalf the person was to attend, pay costs to one or more of the parties.
* (8) – Proceedings must be **recorded** – record not available without court order
* (9) – Judge, without limiting the ability of the trial judge to make other orders at trial, may, whether or not on the application of a party, make orders respecting one or more of the following:
  + - (a) a plan for how the trial should be conducted;
    - (b) whether or not the trial or any part of it is to be heard without a jury, on any of the grounds set out in Rule 16-1(5);
    - (c) amendment of pleadings within a fixed time;
    - (d) admissions of fact at trial;
    - (e) admission of documents at trial, including
      * (i) agreements as to the purposes for which documents may be admitted, and
      * (ii) the preparation of common books of documents and document agreements;
    - (f) imposing time limits for the direct examination or cross-examination of witnesses, opening statements and final submissions;
    - (g) directing that a party provide a summary of the evidence that the party expects one or more of the party’s witnesses will give at trial;
    - (h) directing that evidence of witnesses be presented at trial by way of affidavit;
    - (i) respecting experts, including, without limitation, orders that the parties’ experts must, before the service of their respective reports, confer to determine and report on those matters on which they agree and those matters on which they don not agree;
    - (j) directing that the parties present opening statements and final submissions in writing;
    - (k) respecting when and how an issue between the party filing a third party notice and the third party may be tried;
    - (l) adjournment of the trial;
    - (m) directing that the number of days reserved for the trial be changed;
    - (n) directing the parties to attend a settlement conference;
    - (o) adjourning the trial management conference;
    - (p) directing the parties to attend a further trial management conference at a specified date and time;
    - (q) any other matter that may assist in making the trial more efficient;
    - (r) any other matter that may aid in the resolution of the proceeding;
    - (s) any orders the judge considers will further the object of these Rules.
* (10) – When approval in writing by lawyer not required
* (11) – Prohibited orders - A trial management conference judge **must not**, at a trial management conference,
  + - (a) hear any application for which affidavit evidence is required, or
    - (b) make an order for final judgement, except by consent
* ***Vernon v. British Columbia***held that an application for an adjournment of a trial could not be heard at aTMC as the matter **required affidavits**, statements of counsel could not provide a proper evidentiary basis.
  + With respect to **both CPCs and TMCs**: they are *not* generally the forum to determine ***contested* applications**.  Such applications will usually require **affidavit evidence and...cannot be heard at such conferences**...
  + BUT in ***Jurczak v. Mauro***: judge determined a trial adjournment application, **based on affidavit evidence,** at a TMC. The distinction between the two cases appears to be **whether there are *contentious issues* which require affidavits and an assessment of the merits and weight of the affidavit evidence in determining whether to exercise discretion**
* ***Jurczak v. Mauro:*** *Vernon* does not suggest that a judge at a TMC can never order an adjournment if one party objects. In some cases where an adjournment is sought, a judge may decide that supporting information is or is not adequate
  + **It is for the judge to decide whether a particular application requires affidavit evidence and whether any affidavits that have been tendered are relevant**
  + There are situations where the need for an adjournment can be clearly assessed on the basis of information provided at the TMC and affidavit evidence would be of no assistance.  T**he fact that the adjournment application was contested would not, in itself, have prevented me from hearing and deciding it at the TMC**.  In the circumstances, affidavit evidence was not necessary.
* ***Vernon*** – no affidavits
* ***Hans*** – no affidavits
* ***Juczak*** – no affidavits for contested issues
  + But if there is an uncontested issue, affidavits may be allowed 🡪 if its just to put evidence before the court
* EVIDENCE AND PROCEDURE AT TRIAL – Rule 12-5
* Ways to present evidence:
  + Deposition
  + *Viva voce* (live witnesses)
  + Notices to admit
  + Interrogatories
  + Affidavit evidence (if you get leave)
  + Transcripts of discovery
  + Expert evidence
* **Reading in**
  + At least 2 weeks before trial have to give notice of the discovery evidence you plan to read in if it is in your transcript
    - Boring, but effective b/c know what the evidence will be beforehand
  + Transcript from pre-trial examination of a witness (Rule 7-5)
  + Evidence from a deposition (Rule 7-8) – it parties agree or court orders
* 2 ways to get a party to testify
  + 1. Subpoena (31)-(36)
  + 2. Notice to adverse witness (19)-(26)

### WITNESSES

* + **(27) – Witness to testify orally –** subject to any enactments in these rules:
    - (a) a witness at a trial of an action must testify in open court, and
    - (b) unless the parties otherwise agree, the witness must testify orally.
  + **(28) – Witness must be listed in witness list** 
    - Unless the court otherwise orders, a party must not, at trial, leave evidence from a witness unless that witness is listed in a witness list.
  + **(29) – Examination of witnesses -** The court may permit a party
    - (a) to examine a witness, either generally or with respect to one or more issues,
      * (i) by the use of **leading questions,**
      * (ii) by **referring the witness to a prior statement** made by the witness, whether or not made under oath,
      * (iii) respecting the **interest of the witness, if any, in the outcome** of the proceeding, or
      * (iv) respecting any **relationship or connection between the witness and a party**, or
    - (b) **to cross-examine a witness**, either generally or with respect to one or more issues.
  + Leading questions not commonly permitted – but can happen where issues are non-controversial – but in general, the less you have to lead the more weight the evidence has
  + **(30) – Any party may contradict testimony – may contradict or impeach**
  + **(38) – Failure of witness to attend, etc. -** On proof
    - (a) of service of a subpoena on a witness who fails to attend or remain in attendance in accordance with the requirements of the subpoena,
    - (b) that proper witness fees have been paid or tendered to that witness, and
    - (c) that the presence of that witness is material to the ends of justice, **the court,** by its warrant in Form 46 directed to a sheriff or other officer of the court or to a peace officer, **may cause that witness to be apprehended and promptly brought before the court and to be detained in custody** or released on terms the court may order, and the court may order that witness to pay the costs arising from his or her failure to attend or to remain in attendance.
* **(19)-(25) ADVERSE witness** – getting someone declared an adverse witness allows you to cross examine them and the other party can just examine them on the issues that come out of the cross
  + Practically speaking, once person gets an order to call an Adverse Party, the other side will first call them as a witness
  + This way they get control over their testimony and other side can only cross examine them on issues arising from this
* **(19) - “Adverse party” defined -**  *“adverse party” means a party who is adverse in interest.*
  + **(20) – Adverse witness**
  + Subrules (21) to (24) apply if a party wishes to call as a witness at the trial
    - (a) an adverse party, or
    - (b) a person who, at the time the notice referred to un subrule (21) is served, is a director, officer, partner, employee or agent of an adverse party.
  + **(21) – Notice to call adverse witness – serve notice and fees 7 days before date witness is required**
  + **(22) – Exceptions -** Despite subrule (21), a party may
    - (a) call as a witness, without payment of witness fees or previous notice, a person referred to in subrule (20) if the person called is in attendance at the trial, or
    - (b) subpoena a person referred to in subrile (20).
  + **(23) – Application to set notice aside -** The court may set aside a notice served under subrule (21) on the grounds that
    - (a) the adverse party is unable to procure the attendance of the person named in the notice,
    - (b) the evidence of the person is unnecessary,
    - (c) it would work a hardship on the person or the adverse party to require the person to attend the trial, or
    - (d) the person named in the notice is not a person referred to in subrule (2)0.
  + **(24) – Court may make order**
  + **(25) – Refusal to comply with notice -** If a person called as a witness in accordance with subrule (21) or (22) refuses or neglects to attend the trial, to be sworn or to affirm, to answer a proper question put to the person or to produce a document that the person is required to produce, the court may do one or more of the following:
    - (a) grant judgment in favour of the party who called the witness;
    - (b) adjourn the trial;
    - (c) make an order as to costs;
    - (d) make any other order it considers will further the object of these Rules.
  + **(26) – Adverse party as witness may be cross-examined**
  + If a party calls an adverse witness, the following apply:
    - (a) **the party calling the witness is entitled to cross-examine the witness generally on one or more issues**;
    - (b) the adverse party must not cross-examine the witness except to obtain an explanation of matters brought out in the examination-in-chief;
    - (c) other parties may cross-examine the witness generally on one or more issues, as the court may direct;
  + (d) the party calling the witness must not re-examine the witness except in relation to new matters brought out in cross-examination
  + **\*HERE is where you can cross-examine your OWN witness!!!!**
* **Normal vs Adverse – know the difference!**

### EVIDENCE

* + **(2)** by serving a **notice to produce** at least 2 days before trial – one side can make the **other party** bring (a) any **document** listed, (b) any **physical object** in their possession or control that party A wants to use at trial as exhibit
  + **(36)** Same provision as (2) but for a **non-party**
  + **(10)** no exhibits are to be entered unless, at least 7 days before the start of the trial, parties have opportunity to inspect it
* **A. Depositions**
  + (40) – **Use of deposition evidence**
    - A transcript of video recording of a deposition under Rule 7-8 may be given in evidence at the trial by any party and, **even thought the deposition of a witness has or may be given in evidence, the witness may be called to testify at trial.**
  + (41) – Use of videotape or film
  + (42) – Certified transcript
  + (43) – Video recording of deposition evidence
  + (44) – Video recording of evidence becomes exhibit
  + (45) – Deposition to be given in full
    - If a transcript or video recording of a deposition is given in evidence,
    - (a) subrule (56) applies, and
    - (b) the **deposition must be presented in full**, unless otherwise agreed by the parties or ordered by the court. [unlike discovery!]
* **B. Discovery**
  + **(46)** – Persons against whom discovery evidence is admissible
    - If otherwise admissible, the evidence given on an examination for discovery by a party or by a person examined under Rule 7-5(5) to (10) may be tendered in evidence at trial by any party adverse in interest, unless the court otherwise orders, but the evidence is admissible against the following persons only:
    - (a) the adverse party who was examined;
    - (b) the adverse party whose status as a party entitled the examining party to conduct the examination under Rule 7-2;
    - (c) if the person was examined under section 17 of the Class Proceedings Act as a member of a class, the members of that class.
  + (47) – Notice required of evidence – **14 days before trial**
  + (48) – Attendance at trial may be required
  + (49) – Court may consider whole examination
    - If party of an examination for discovery is tendered in evidence, the court may review the whole of that examination and if, following the review, the court considers that another party of the examination is closely connected with the part tendered in evidence, it may direct that the other party be tendered as evidence.
* **C. Pre-Trial Examination**
  + **(52)** **– Use of pre-trial examination of a witness**
    - A party may tender in evidence at the trial all or party of the examination of a person taken under Rule -5
    - (a) to **contradict or impeach** the testimony of the person at trial, or
    - (b) if it is necessary in the interests of justice and
      * (i) the person is dead,
      * (ii) the person is unable to attend and testify because of age, infirmity, sickness or imprisonment,
      * (iii) the person is out of the jurisdiction, or
      * (iv) the person’s attendance cannot be secured by subpoena
  + \*generally not supposed to read in pre-trial examination because it was meant to figure out their case or if you thought they may be dead
  + **(53)** – Court may consider whole pre-trial examination
* **D. Interrogatories - (58) –** Use of interrogatories at trial
  + At the trial of an action, a party may give in evidence an answer, or party of an answer to interrogatories, by the court may look at the whole of the answers and, if it is of the opinion that any other answer or party of an answer is so connected with an answer or part of it given in evidence that the one ought not to be used without the other, it may direct that the other answer or part of it be put in as evidence.
* **E. Affidavit - (59) – Affidavit evidence**
  + On the application of a party of record at or before trial, a judge or master may order that the evidence in chief of a witness may be given by affidavit.
  + **(60) copy of affidavit must be served 28 days before**
  + **(61) – Cross-examination**
    - If a copy of an affidavit of a witness is served under subrule (60), any party may, unless the court otherwise orders, require the witness to be called from cross-examination at trial, provided that the party gives to the party seeking to tender the evidence by affidavit notice of the requirement within 14 days after receiving the affidavit.
  + (63) – **Contents -** The person swearing or affirming an affidavit referred to in subrule (59) may state only what he or she would be permitted to state were the evidence to be given orally.
  + **(64**) cross is NOT limited to matters contained in affidavit

### PROCEDURE

* **Questioning and Cross** (29)
  + If you subpoena a W they are your W – i.e. no cross examination unless court permits it
  + On non controversial evidence – court will allow leading and cross
  + On contested matters – court won’t allow leading or cross
  + The “cleaner” the evidence goes in the more weight the court will give it (more leading/cross = less weight)
* **Hearsay** evidence generally not allowed unless it meets an exception:
  + Expert, interrogatory, notice to admit, admission against interest etc.
* **Order of speeches (72) -** Addresses to the jury or the court must be as follows:
  + (a) the party on whom the onus of proof lies may open his or her case before giving evidence;
  + (b) at the close of the case of the party who began, the opposite party, if that party announces his or her intention to give evidence, may open his or her case;
  + (c) at the close of all the evidence, the party who began may address the jury or the court, and the opposite party may then address the jury to the court and the party who began may then reply and the court may allow the opposite party to be heard in response to a point raised in the reply;
  + (d) if a defendant claims relief against another defendant, the defendant claiming relief may address the jury after the defendant against whom the relief is claimed;
  + (e) if a party is represented by a lawyer the rights conferred by this rule must be exercised by the party’s lawyer.
* \*there WILL be an expert evidence question on the exam
* **(3) –** **Failure to prove a material fact** - If a **party omits or fails to prove some fact material** to the party’s case, the court may proceed with the trial, subject to the fact being afterwards proved as the court directs, and,
  + (a) if the case is being tried by a jury, the court may direct the jury to find verdict as if that fact had been proved, and
  + (b) unless the court otherwise orders, judgment must be entered according to whether or not that fact is or is not afterwards proved as directed.
  + [High threshold – difficult to get the court to do this]
* (67) Court can order one or more issues be tried and determined before the others

### MOTIONS TO STRIKE A CASE

* **\*\*Difference between a No Evidence (4) and Insufficient Evidence (6) motion**
  + **(4) No evidence** – on some point material to the case, the P has not presented evidence – P automatically loses
    - Make this application and court determines if there is any evidence – if there is some, the trial continues and the court does not weight the evidence
    - **If application fails, D can still call evidence**
    - Common re: causation
  + **(6) Insufficient evidence** – call for dismissal because on a balance they have not met the burden and will lose (essentially electing to close the trial)
    - Use this where you’re fearful as to the evidence that will come out if you call you witness
    - **(7)** **IN ORDER TO MAKE APP UNDER (6), D HAS TO ELECT NOT TO CALL EVIDENCE**
    - So, unlike under (4), if your app is dismissed you are screwed
* (75) – Failure of all parties to appear at trial – struck off the trial list
* (76) – Failure of one party to appear at trial – continue in their absence
* (77) – Court may set aside judgment – if a party does not attend
* JURY TRIALS – Rule 12-6
* Rare in civil cases because they are expensive, take time and are seen as unpredictable
* **(1) – Trial without jury generally** - Subject to subrule (3), a trial must be heard by the court without a jury.
* (2) – A trial **must be heard by the court without a jury** if the trial relates to
  + (a) the administration of the estate of a deceased person,
  + (b) the dissolution of a partnership or the taking of partnership or other accounts,
  + (c) the redemption or foreclosure of a mortgage,
  + (d) the sale and distribution of the proceeds of property subject to any lien or charge,
  + (e) the execution of trusts,
  + (f) the rectification, setting aside or cancellation of a deed or other written instrument,
  + (g) the specific performance of a contract,
  + (h) the partition or sale of real estate,
  + (i) the custody or guardianship of an infant or the case of an infant’s estate, or
  + (j) a proceeding referred to in Rule 2-1(2).
* **(3) – Notice requiring jury trial** – 21 days after notice for trial but 30 days before trial
* (4) – Jury notice not to prevent transfer of proceeding
* (5) – **Court may refuse jury trial -** Except in cases of **defamation, false imprisonment and malicious prosecution**, a party on whom a notice under subrule (3) has been served may apply
  + (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
    - (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
    - (ii) the issues are of an intricate or complex character, or
    - (iii) the extra time and cost involved in requiring that a trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
  + (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).
* EXPERT REPORTS – Rule 11
* Vast majority of cases require some kind of expert 🡪 must be objective
* 11-6 talks about expert **report**
* 11-7 talks about how that report / the expert can be used **at trial**
* ***R v. Mohan***(SCC, 1994) - **4 Criteria for an Expert report**
  + The party putting forward the expert evidence must show that the expert’s testimony is:
  + 1. **Relevant**
  + Whether the evidence is likely to assist the judge/jury in fact finding
    - Whether the evidence is reliable
    - Whether the evidence tends to prove an issue or material fact
    - Is the evidence controversial?
  + 2. **Necessary**
    - Beyond helpful
    - More about what is to be outside the experience of the judge/jury – do they need the assistance of someone with special knowledge?
  + **3. No prohibatory rule excluding it’s inclusion**
    - * Cannot rely on hearsay in the development of an opinion
      * If admitted b/c relevant but based on second hand evidence to show the evidence upon which the opinion is based, but not as evidence as the truth
  + **4. Expert must be properly qualified**
    - Must have special or peculiar knowledge through study or experience on the issues s/he is asked to testify
* Some objections to expert testimony:
  + Renders opinion on ultimate issue (role of court)
  + Fails to set out proper qualifications
  + Fails to set out facts and assumptions on which report was based
  + Renders opinion on conduct that is beyond the scope of expert’s expertise
  + Novel, untested area, has not been subject to per review

### 11-2 – Duty of Expert witness

* + **(1)** expert appointed by one or more parties or by court has a **duty** to assist the court and **not to be an advocate for any party**
  + **(2) certification -** If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she
    - (a) is aware of the duty referred to in subrule (1),
    - (b) has made the report in conformity with that duty, and
    - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty
  + So make sure your expert is not hypothesizing, argumentative, or answering the ultimate issue

### 11-3 Appointment of Joint Experts

* + (1) – If 2 or more parties who are adverse in interest **wish to or are ordered** under Rule 5-3(1)(k) **to jointly appoint an expert**, the following must be settled before the expert is appointed:
    - (a) the identity of the expert;
    - (b) the issue in the action the expert opinion may help to resolve;
    - (c) any facts or assumptions of fact agreed to by the parties;
    - (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
    - (e) the questions to be considered by the expert;
    - (f) when the report must be prepared by the expert and given to the parties;
    - (g) responsibility for fees and expenses payable to the expert.
  + Proportionality suggests that an effort should be made to avoid duplication of the costs of obtaining an expert report which is the likely outcome if a joint report is not ordered  (***Leer and Four L. Industries v Muskwa Valley Ventures***)
* **11-5 Court can appoint its own expert**

### 11-6 EXPERT REPORTS

* + An expert report is an exception to the rule that you generally need first hand evidence
  + Their report is like an **equivalent to the examination in chief**
    - But they can still be called as witness to give info on their report
    - Expert must be *available for trial*
    - If other party wants to cross the expert – have to ask
  + **(1) – Requirements for report -** An expert’s report that is to be tendered as evidence at trial must be signed by the expert, must including the certification required under Rule 11-2(2) and must set out the following:
  + (a) the expert’s name, address and area of expertise;
  + (b) the expert’s **qualifications and employment and educational experience** in his or her area of expertise;
  + (c) the instructions provided to the expert in relation to the proceedings;
  + (d) the **nature of the opinion being sought** and the issues in the proceeding to which the opinion relates;
  + (e) **the expert’s opinion** respecting those issues;
  + (f) the expert’s **reasons for his or her opinion**, including
    - (i) a description of the **factual assumptions** on which the opinion is based,
    - (ii) a description of any **research** conducted by the expert that led him or her to form the opinion, and
    - (iii) a **list of every document, if any, relied on** by the expert in forming the opinion
  + ***VCC v Barrett***  - court will look at how **report was prepared**
    - Here, expert revised it 10 times with advice from counsel
    - Did not prepare it on his own
    - He seriously compromised the objectivity
  + **(3) – Service of report** – 84 days before trial
  + **(4) service of responding report** – 42 days before trial
  + **(8) – Production of documents -** Unless the court otherwise orders, if a report of a party’s own expert appointed under Rule 11-3(9) or 11-4 is served under this rule, the party who served the report must,
  + (a) promptly after being asked to do so by a party of record, serve on the requesting party whichever one or more of the following has been requested
    - (i) any written statement or statements of facts on which the expert’s opinion is based;
    - (ii) a record of any independent observations made by the expert in relation to the report;
    - (iii) any data compiled by the expert in relation to the report;
    - (iv) the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relief on that test or inspection in forming his or her opinion, and
  + (b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert’s file relating to the preparation of the opinion set out in the expert’s report,
    - (i) if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request, or
    - (ii) in any other case, at least 14 days before the scheduled trial date.
  + **(10) – Notice of objection to expert opinion evidence -** A party who receives an expert report or supplementary report under this Part must, **on the earlier of the date of the trial management conference and the date that is 21 days before the scheduled trial date**, serve on every party of record a notice of any objection to the admissibility of the expert’s evidence that the party receiving the report or supplementary report intends to raise at trial.
  + **(11) – When objection not permitted -** Unless the court otherwise orders, if reasonable notice of an objection could have been given under subrule (10), the objection must not be permitted at trial if that notice was not given

### 11-7 EXPERT OPINION EVIDENCE AT TRIAL

* + (2) When report stands as evidence
  + (3) **cross-examination of expert**
    - **(a) if expert was jointly appointed, either side can demand to cross-examine**
    - **(b) if expert for one party, the other party can demand the right to cross-examine**
  + **(5) Expert’s report IS THE EVIDENCE**
    - (A) party must not call the expert to give oral evidence unless:
      * (i) demanded under (3)
      * (ii) the party believes direct examination of expert is **necessary to clarify terminology in the report**
    - **(b)** party must not cross their own expert

# FAST TRACK AND EXPEDITED LITIGATION – Rule 15-1

* In certain limited circumstances, this rule allows for an alternative to a full trial
* For relatively simple matters than are less than $100,000
* **If you bring this application it is mandatory**
* Not always available 🡪 only for **actions** not petitions
* **(1) – When rule applies -** Subject to subrule (4) and unless the court otherwise order, this rule applies to an action if
  + (a) the **only claims in** the action are for one or more of money, real property, a builder’s lien and personal property and that the total of the **following amounts is $100,000 or less,** exclusive of interest and costs:
    - (i) the amount of money claimed in the action by the plaintiff for pecuniary loss;
    - (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
    - (iii) the fair market value, as at the date of the action is commenced, of
      * (A) all real property and interest in real property, and
      * (B) all personal property and all interests in personal property claimed in the action by the plaintiff,
  + (b) the trial of the action can be **completed within 3 days,**
  + (b) the parties to the action **consent**, or
  + (d) the **court**, on its own motion or on the application of any party, **so orders**
* (3) nothing prevents court from awarding damages in excess of $100,000
  + ex if property was $80,000 but has increased to $120,000 – court can give higher amount
* (5) in the event of a **conflict between this rule and another** – this one applies
* (7) a party to a fast track must not serve a notice of application or an affidavit in support of an application unless a CPC or TMC has been conducted
  + (8) exceptions
* (10) no right to jury
* (14) if, at TMC, judge determines it will take more than 3 days, judge
  + (a) may adjourn to regular trial
  + (b) is no longer seized
* **(15) – Costs -** Unless the court otherwise orders or the parties consent, and subject to Rule 14-1(10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
  + (a) if the time spent on the hearing of the trial is one day or less, $8,000;
  + (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9,500;
  + (c) if the time spent on the hearing of the trial is more than 2 days, $11,000.

# \*\*COSTS\*\* - Rule 14-1

* Costs drive litigation 🡪default is that costs go to the successful party **(9)**
* Costs orders serve many functions. They indemnify successful litigants; deter frivolous proceedings and defences; encourage parties to deliver reasonable offers to settle; and discourage improper or unnecessary steps in litigation (***skidmore)***
* “Costs” include disbursements and legal costs
* **Disbursements** – out of pocket costs
  + Service fees, printing, faxes
  + There is full indemnification for these fees
  + Can never be awarded double disbursements!
  + TEST – were they **proper or reasonably necessary (2)**
* **Legal Fees** – what you paid your lawyer
  + “party and party” costs
  + Paid on tariff / schedule
  + **APPENDIX B – p 561**
* \***costs are available even if you represented yourself**
* judge does not determine **amount** of costs, only **who** gets costs and the **type** they get
* **Orders:**
  + “Costs to the plaintiff in any event of the case”
    - Means that even if the pl doesn’t win, they are still entitled to the costs of the application
    - The df may win and get costs, but not the cost of the application
    - Common
  + “Cost to the plaintiff in the case”
    - Only recover costs if they win
    - Means the **df will never get their costs**
    - If pl doesn’t win, no one gets costs
    - **Default**
    - Can also be awarded to the “df in the case”
  + “Costs in the cause”
    - Common
    - There is a legitimate application and **whoever wins gets costs**
      * Subject to offers and how they affect costs
    - Left in the hopper until the end of the case
  + Judge can say no costs
    - Each party bears their own costs re: the application
* Judge can order costs “forthwith” 🡪 payable now – usually used as punishment
* **Ways to get MORE costs**
  + 1. Establish you meet the test for special costs
  + 2. Effective use of offer to settle
* (1) default – party and party costs
  + Costs under a tariff / schedule – **APPENDIX B**
  + ***Appendix  B*:**There  is  a  scale  A,  B,  and  C.  *Default*  for  most  litigation  is  Scale  B  (matters  of  ordinary  difficulty).  The  value  of  the  units  for  A:  $60/unit,  B:  $110/unit,  C:  $170/unit.
  + If costs are payable to a party under these Rules or by order, those costs **must be assessed as party and party costs in accordance with Appendix B unless any of the following exist:**
    - (a) the **parties consent** to the amount of costs and file a certificate of costs setting out that amount;
    - (b) the **court orders** that
      * (i) the costs of the proceeding be assessed as **special costs**, or
      * (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
    - (c) the court awards **lump sum costs for the proceeding** and fixes those costs under rule (15) in an amount the court considers appropriate;
    - (d) the court awards **lump sum costs in relation to the application**, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
    - (e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which even Rule 15-1(15) to (17) applies;
    - (f) subject to subrule (10) of this rule
      * (i) the only relief granted in the action is one or more of money, real property, a builders lien and personal property and the plaintiff recovers a judgment in which the total value of relief granted is $100,000 or less, exclusive of interest and costs, or
      * (ii) the trial of the action was completed within 3 days or less, in which event, Rule 15-1(15) to (17) applies to the action unless the court otherwise orders.
* (3) SPECIAL COSTS
  + On assessment of special costs, registrar must
    - (a) allow those fees that were proper or reasonably necessary to conduct the proceeding
    - (b)consider all of the circumstances, including
      * (i) complexity of proceedings
      * (ii) skill, specialized knowledge, and responsibility required of lawyer
      * (iii) amount involved in proceeding
      * (iv) time reasonably spent in conducting proceeding
      * (v) conduct of any party that tended to shorten or to lengthen the proceeding
      * (vi) importance of the proceeding to the party whose bill is being assessed
      * (vii) benefit to party whose bill is being assessed of the lawyer’s services
      * (viii) rule 1-3 (proportionality etc) and any case plan order
  + Special costs are **much closer to actual costs – usually 80-90%**
  + Often awarded in fraud cases when fraud is not proven
  + Special costs may be ordered for **reprehensible conduct falling short of scandal or outrage. Misconduct deserving of reproof or rebuke is reprehensible (*Garcia)***
  + Special costs will not be ordered just because an unsuccessful party’s proceeding had little merit (***Garcia)***
  + ***Bradshaw Construction Ltd v. Bank of Nova Scotia*** **(BCCA, 1991) – special costs**
    - Special costs are a category of costs payable to a party. Special costs are more or less what solicitor and client costs were under Schedule 4 to Appendix C of the Rules of Court in force before September 1, 1990
    - Special costs are meant to provide a much higher indemnity than ‘ordinary’ costs. They are not necessarily the fees that the solicitor for the party entitled to costs could claim from his or her own client. They are the fees that a reasonable client would have to pay a reasonably competent solicitor to do the work for which costs are claimed
    - Special costs should be assessed objectively; fees claimed under the Legal Profession Act are reviewed in a subjective basis as between the solicitor and his own client
    - Special costs are the fees that a reasonable client would have to pay a reasonably competent solicitor to the do work for which the costs are claimed
  + ***Lee (Guardian ad litem of) v. Richmond Hospital Society*** **(BCCA, 2005) – special costs; contingent agreements**
    - Special costs are intended to ‘resemble closely’ the reasonable fees charged by a lawyer to his or her own client
    - Lawyers who make contingent agreements with their clients confer a benefit on the client of the sort contemplated by Rule 14-1(3)(b)(vii) and for that reason the clients’ ability to pay is a relevant factor for consideration on special cost assessments. The amount of a contingent fee must be taken into account ‘…to the extent that it was properly or reasonably necessary in the conduct of the proceeding for which the fee was charged between lawyer and client considering all of the circumstances
* **(5) Disbursements**
* **(10) – Costs in case within small claims jurisdiction**
  + *A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for brining the proceeding in the Supreme Court and so orders.*
  + [For example, small claims court does not have jurisdiction for defamation cases – must bring in Supreme court – so if are awarded less than $25,000 it is still okay because have a ‘sufficient reason’ for bringing the case in that court]
  + [If get less than $25,000 and don’t have a good reason, then don’t get costs]
* **(13) When are costs payable -** Costs are usually not recovered until proceeding is over, so even if you are awarded costs on an application along the way, the other side does not pay until the end
* SECURITY FOR COSTS
  + Available to **defendant** – seek that the plaintiff provide security for the cost that D is expected to incur, so that if D wins, they can recover costs
  + Not available to P because they **chose** to come to court by commencing an action – they take the risk that they may not recover
  + But D did not ask to be there
  + Used when there is a ***real risk*** that P won’t be able to pay costs
  + May act as a stay – P cannot continue until they pay into security
  + This will not be ordered if the only reason is to stop a legitimate claim
  + Fat Mel’s Restaurant Ltd v. Canadian Northern Shield Insurance Co **(1993) – security for costs**
    - The purpose of ordering security for costs is provide a fund for the payment of the costs of parties who succeed against impecunious opponents
    - The amount to be ordered as security should be determined having regard to all of the circumstances
* Bill of Costs
  + Successful party sends over a bill of costs
    - Sets out what they are claiming
    - Go back and forth and negotiate what reasonable costs are for items in which there is a range (e.g. correspondence, document review)
  + For anything that is a per-day rate, that assumes it goes more than 2.5 hours
    - Per day units are for a full date
    - If less, only get half credit
    - Either half or full – no other fraction
  + **If parties cannot agree on costs, must go before the Registrar**
    - Need 3 (or 4) things:
    - 1. **Order awarding you costs -** Give registrar jurisdiction to deal with this
    - **2. Appointment -** To appear before the registrar – file and serve
    - **3. Bill of Costs -** What you are claiming
    - **4. Evidence supporting your claim for costs**
      * Oral evidence from lawyer of client
      * If you are the lawyer, you show up and give *viva voce* evidence (argument as to you should get these different units – discuss complexity of the case etc.)
      * May also give affidavit evidence
        + Mostly used when trying to justify a disbursement
* **(17) Setting  off  costs:**If  there  have  been  a  number  of  different  cost  determinations  on  applications  during  the  course,  the  court  may  resolve  it  all  at  the  end  of  the  day.  Ex.  If  the  plaintiff  is  successful  and  is  awarded  costs  on  Scale  B,  if  along  the  way,  there  were  “*costs  to  the  defendant  in  any  event  of  the  cause,*”  the  costs  of  that  application  are  calculated  and  **set  off**against  the  costs  awarded  to  the  plaintiff.  But  note:  if  there  were  “*costs  to  the  defendant  in  the  cause*,”  since  the  defendant  did  not  win,  the  defendant  does  not  get  these  costs,  but  neither  does  the  plaintiff  because  they  didn’t  win  on  that  application.
* If  you  take  **default  judgment**,the  costs  that  are  recoverable  are  a  reduced  level  of  costs  set  out  in  ***Appendix  B***(***p.  569:  Schedule  2***).
* If  you  have  a  **fast-­track  proceeding**,  you  get  modified  levels  of  costs.

# APPEALS AND REVIEW OF DECISIONS

* 14 days to appeal a master’s decision to a judge
  + Then apply for leave to appeal 🡪 Then appeal
  + General test for judge is **reasonableness -** Is the Master’s test reasonable?
  + Exception is for true legal questions – then test is correctness

### BC Court of Appeal

* For a **final decision**
  + You have 30 days to file an appeal, Automatic right, 3 judge panel
* If **interlocutory**, or some other non-final decision
  + **Must seek leave from one judge of CofA,** Won’t generally interfere with discretionary findings, unless unreasonable
* Can’t overturn precedent unless 5 judges sitting
* Factors considered re: **whether to grant leave**
  + Point on appeal is of significant to the practice
  + Point raised is significant to the action itself
  + Whether appeal is *prima facie* meritorious, or whether it is frivolous
  + Whether appeal will unduly hinder the progress of the action

### Court of Appeal Act, ss. 6 and 7

* 6. Appellate jurisdiction
  + ***6 (1****) An appeal lies to the court*
    - *(a) from any order of the Supreme court or an order of a judge of that court, and*
    - *(a) in any matter where the jurisdiction is given to it under an enactment of British Columbia or Canada*
  + *(2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subjection (1), that enactment prevails*
* 7. Leave to appeal
  + ***7 (1****) In this section, “interlocutory order” includes*
    - *(a) an interim order made under the Family Relations Act, and*
    - *(b) an order made under the Supreme Court Rules on a matter of practice or procedure*
  + *(2) Despite section 6(1), an appeal does not lie to the court from*
    - *(a) an interlocutory order,*
    - *(b) an order respecting costs only, or*
    - *(c) an order for determination under Rule 21-7 of the Supreme Court Civil Rules*
  + *without leave of a justice*
  + *(3) In an order granting leave to appeal under this or any other Act , a justice may limit the grounds of appeal*
* 14. Bringing an appeal
  + *14 (1) The time limit for brining an appeal or an application for leave to appeal is* 
    - *(a) 30 days, commencing from the day after the order appeal from is pronounced, or*
    - *(b) in another enactment specifies a different period, that different period*
  + *(2) An appeal or application for leave is brought*
    - *(a) by filing a notice of appeal or notice of an application for leave to appeal in a registry, and*
    - *(b) by serving a copy of the notice on every respondent, unless a justice orders that service on a respondent may be dispensed with*
  + *(3) Within 10 days after serving all respondents required to be served, that appellant must file in a registry proof, in a form satisfactory to the registrar, that a copy of the notice of appeal or application for leave to appeal has been served on every respondent required to be served*
  + *(4) If leave to appeal is granted, the appeal is deemed, for all purposes, to have been brought*

### Supreme Court of Canada

* Must seek leave **within 60 days** in most circumstances
* Leave is heard by 3 judges 🡪 If granted, go before 5, 7 or 9
* Test is public importance
  + Of national importance OR Where there are competing CofA decisions that need to be resolved
* Can use appeal as leverage (e.g. when negotiating costs)