Civil Procedure

Law 306: Final Outline 2015

Natalie Pawson

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Civil Litigation in Context

- **Full civil trial is beyond the means of the majority of Canadians, without government funding, and this has the potential to erode ROL** (Hryniak v Mauldin)
    - A shift in the system is required
    - Alternatives are only useable if neither party can go to trial – richer party can bully other party if they knew they cannot afford to go to trial
    - Rules changed to try to achieve this

- **Rule 1-3** – Objects of the Rules
    - **1-3(1)** – to have a **"just, speedy and inexpensive determination of every proceeding on its merits"**
    - **1-3(2)** – requires consideration of 3 things and their proportionality:
        - The amount involved
        - The importance of the issues in dispute
        - The complexity of the proceeding

TEST: Should you commence an action?

1. Does the client have a valid cause of action?
2. Can the client prove the elements of the cause of action?
3. What are the financial consequences
4. Can a favourable judgment be recovered?

➔ If action commenced…

1. What is the appropriate court?
2. How can the action be commenced?
3. Draft the Pleadings and serve on other party
4. Is there Discovery?
5. Can the issue be resolved with out trial?
6. Go to trial.

Adversarial System

- **Party Prosecution:** parties play main role and drive the process – without action, claim will stop
- **Party Autonomy:** parties define the issues and bring forward whatever evidence for this issue
    - Judge cannot redefine issues – limited to what is in the pleadings
- **Courts Role**: passive, non-interventionist – they are a referee
- Reasoning: parties are best suited to look after their own interests and determine what claims to bring forward
    - Free market ideology – distrust of state, limit judiciary's role, parties get own justice
- **Critiques:**
    - Parties with different financial limits – fair to drive their own cases if they can't afford it?
    - Judges don't care as much and some lawyers aren't great
    - SRL – don't know process, less likely to properly define the issues and bring the proper evidence to be successful
    - Assume continued motivation throughout process
    - Assumes all interests are represented – public interest? Environmental?
        - Who should be involved in decision-making?
- **Push to more of an inquisitorial system**

Inquisitorial System

- **Parties Role:** start the action but do not drive it or define issues
- **Courts Role:** authoritative, interventionist – drive claim forward by their own initiative
    - Duty of court to bring dispute to a conclusion
    - Develop the issues and decide what evidence and witnesses are required
    - Trial is series of hearings, not a single event – depends on court
- **Judges:** not trained as lawyers but as judges – very different approach
- Public interest in resolving disputes – as important as private rights
- German Civil Procedure:
    - P's lawyer commences action – sets out facts, legal basis, remedy and evidence (**still an adversarial element by choosing issues and picking evidence**)
    - Hearing scheduled by judge who invites witnesses and parties
        - Judge examines witnesses and asks counsel questions
        - Counsel can make submissions after
    - Court decides if experts will be used and who

Access to Justice

- Fundamentally important in any free and democratic society and required for a fair trial but there is **NO general right to legal counsel as a precondition to ROL** (BC v Christie)
    - No constitutional right to be represented
    - **Cannot use unwritten principles to strike down legislation** (BC v Christie)
- A2J is more than just being able to walk into the courthouse, just the starting point (BCGEU) – strike blocked doors to courthouse to CJ at the time made motion to prevent it
- A2J is not static: has changed through time – just getting into courthouse to now, more is required to have A2J

- **Principles to guide shift:**

1. **Put the public first** – look at problem from point of view of people experiencing the system
    a. Service oriented
    b. Other ways to deal with problems beyond court

2. **Collaborate and Coordinate** – not just the judiciary's responsibility to enable A2J
    a. Overcome silos that prohibit problem solving

3. **Prevent and Educate** – legal problems can be dealt with at early stages before court is necessary
    a. Build legal capacity to recognize and deal with problems early

4. **Simplify, make Coherent, Proportional and Sustainable** – not every legal problem requires a lawyer, may need someone else to help

5. **Take action** – actually do something rather than talking about it

6. **Focus on Outcomes** – shift focus from process to meaningful outcomes for participants
    a. Process must be fair and just but that is not everything in A2J
    b. Clients will feel like they have A2J if they feel the outcome was meaningful
    c. Emphasis on the needs of the clients

Costs

- **Legal Fees** = When client retains lawyer, enter into K

- **Costs** = At end of trial, successful party has been determined and the court awards them an amount to indemnify them of their legal fees
    - Amount paid by loser
- Regular costs: partial indemnity that loser pays to winner at end of litigation
    - Encourages settlements

- **Presumption**: costs will follow the case as a matter of law unless court makes order otherwise
    - Generally 35-50% of actual costs
    - Rare to have full indemnity

- **Rule 20-5** – court can order that someone is indigent and **can excuse them from paying court registry fees** (filing fees), must show it would result in undue hardship

- Determined after the fact when judge knows who has won – exception is Advanced Costs…

Advanced Costs

- Very rare – only 10 awards across Canada in 10 years
    - Okanagan Indian Band, Little Sisters #2 and R v Coron – main awards
- Not an answer to A2J because the test is so strict that awards rarely happen

Test for Advanced Costs in Public Litigation with Constitutional Component: (Okanagan Indian Band)

1. Party seeking interim costs cannot afford to pay for litigation and there is no other realistic option to bring case to trial

2. The claim to be adjudicated is prima facie meritorious – would be contrary to justice to deny them the opportunity to adjudicate

3. The issue raised transcends individual interests of litigant and are of public importance which have not been resolved in previous cases
    a. **Discretion** – even if litigant meets all 3 steps, court will consider if the case is sufficiently exceptional and special enough to garner this award (can still fail even if 3 steps met)

- **NOTE:** steps of the test must be met with admissible evidence – must PROVE indigent status and demonstrate each step (Little Sisters #2) – makes test harder

Costs in Pro Bono

- Where there is pro bono representation and they win, an award of costs can still be ordered even if there are no legal costs – costs are payable from party to party, not party to lawyer (case quoted in Carter)
    - **Same for SRL** – no legal costs but can still have an award of costs

Test for Full Indemnity in Public Interest Cases (Carter) – similar to advanced costs test

1. Only for truly exceptional cases – **must have wide spread, significant social impact**

2. Show **no personal interest in litigation** that would justify proceedings on economic grounds – show it is impossible to pursue litigation with private funding
    a. Only way to proceed is by getting government to pay

3. **Discretion of court to depart from normal costs**

OLD Test for Full Indemnity (Adams v Victoria) – **too low of a threshold - REFRAMED**

1. Case concerns matter of public importance that transcends individual importance and hasn't been considered before
2. P has no personal, proprietary or pecuniary ability that would justify proceedings on economic terms
3. The unsuccessful party has superior capacity to bear costs of the proceedings
4. P didn't act frivolously or in vexatious manner

Courts, Jurisdiction and Standing

Courts

- **S.92(14), Constitution** – legislative authority and competence over provincial courts is given to the provincial government – Provincial Court
    - Judges of PC are appointed by Provincial government

- **S.96** – superior courts are through the federal government and judges appointed by federal

- **S.101** – parliament can provide constitution maintenance and organization of SCC, brings the SCC into being
    - Ability to bring Federal Court system into being

Jurisdiction

- **Inherent Jurisdiction:** power the court can draw on to do justice (contempt of court and dismissal without trial are examples) – **where there are gaps in the rules and outcome isn't clear, inherent jurisdiction steps in to do justice between the parties**
    - Superior courts are descendants from royal courts, inherit their powers (Endean v BC)
    - **Essential to administration of justice and ROL** – essential to existence of the superior courts (Endean)

- Cannot be exercised in conflict with statute or rule (Endean)
- Must be used in a way that is proportional to the case – discretion!

- **Provincial Courts DO NOT have inherent jurisdiction** – only for superior courts

- **Jurisdiction:** ability or authority of court to hear and decide a dispute

- **If multi-jurisdictional** – must be satisfactory link to this jurisdiction to hear case – consider:

    - Are the parties resident in the province?
    - Do they carry on business in the province?
    - Where was the tort committed?
    - Was the contract made in this jurisdiction?

Standing

- Who is able to bring a claim?

- **Standing as of right:** anyone who alleges they have suffered a breach or invasion of some kind of legally recognizable right – **the person who suffers the harm has standing to bring a claim**

- **Public Interest Standing** – more controversial
    - Challenging state action, either legislative or physical action – allegation that something is unconstitutional but have not suffered any harm
    - Government cannot be beyond judicial review so must be way to challenge…

Test to get Public Interest Standing:

1. Must demonstrate a serious issue to be tried

2. Must demonstrate a genuine interest in the subject matter

3. Must demonstrate that the challenge/case is a reasonable and effective way to deal with the matter, bringing it to court
    a. Previously, test had been strict – looking at whether there is anyone else in the world that is better suited to bring the action (Canadian Council of Churches)
    b. **Relaxed now, flexible approach – is this the best way to challenge the law?** (Morgenthaler)

- **Why Limit Public Interest Standing?**
    - **Court resources are valuable** – want to avoid hypothetical constitutional challenges that waste court and judges time
    - **Integrity of System** – only people with true claim can get standing
    - **Operation of System** – only people truly interested get standing to make sure the adversarial system works properly

Limitation Periods

- **Definition:** period of time in which you must commence a legal action or claim to get a remedy from the court – outside of the period, you lose the right to bring a claim
    - Missing LP can result in dismissal of claim without regard of merit
    - Must file by a certain date (doesn't mean proceeding in timely manner)
    - **Laches:** based on old doctrine – *cannot wait on your rights, after a certain point D should be able to move on with their life*

- **Defence: D must claim LP has expired** – it is a **defence**, NOT an element of the claim

- **Purpose:** create certainty, predictability for D, efficiency of legal system
    - Bring claims while evidence is fresh
    - Judges rely on current social/economic standards rather then import current standards to old cases where standards didn't exist yet

- **BC Limitation Act,** June 1, 2013 – default act to apply where specific statutes don't have timeline
    - More balance between D and P rights – element of discoverability
    - Act/Omission method for running of period
    - **Application:** applies to all civil and self-help remedies BUT NOT to appeals, JR, aboriginal and treaty rights, elements of land law
        - *Old Act:* only applied to civil actions

- **To bring claim, MUST fit under BOTH the ultimate AND basic LPs**

- **Basic LP: s.6, 2 years** – prima facie applies unless P shows that it was extended (see below)
    - Starts to run once P discovers the claim – discovers they were damaged by act/omission
    - *Old Act:* several different basic LPs based on type of claim – complicated, had to know what type of claim to know which LP applied
        - 2 years: damage to person or property, injury focused
        - 10 years: trust based claims
        - 6 years: everything else

- **Ultimate LP: s.21, 15 years** – final time claim can be brought
    - Starts to run the day of the tort – no damage is required
    - *Old Act:* 30 years was the ultimate
        - 6 years: ultimate for claims against doctors and hospitals
        - 30 years: everyone else (doctors NOT in hospitals) – seen as unfair

- **New Element:** no LP for sexual assault or assault on minor or dependent adult, based on when P discovers that there was a claim, no matter when then it starts running
    - Old Act: no LP only applied to sexual abuse

- **Delay of Limitation Period:**
  - **Clock can be postponed, suspended or reset depending on circumstances**
  - Must be serious, substantial and compelling circumstances to delay starting the clock (Novak v Bond)
    - **Objective:** at what point would a reasonable person looking at the person in their circumstances have brought an action?
      - Would reasonable person think permanent damage resulted at certain times? (Brooks) – *medical negligence, loss of blood resulting in permanent damage causing syndrome*
    - **Subjective:** in P's unique circumstances, when could they have brought the claim?

  - Can be extended if D affirms or acknowledges this – must be done after LP runs but before it expires and then basic LP is reset
    - Can be written acknowledgment or conduct, like partial payment

  - Tactical considerations would not count for postponement, waiting for settlement offer is not a good enough reason (Iezzi)

  - **Must be capable to commence the action and if not, this can postpone the clock** (Strata Plan) – *strata must have 14 days to give notice of members to vote on whether to start case so on day of damage, not capable of commencing action*
    - Unconscious person is not capable to commence action

Discoverability

- **S.8** – **basic LP runs on the day the P the claimant either knew or reasonably ought to have known of the injury, loss or damage caused by the negligent act or omission by the D** AND that a court proceeding would be appropriate means to seek remedy

  - Onus on P to show when they discovered claim and when it was reasonable to discover the damage and start the clock
  - Must have known or ought to have know all of the following:
    - The injury, loss or damage occurred
    - The injury, loss of damage was caused by an act or omission
    - The act or omission of a person is the person against whom the claim may be made
    - A court proceeding is the appropriate method to seek a remedy

- **Special Rules:** can suspend time until claimant is competent at law
  - **S.18** – minors (extends basic and ultimate LP)
  - **S.19** – persons with disability (extends basic and ultimate LP)
- **Notice to Proceed** – D can start the running of the clock against minor or disability
  - Must serve notice on guardians and PGT

- **Expiry of LP: s.27** – once LP runs out, right to bring claim and right to any non-judicial remedy is extinguished
  - *Old Act*: s.9 – dealt with same thing

Transitional Provisions

- **S.30** – transitional provisions
    - If act/omission occurs **on or after June 1, 2013, new act applies**
    - If LP expires before June 1, 2013, new act CANNOT revive it
    - If act/omission **occurs before and was discovered before June 1, 2013, old act applies**
    - If act/omission **occurs before June 1, 2013 BUT discovered after June 1, 2013, new act applies to BASIC LP** and there are *special provisions about ultimate LP*

Running of Limitation Period

- *Accrual Method from Old Act:* runs on the date the cause of action completed (all substantive elements of claim exist)
    - Damage or loss is required – don't necessarily have to know about the damage or the full extent of damages
    - Doesn't consider whether P is aware of damage and has claim so the LP can run out and bar them from a valid claim before they even know about it – uncertainty!

- Example: building built in year 0, bricks fell off in year 20 and hurt someone
    - Accrual method:
        - Ultimate – starts running in year 20 (damage required)
        - Basic – starts running in year 20 (damage required)
    - **Act/Omission method:**
        - **Ultimate** – starts running in year 0 (no damage required – claim for negligent design of building beings when it was built)
        - **Basic** – starts running in year 20 (they were hurt, claim appeared)
        - Minor or lacking mental capacity would have a claim because LP wouldn't start to run while they are minor
        - Adult would not have claim because ultimate LP would have run out by the time the basic started – must fit under both to bring claim

Small Claims

- **Claims for 25,000 and under** (not counting disbursements and penalties) – 25,000 + disbursements and fees = up to 31-35,000

- Small Claims Court does NOT take: these will go to BCSC regardless of damages requested
    - Family law
    - Libel or slander (defamation)
    - Real property
    - Landlord/tenant
    - Charter claims

- **Procedure – registry driven**
    - **Pleadings** – same rules as notice of civil claim
        - Because it is usually SRL, another chance to amend defective pleadings as opposed to motions to strike in BCSC
    - Reply to notice within 14 days (or default judgment)
    - No discovery
        - For PI, have certificate of readiness (proof of injury with medical reports)
    - Expert reports due 30 days before trial
    - Can have settlement conference – have to bring all relevant documents to this

- **Ability to ignore rules of evidence and flexibility allows evidence in that would not normally be**

- No Costs awards except in 3 situations:
    - **Formal offer made within certain time after settlement conference** – can recover portion of claim as penalty if you succeed at trial more than the offer
    - **Disbursements relating to claim** (Travel costs)
    - **Rule 20-5** – application for a penalty, to trial without reasonable chance of success

Initiating the Action

Res Judicata

- **Definition:** doctrine that prevents the re-litigation of matters already decided – discretion in narrow, special circumstances (or possibly by agreement)
    - **Practically:** cannot sue same D for same cause of action
    - Binds more strictly than stare decisis (rule of law from an earlier case than controls results in later cases)

- **Rationale:**
    - State interest in finality of litigation – protect individuals from repeated litigation for same issue
    - Society's Interest – waste of court resources
    - Prevents inconsistent decisions – means certainty and integrity of law
    - D should only have to pay damages once

- 2 branches of the principle:
    - **Cause of Action Estoppel** OR Claim Preclusion
    - **Issue Estoppel** OR issue preclusion/collateral estoppel

Elements for both:

1. 2 actions involving the same parties or their privies
2. Claim being sought is within the previous courts jurisdiction
3. Prior adjudication was on the merits (includes default judgment, NOT procedure)
4. Prior **decision was final**

Cause of Action Estoppel

- **Entire claim is barred**
    - Focus on fairness to litigants
    - Applies equally to **claims AND defences** – bring everything for both

- **Cannot sue same D for same cause of action even if it is dressed up differently** – If same cause of action, 2nd action must fail – **bring everything at once or SOL**
    - Every fact that would be necessary for that cause of action that could have been brought has been brought at the first trial (UVic Student Society)
        - **Where parties had opportunity to raise issue in previous proceeding and should have raised them – must bring all issues or defences in the prior proceeding**
    - **If you are in court, should bring all claims you can at once based on those facts, one kick at the can and that's it** (Young v BC)

- Prevents party trying to re-litigate case by claiming a new legal theory for the same claim on essentially the same facts (Brittania v Royal Bank)

Issue Estoppel

- **A single issue is barred**
  - Focus on preventing inconsistent results on same issue

- Developed to fill gaps from Cause of Action Estoppel

- **Step 1 – Requires:**
  1. Same question as been decided
  2. Prior judicial **decision was final** and made **on the merits**
  3. **Parties to both proceedings are the same, or are privies to each other**
     - Mutuality: privies means sufficient degree of connection between the 2 parties making it fair for the other party to rely on an earlier determination that involved the other party – case-by-case determination (Brittania v Royal Bank)
     - Would other party be bound by previous judgment?

- **Step 2 – Residual discretion** to not bar claim under this even where all 3 criteria is met if applying it would result in an injustice
  - Concerned with consistency in decision making – avoid embarrassment for justice system to have 2 different rulings on same issue
  - Is it fair to use the past proceedings to stop the current one? (Penner)
  - Factors to consider in discretion: (Penner)
    - Is there a significant different in purpose, process or the stakes?
    - What is the burden of proof in each case?
    - What are the parties' reasonable expectations about how the 2 cases will work together?
    - What does the statutory scheme say?
    - Are there concerns about a chilling effect?

Abuse of Process

- **Allows court to take steps to prevent misuse of court proceedings and process** – part of the court's inherent jurisdiction
  - Would the action bring the administration of justice into disrepute?
  - Alternative if strict requirements of Res Judicata isn't met

- **If proceedings would be vexatious, oppressive OR violate principles of fundamental justice if it was allowed to proceed, can stop them**
- Preclusive Issue Estoppel – prevents litigation (civil litigation)
- **Prima Facie Evidence subject to Estoppel** – allows re-litigation but with past judgments admitted as evidence in 2nd litigation (**criminal convictions**)
  - Criminal convictions can be allowed for use in civil cases – burden of proof is higher and would be abuse of process to require civil parties to reprove the criminal action if the party was already convicted (Toronto v CUPE)

Pleadings

Notice of Civil Claim

- **Allegations of the claim set out in writing – must be concise**
  - Positive assertion of facts of the legal theory (can plead alternative theories)
  - Set out relief sought – general damages
    - Covers injuries where exact amount cannot be determined (pain/suffering)
    - Special Damages – precise out of pocket expenses (medical bills)
    - Punitive Damages – punish wilful or malicious conduct
    - Statutory Damages – damages available through statute

- **Rule 3-1(1)** – **set out concise facts leading to claim, set out relief sought against each named defendant and set out legal basis for relief sought**
- **Rule 3-1(2)** – notice must set out concise statement of material facts giving rise to claim
- **Rule 3-7(1)** – pleadings CANNOT include evidence that support the facts pleaded

Things to include:

1. **Who are the parties?**
   a. Important to name parties correctly – if sued in the wrong name, suit will stop
   b. To change name of parties: difficult – must amend pleadings
   c. **Rule 20-2** – If minor or lack capacity, commence litigation through litigation guardian who must be represented by a lawyer
      i. A2J issue: if guardian cannot afford lawyer, case cannot go to court

2. **Why are they suing?**

3. **What happened?** – include the material facts

4. **Why are the defendants responsible?** – summary of legal basis, break down law to ensure all elements of the offence are laid out
   a. **Are there any statutes that influence the pleadings**? – must link facts and statute if it applies (Halverson)
   b. **Are you seeking to recover costs** or disbursements?

5. **What are you asking for?** – relief sought, general damages etc.

- Purpose:
  - Define the issue to be determined between the parties – know the case to meet
  - Outline the case to be met
  - Frame the issues to be determined by the court
  - Prevents re-litigation of same case
  - Advocate to judge and other lawyer – better impression with well drafted pleadings

- **Material Facts: facts that are necessary to establish a cause of action**
  - Must be able to prove each of these facts to be able to prove each element of the claim
  - If any material facts are absent from pleadings, cannot be successful even if everything else is true

- **Particulars:** all the other facts that would be in the notice to **give context** to the material facts
    - **D can request more/better particulars** if pleadings don't provide enough – if denied, can request this from the court and they can order more
    - **Rationale for requesting particulars**:
        - Inform the other side of the case to meet
        - Prevent other side from being taken by surprise
        - Allow other side to get evidence to prepare
        - Limit the generality of pleadings
        - Binds the hands of the parties – cannot create new basis without leave, limits the case

Service

- **Documents must be personally served** – must have personal notice in order to make decisions about how they want to deal with the law suit
    - If no defence at all, P can ask for default judgment
        - To give default judgment, court must determine if D gets it personally – sworn affidavit from process server that they received it – and if no response, then default judgment can be awarded
        - **Collateral Attack:** if did not challenge the decision, cannot after the fact challenge it through a different court action – cannot do something indirectly that you did not do directly

- Specific types of service:
    - **Business** – notice with registered records officer, a partner of the partnership or the place of business
    - **Municipality** – notice to mayor, CFO, numerous types of people can be served
    - **Minors/lack capacity** – leave with the committee or PGT (person responsible for care)

- **Substituted Service:** where D is evading service, can ask court to order substituted service
    - **Finds that service has been affected personally even if it hasn't been**
    - **Prove:** evidence of attempts of service and support substitutional method you want the court to endorse (show why this would get document into D's hands)

Admissions

- **Rule 7-7** – acknowledge and agree on certain facts of case
    - Can be made in pleadings or in response to notice to admit (requirements in rules)
    - **(5)** – cannot withdraw admitted fact without consent or leave of the court
        - Once fact is deliberately admitted, very difficult to retract
        - If admitted as a mistake, often allowed to withdraw

- **Purpose:** narrow or define issues, promote settlement, make trial more efficient
    - Helpful for summary judgment as well
    - Helps for non-contentious facts or dealing with authenticity of documents

Response to Civil Claim

- **Rule 3-3 and 3-7** – Reply to allegations in Form 2
    - Reply within 21 days of service of notice of civil claim – if numerous D, would be different deadline for each D depending on when they were served
    - **Missing deadline = default judgment for other party**
- If reply includes new allegations, P can reply and set up defences OR if no reply, deemed to deny the new allegations

Types of Pleadings:

- **Admissions**: admit the allegations that are true
    - These are then a fact of trial and do not need to be proven

- **Denials:** deny the truth of allegations
    - These must be proven by plaintiff at trial
    - **Pro Forma Defence** – only says deny everything
        - Not great, have to amend everything later with more details

- **No Knowledge:** don't know about a pleaded fact, not denying, just have no information
    - Plaintiff must prove

- **Affirmative Defences:** plead facts to establish positive legal defenses if available at law
    - Different than denying claims

- Considerations when writing response:
    - Is the client properly named? – if not the legal name, not involved
    - Was the notice properly served? – only starts to run on proper service
    - Have sufficient particulars been provided? – need enough information to determine the nature of the claim
        - **Rule 3-7(18) – 3-7(24)** – *look at for the particulars, certain claims need different amounts of particulars*
    - Does the court have jurisdiction? – tort location, place of business, location of K
    - What is the client's version of events? – what do they admit or deny
    - Are there statutory defences? – specify
    - What is the position on the relief sought?
    - Does the client make any counter claims?
    - Are they seeking costs?

Counter Claims

- **Rule 3-4 and 3-7(11)** – counter claim must be filed by D against a P in the action or someone else who will become D by counter claim
    - Must be served within the **deadline for response** (**21 days**) – served very quickly
    - Response to **counter claim** must be filed within **60 days**

- **Rule 3-4** – amount is not limited to amount claimed in P's claim – can be over

- Separate, independent legal action even though it is part of same proceeding
    - **Can involve same facts and cause of action but not required** – can be totally different cause of action
    - If P's action is discontinued, this will survive
    - **Will be 2 separate judgments**

- **Rationale:** allows court to pronounce judgment on related claims all at once – judicial efficiency, more convenient and cheaper for parties

Set-Off

- **Rule 3-11** – **Defence** used in response to civil claim – cancel or reduce amount of any judgment
    - Dependent on P's action (not separate) – **not in control of the claimant, if P's claim is discontinued, the set off claim disappears**
    - Only 1 judgment

- **Rule 3-4** – amount is not limited to amount claimed in P's claim – can be over

- Types of Set-Off:
    - **Legal:** must be mutual debt in related claims (usually just money claims)
    - **Equitable:** must have relationship between obligations such that it wouldn't be fair to permit one without considering the other (not mutual debts, include things that are beyond money, like ATVs)

- **Example:** *someone owes 10,000 but other owes 3,000 – sue for the 10,000 but set off against the 3 and only claim 7,000*

Third Party Claims

- **Definition: D wants to bring in another party into suit OR have related claim against another**
  - Counterclaim = against P
  - 3rd Party Claim = against different D OR new party to the action

- **Types of 3rd Party Claims:**
  - Independent claim against a 3rd party (**rule 3-5(1)(a))**
  - Contribution and Indemnity (**rule 3-5(1)(b)/(c))** – if I have to pay P, another D has to pay me back

- **Rule 3-5** – when a party can bring 3rd party claim

  - **3-5(1)(a)** – can have 3rd party claim if a party is entitled to contribution and indemnity from the 3rd party in relation to any relief sought against a party in the action

  - **3-5(1)(b)** – Independent Claim: can have relief if it relates to or is connected with subject matter of the action
    - **(c)** – If the issue is substantially the same as an issue relating to the relief or issue in the action OR is an issue that should be properly determined\
    - **If significantly related with same underlying facts, can bring 3rd party claim** (Louie #1)

  - **3-5(4)** – have 42 days from being served with claim or counter claim to file
  - **3-5(7)** – 3rd party has to be served within 60 days of notice being filed

- In allowing claim, court looks at what is just and convenient between parties (Louie #2)
  - **Would allowing 3rd party claim increase time or complexity of the trial?** – don't want simple claim to be overwhelmed by a monster claim, could be divided instead (Louie #2)

- **Ability to begin claim at anytime during the action** – factors to consider:
  - Has the 42 days expired?
  - How close is it to trial?
  - What was the reason for the delay?
  - Consider everything together

- **Purpose:** theoretically more efficient, less costly and avoid inconsistent court decisions
  - Consistent with Rule 1-3 (just, speedy and cost effective)

Contribution and Indemnity

- **Rule 3-5(1)(a)** – Type of 3rd party proceeding – make whole remedy
  - One TF pays P and then claims all or party of that amount against another TF
  - **Contribution** = seek part of money paid to P
  - **Indemnity** = seek ALL money paid to P – claiming it wasn't their fault

- **Test: is the potential 3rd party potentially liable to P?**
  - **Take snapshot of situation the moment before the incident – was there a relationship between P and potential 3rd party?**
  - Consider if there was a K or legislation that allocated risk – must have been entered into before the incident (Orange Julius)
  - P's conduct after the incident doesn't impact D's ability to get contribution and indemnity

- Better way to bring a 3rd party claim in P's action (Strata Plan)
  - **If a 3rd party claim is brought last minute or overwhelms P's claim, it would otherwise have to be brought separately** (Strata Plan)

- **S.4, Negligence Act** – allows TF to recover from other TF
  - **S.1** – P that is contributorily negligent can still recover up to the amount they were NOT responsible for
  - **S.4(2)** – can be jointly and severally liable to P
  - Whoever P sues, has a claim against any one TF that contributed to the P's injury

- **S.16, Limitation Act** – clock starts running to bring this claim, as soon as D is served with pleading OR first day on which D knew or reasonable ought to have know there was a claim for indemnity or contribution
  - Later of those 2 dates
  - Expiration is factor for 3rd party claims – **if LP has expired, court assumes prejudice but this can be rebutted** (Louie #2)

Change of Parties

- **Rule 6-2** – application to have a party added or removed
  - Removing party: find out that they aren't actually involved so remove
  - Adding party: P applies to add more D

  - **(7)(b)** – **meet the threshold test**, automatically added as a party – participation is necessary to ensure all matters are effectually adjudicated
  - **(7)(c)** – court has discretion and considers other factors (if there is issue that is related to the claim and would be convenient to deal with together)

- **TEST to Add a Party:** (Letvad v Fenwick)
  - Is there a question or issue between the party and proposed party? – issue must be connected to relief claimed or issues
  - Is it just and convenient in the opinion of the court? – **trumps everything**, regardless of P expiration, can decide to add party

- **Anyone can apply, even if someone isn't a party** (governments apply to be added)

Defects in Pleadings

Default Judgment

- **Rule 3-8** – judgment in favour of P when D fails to respond to lawsuit
    - **Apply: show that D was served and failed to respond**
    - **(2)** – file proof of service from P (affidavit of process server) and from registry (file document stating that no response has been filed)

- Common if D has no money so judgment wouldn't affect them
- Process: **by notice of application or motion**
    - Reference initiating documents: provide notice to other party, include summary of facts and legal basis, list evidence to be relied on in application
    - Hearing on basis of notice and evidence: present application

- **Rule 3-8(11)** – Able to set aside or vary default judgment (essentially starting lawsuit up again)

Test to set aside default judgment: (Miracle Feeds)

1. D must establish that failure to respond was not wilful or deliberate – mistake or inadvertence is the only way
    a. Do not want people to be able to take advantage of legal system

2. Application was made as soon as reasonably possible after learning of judgment – very quick!

3. There is a meritorious defence or a defence worthy of investigation – common sense assessment to see if there is anything there

4. 3 parts must be defensible by affidavit evidence – swear to the facts of each prong to emphasis seriousness of lawsuits, if anyone lies, result is perjury
    a. **If evidence is too weak, can refuse to set aside** (Director of Civil Forfeiture)

Striking Pleadings

- **Rule 9-5** – **pleadings are inadequate/insufficient (no material facts, no legal cause of action) OR claim is not actually a cause of action**
    - Only way to survive this motion is to ensure material facts are pled and that there is a legal cause of action – must include EVERY element of the offence
    - **Ask: if everything in pleadings is assumed to be true, would party win?**
        - Is the case doomed to fail because the pleadings are inadequate or that the cause of action is unknown or non-existent?
- Generally allowed 1 amendment because it if a harsh consequence – won't strike on first application

- **Rule 9-5(1)** – **Basis to Strike:**
  - **(a)** No reasonable claim or defence – lack material facts, only examining pleadings for sufficiency, nothing else
    - **Rule 9-5(2) –** NO EVIDENCE MAY BE BROUGHT FORWARD
  - **(b) Unnecessary, scandalous, frivolous or vexatious claims** – waste of courts time
  - **(c) Prejudice or delay the fair hearing of case** – strike out the nonsense part of the claim and just the true claim is dealt with
  - **(d) Otherwise would be an abuse of process** – broad, includes res judicata, collateral attack, abuse of court otherwise
    - Prevents re-litigation of claims

- Difference between motion to strike and summary judgment (Dawson v Rex Craft Storage)
- **Novel cause of action should not be struck** – only granted where the action is doomed to fail because it is non-existent (Jane Doe)

Summary Judgment

- **Rule 9-6** – **facts in pleadings are untrue or insufficient evidence to prove the facts claims**
  - No need to have trial because other party cannot prove their case
  - Ask: is there any evidence that creates a contest between parties such that a judge is needed to decide?
    - Look to discovery, admissions, affidavit evidence to determine if there is a genuine factual dispute that requires a trial
    - Potential for D to argue LP expired and therefore there is no genuine issue requiring a trial so this applies
- **Courts should make processes quick and inexpensive to promote A2J – use this before requiring full trial on merits** (Hryniak v Mauldin)

Summary Trial

- **Rule 9-7** – **full trial on the merits but witnesses give affidavit evidence rather than in court** (makes process faster and cheaper) – court is weighing evidence and fact finding
  - First jurisdiction to have this – SCC says to use summary judgment to avoid full trial but ability to have summary trial in BC (Hryniak v Mauldin)
  - Where there is a contest about parties versions of the events – judge must decide something based on the evidence
    - **Ability to decide all of the case or just part of it** (Harrison) – rest can go to full trial if necessary
  - **(15)(a)** – can grant judgment in favour of any party on any issue or generally **UNLESS:**
    - **(1)** They are unable to find the facts necessary to decide to issues of fact or law
    - **(2)** The court believes that it would be unjust to decide the matters

- **Factors to consider in having summary trial**:
  - Money involved
  - Complexity of the matter
  - Urgency – quicker determination
  - Prejudice – if any arises by delay
  - Cost for trial compared to cost at issue – lower the amount involved, the more economical it will be to have summary trial
  - Course of proceedings – if it has been slow up to that point judge may order this

Non-Compliance with Rules

- **Rule 22-7 – must comply with rules and court orders**
  - **(1)** – non-compliance doesn't nullify proceedings unless court orders (should try to comply but mistake isn't end of the world)

  - **(5)** – certain types of non-compliance will nullify case:
    - Refusing or neglecting a subpoena for examination for discovery
      - Refuses to be sworn or answer questions
      - Refuses to inspect property or documents
      - Refuses to produce things through discovery process
      - Refuses to attend medical examination where rules require it
    - ***If P – court can order the dismissal of proceedings***
    - ***If D – court can order case proceed as if no response was filed*** (= default judgment would result)

Want of Prosecution

- **Rule 22-7(7) – discontinuance of trial due to delay in litigation**
  - Often where P disappears and lawsuit not moving forward
  - D can apply for court to dismiss for want of prosecution (lack of activity in litigation)
- Court does not want to dismiss case where there is meritorious claim – likely won't dismiss on technical basis if it could be adjudicated on the merits
- **Strategic action** – wake up other party and get them to move litigation forward

Test for case to be dismissed (Tundra Helicopters)

1. There was inordinate delay;
2. The delay is inexcusable; and
3. The delay has caused or is likely to cause serious prejudice to applicant

- **To revive claim that has been dismissed for Want of Prosecution**: **(unusual to allow this)**
  - **Must explain the delay** – show they always intended to make action in time
    - Inadvertence in missing deadline
  - Motion to revive is **brought as promptly as reasonably possible**
  - **No prejudice would result** – tough to show

Discovery

- **Part 7** – **used to find facts and information about other party's case**
  - Most cases settled during discovery or after discovery, prior to trial

- **Purposes:**
  - Promote justice and efficiency by removing element of surprise
  - Facilitates defining and narrowing the issues
  - Helps test the strength of client's evidence
  - **Helps prevent suppression, destruction and fabrication of evidence**
  - Tests strength of other side's case – do they have a defence?
  - Encourages settlements prior to trial
  - If goes to trial, more efficient because issues have been narrowed

Document Discovery

- **Rule 7-1** – requirements for production of documents within 35 days of closing of pleadings
  - **Compulsory for law suits** – must send list of documents that will be relied and make the documents available for inspection by the other party
  - Even if document is damaging to case, MUST produce it – ethical duty
  - **(9)** – if you find additional documents, must provide supplemental list of documents
  - **(18)** – rule to get documents from 3rd parties (common in insurance claims)
  - **(21)** – consequences of non-disclosure: prevented from using documents for purposes of direct or cross examination
    - Must disclose to the other side in order to use the document in trial

- **Rule 1** – definition of document – very broad, includes everything
  - Notes are included, electronic and physical

- Preparation can be resource intensive and expensive – often complex litigation won't be able to provide list within 35 days

- **Peruvian Guano:** must produce every document that relates directly or indirectly to any matter in question in litigation – VERY broad
  - Included anything that might lead to a line of inquiry
  - **Critiques**: can bury the other side in documents and hide smoking gun in there
    - Hard to review that many documents to determine relevancy and include
  - Limited circumstances in which this standard will still apply – **court can order this level of disclosure under inherent jurisdiction** (XYLLC v Canadian Top Sires)

- **New standard: anything that could be used to prove or disprove a material fact at trial**
  - **Material Fact** – ultimate fact that when resolved it would have legal consequences between the parties
    - Why it is important to include in pleadings
    - Credibility isn't material
    - Must be admissible evidence at trial
  - **Test: would the determination have legal consequences for the parties**?

- Issues:
  - **If don't disclose enough**, court can order costs against client or draw adverse inferences
  - **If disclose too much**, can get in trouble under privacy legislation or court orders costs because you are seen as burying the other side in documents

- **Rule 7-1(10) – 7-1(14)** – Additional Disclosure can be demanded if unhappy with level of initial disclosure but not automatic
    - **(10)** –**additional documents** that should have been included but weren't
    - **(11)** – **additional classes of documents** that weren't required to be listed at first instance but would be beneficial to litigation
    - **(12)** – if person gets demand under (10) or (11) must respond as to whether they will provide the documents or not
    - **(13) and (14)** – can apply to the court for additional disclose
        - Must try to resolve between parties 1st before going to court
        - **Onus on party applying for additional disclosure to justify and provide reasonable explanation for why they should be disclosed**
        - Court has wide discretion – proportionality is important to consider
            - Nature of case, causes of action and evidence in support will also be considered

- **Form 22** – used to list documents, separated into types of documents in different sections
    - **Part 1** – documents with no objection over disclosure
        - **Used to prove or disprove a material fact**
        - Includes any document that is or has been in the parties control – documents that have been destroyed are included
    - **Part 2** – documents that you intend to rely on at trial that are not in Part 1
        - Wouldn't prove/disprove material fact but **rely on them for other purposes**
    - **Part 4** – privileged documents
        - Should be listed with enough specificity that other side can challenge privilege
        - Broader interest in not disclosing this type of document
        - **Types: solicitor-client, litigation, statutory, public interest, settlement**

Privilege

- Privileged documents must be included in list of documents so that other side is able to challenge privilege if they want to view them
    - Lasts forever and against the whole world
- **Some documents are worthy of protection from discovery – higher interests than general purposes of discovery**

Solicitor-Client Privilege

- **Confidential relationship is seen as necessary and essential to the effective administration of justice so these communications are protected above all others – most deference by court**
    - Justice system needs full and frank disclosure between lawyer and client
- **Communications must be a result of a request for legal advice to a member of the bar**
    - Once threshold met, documents will be protected

- **Waiver:**
    - **Intentional** – disclose things to 3rd parties or say that your lawyer gave you X advice
    - **Unintentional** – puts legal advice at issue in litigation (claim you acted in accordance with legal advice – waives privilege over that advice)
    - **Test:** must be deliberate conduct to waive the privilege by someone who has authority to waive the privilege (either lawyer or client)

Litigation Privilege

- **Privilege over work product:** Communications or documents that are directly associated with piece of litigation or related litigation – includes communications and documents between lawyer, client and 3rd parties
    - Applies to SRL
    - **Only lasts as long as the litigation or related litigation lasts** – then privilege stops
    - **Only privileged against the other parties to litigation** – not the whole world
    - In BC, it attaches to documents gathered and copied

Test: (Blank v Canada, Smith v Air Canada) – *onus on party wanting to protect document to prove that it is protected*

1. **Was litigation a reasonable prospect at the time the document was created?** (Smith)
    a. Reasonable person test – would reasonable person with all relevant information conclude that it was **unlikely that the claim would be resolved without litigation**?

2. **If so, was it the dominant purpose behind the documents creation?** (Blank)
    a. Litigation must be the dominant purpose of preparation to be protected – other reasons will not count and those documents won't be protected

- Purpose: ensure efficacy of process and smooth administration of justice
    - Parties should be left to prepare their cases in private without interference or premature disclosure

- There are obligations to waive privilege over course of litigation
    - **Part 7** – **produce witness list** of who you intend to call (waives privilege)
        - Possibly includes a "will say" document – who called, why called and what they will say
    - **Rule 7-1** – **list of documents** disclosed to other side

Common Interest Privilege

- Subset of Litigation Privilege

- **May share privileged documents and maintain privilege if shared with parties with similar interests (on the same side of an issue)** – often with co-D or co-P but could be 3rd party as well in a totally different case
    - Sharing would normally waive privilege

Settlement Privilege

- **Without Prejudice Rule** – **cannot use settlement discussions and final settlement against the other party or disclose at all**
    - Privilege will continue regardless of whether settlement is reached
        - If settlement reached, privilege continues

- **Rationale:** public policy and desire to protect communications in order to encourage litigants to settle before trial
    - Disclosure of settlement discussions would discourage settlement

- **Exceptions:**
    - **To prove existence of settlement** – if reach settlement but other party doesn't follow through, can use settlement documents to prove it exists
    - **Subrogation clauses** – give insurer enough information to get money back based on insurance documents
    - **Statutory exceptions** – ex. Health Care Recovery Act – allows minister to get settlement info and make approval decision
    - **Infant settlement and class actions** – court approval to do this type of litigation so must tell court about any settlements

Crown Immunity Privilege

- Documents from government that are prepared for cabinets or for interest of national security, will be protected form disclosure for public interest and greater good – can ONLY be claimed by government
    - Not always high level info

- **Can get documents through FOI process** – best to do for governments
    - Discovery only gets RELEVANT documents – FOI gets everything, more info

Confidentiality

- **Other types of relationships can attract privilege if they meet the Wigmore Test for confidentiality:** - case-by-case determination

1. Communication must originate in confidence that it won't be disclosed

2. Element of confidentiality must be necessary to full maintenance of relationship

3. Relationship is one that, in opinion of community, should be fostered

4. Injury to relationship by disclosure of communication is greater than the benefit afforded to the litigation by disclosure

Examination for Discovery

- **Rule 7-2 – oral examination under oath to determine what kind of witness someone will be**
    - Entitled to examine other party under oath as long as the 2 parties are adverse in interest – must be something to fight about in the litigation, opposite sides of issue

    - Question/answer format - broad in scope, **more of a Peruvian Guano standard** (if it is relevant, can examine about it as a right – more so than documents)
    - Done after document discovery – with court reporter to produce transcript
        - **Evidentiary concerns about admissibility do not apply** – just assessing case

- Lawyer has limited role – can only object for relevance and privilege
    - Once discovery begins, cannot talk to client until its over

- Purpose: see the case, test issues, prevent surprise and destruction of evidence

- Who can be examined:
  - **Rule 7-2** – if the party is an individual, they can be examined
    - **(8)** – if **minor there are 3 exams**: child, guardian and litigation guardian
    - **(9)** – if mental disability: litigation guardian and committee, **but NOT person**

  - **Rule 7-2(5)** – if party is a corporation, right to have 1 representative examined
    - Party can nominate an appropriate representative but don't have to accept
    - **Prima facie right to choose who to examine**
    - Representative has obligation to inform themselves of the case
      - **(22)** – if representation didn't know something, discovery can be adjourned for them to determine answer – list of outstanding questions and they will answer them in a document after
    - **If corporation opposes who is chosen, can go to court and show significant prejudice to have representative change** – rare

- Length of Discovery:
  - **Rule 7-2(2)** – discovery is **limited to 7 hours**
    - Old Rules: no limit, change is for proportionality

  - **Rule 7-2(3)** – **court can extend time**, considers:
    - Conduct of person examined (if intentionally taking longer), complexity of matter (often by consent)

- How is it Used:
  - **Used to assess and challenge credibility** – determine what judge will think of the party
  - **Transcript can be used at trial for some purposes** – can read in parts of transcript as part of the case
    - Allows them to **establish case without calling witnesses**, BUT information has to be otherwise admissible
    - Can ask whatever during discovery but to use it in trial but be admissible

Physical Discovery

- **Rule 7-6**
  - **Medical Exams** – required if there is a physical or mental condition at issue in trial
    - Pleadings must state that the condition is at issue to get exam
  - **Inspection of Property** – order for physical inspection

Interrogatories

- Rule 7-3 – **send a list of questions to the other party and they respond by affidavit**
  - Used to deal with non-contentious issues or authenticate documents

Pre-Trial Examination of Witnesses

- **Rule 7-5** – **potential witness is examined under oath for possible material evidence**
  - Not available as of right – witness must consent OR court order for examination
  - **(3)** – specific information required to get court order
    - Witness can give statement instead, not under oath

- **Purpose:** facilitate trial preparation, allow disclosure of relevant information to encourage settlement, prevent witness from being uncooperative, prevent loss of evidence (memory failing, people dying)

Implied Undertakings

- **Protects discovery evidence in one proceeding from being used in any other proceeding**
  - Protects privacy of litigants and encourages full and frank disclosure in litigation so this information should be protected (Deucet)
  - Cannot be disclosed or used other than in that litigation, leave of the court required for any other uses (Deucet)

- **Lasts until evidence is disclosed at trial BUT if case settled before trial OR information never comes out at trial, information remains covered**

- To use in related litigation: must get leave of court (common to get this)

- **Exception:** immediate and serious danger of physical harm, can be disclosed by leave of court (Deucet)

Managing the Process

Case Planning Conferences

- **Rule 5-1 – as soon as pleadings close, any party can apply to seek case planning judge**
  - Set up timetable for steps to be taken and ensure parties are keeping to it, breakdown of proposed expert witnesses
  - **(3)** – first meeting has to be face-to-face – any subsequent can be by phone

- **Practice Direction:** required any time a trial was estimate to be over 20 days
  - If judge assigned, they will preside at trial
    - **Benefits:** can adjudicate more efficiently because they know the case
    - **Negatives:** knee jerk assessments and first blush decision before hearing evidence sometimes
  - Can remove case from management process if no longer required

- **Purposes:** get parties to know their case, encourages earlier settlement
  - Response to complaints about delay in cases
  - Judges get involved earlier and involved as umpire – can give opinion about how a court would find

- **Benefits of Case Planning:**
  - Assist in trial prep
  - Eliminate delays and adjournments
  - Can determine if ADR is suitable in the case because going to trial
  - Meaningful outcomes
  - Force other side to commit to theories of case and positions
  - BUT richer party would know that other party couldn't afford to go to trial and would therefore have an advantage for settlement – know it's the only option for the other

Applications

- **Rule 8-1 – bringing an application in chambers – can be brought in middle of litigation, can be contested or by consent, with hearing or not**
  - Everything that is not a trial – *petition, JR, injunction, procedural issues, appeals from masters or registrars, interlocutory applications*

- **Rule 22-1 – evidence must be through affidavits**

  - **(2)** – written statement of evidence and relied on like oral testimony – should be written in witnesses own voice

    - All statements must be admissible, relevant and within their knowledge – NO personal opinions unless they meet test for expert evidence

  - **(13)** – **Single hearsay is admissible but double is not** (he told me that she told him)
  - Cross examined on content

  - **(8)(10)** – documents can be attached as exhibits

- **Rule 8-3 – Consent Applications**
  - **Seek order for procedural purpose, everyone agrees it should be issued**
  - **Form 31** – start by requisition (equivalent to notice of application)
  - **(2)** – registrar considers it first and determines if they can order it or if judge/master must determine it
    - **Even by consent, can still require hearing** (maintain oversight)

- **Rule 8-1 – Contested Applications** (**rule 8-5 and 8-6** could apply too)

  - **Form 32** – must file notice of application
    - **(7)** – must be served included affidavits – can be by email
    - **(8)** – should be served 8 days before hearing, 12 days for trial
  - **Form 33** – file application response – consent, oppose or take no position on order

  - **(16)** – unless application is estimated to take 2 hours or more, cannot submit written arguments for the application

- **Rule 8-5 – short notice/leave applications (urgent applications)**
  - Must give reason why it should be heard before normal time period
  - Apply for short leave and also for relief – 2 applications
  - Court has discretion to order this
  - Ethical obligation to be forthright with court about facts and arguments
- **Supreme urgency**: can make application without notice to other party
  - But other party has opportunity to apply to set order aside

- **Go to Chambers to seek:**
  - **Petitions or originating applications** for admin law
  - **Interlocutory orders or applications before trial**
    - Force parties to disclose more documents
    - Challenge privilege
    - Summary trial, default judgment, motion to strike
    - Ruling on narrow principle of law to be used in case

Injunctions

- Equitable remedy to manage behaviour of parties **– can be temporary or permanent**
    - **Inherent Jurisdiction is source of power to grant these** – also from statute in certain situations (s.36 of Law and Equity Act)

- **Rule 10-1 and 10-4 – common law injunctions considers balance of convenience, irreparable harm and the interest of justice**
    - **Interlocutory:** most common, made in middle of case
    - **Prohibitive:** stop from doing something, restrain actions of party – most common and easier to get
        - Often where property damage would result
        - Maintain status quo while determining case
    - **Mandatory**: force/compel someone to do something, difficult to get
        - Order to improve/restore property – restorative in nature
    - **Maerva:** stop someone from disposing of their assets in order for the other party to collect damages – world wide freeze on assets of person or company
        - **Higher threshold for the serious issue to be tried** – unchallenged evidence to make out the claim is required (ex parte – with evidence)
        - Must be able to show the other party is **likely to dispose of their assets** in a way that would stop you from recovering without an injunction
    - **Anton Pillar:** authority of court to physically secure evidence (search warrant)
        - Reason to believe someone will destroy certain evidence which is probative to the case
        - Right to ask them to enter property to get evidence – if refused, must seek further remedies of the court

Test for Injunction (RJR MacDonald)

1. **Serious Issue to be tried** – must be basis and reasonable chance of success, low threshold
2. **Irreparable harm** – nature of harm could not be fixed by damages, not about magnitude of harm
    a. Damages would not replace value of loss
    b. Unavailability of damages if no injunction is ordered– unable to pay damages is lesser factor but considered
3. **Balance of convenience** – which of the 2 parties will suffer the greater harm if injunction is not granted pending final judgment
    a. Weigh individual interests – if rights are roughly equal, hesitate to grant
    b. Consider public interest and public policy where legislation (constitution) is at issue – more weight here than on financial issues of inconvenience

- **If notice of injunction, you are subject to it**
    - If no notice and find out after, can argue in court that they were affected by order but weren't able to state case before order

- **Enforcement**: contempt of court (civil or criminal contempt)
    - **Criminal:** BARD that they breached court order in **wilful and deliberate decision** to flout courts jurisdiction – very high threshold to get
    - **Civil:** BOP that they breached court order – **knew there was injunction and acted contrary** to the order despite the injunction
    - Usually don't get order the first time – court gives party second chance to cure contempt and if it happens again, contempt would follow

Jurisdiction of Masters

- **Judicial officer with most powers of superior judges but limited in what they can hear and decide**
    - **S.11, Supreme Court Act** – appointed under this
    - NO inherent jurisdiction!
    - Jurisdiction on what they can decide is constantly changing – chief justice determines, incrementally allowing them to hear more to take load off judges
        - **S.11(7), Supreme Court act** – same jurisdiction of judge in chambers unless chief justice has made direction they cannot exercise that jurisdiction
- Can make final orders in limited circumstances:
    - By consent, summary judgment (no triable issue), default judgment, striking pleadings, no contested issue
- If master can hear it, choose this – faster to get in front of master
- **Registrar:** appointed under **s.13, Supreme Court Act**
    - **Limited function re accounting** – mainly assessment of costs after litigation, probate, debtor examinations (can they pay anything), wage garnishing

Mediation and Settlement

Mediation

- **Settlement discussions facilitated by a 3rd party** (Often retired judges or lawyers)
  - Usually face to face – P tells their story (can be cathartic), also lets D know P is a good, sympathetic witness (if they are)
  - **Mediator has no power to make any decision**s – trying to bring the parties closer together to promote settlement
  - Must understand the issues to be effective

- **Mediation briefs:** scaled down version of the argument
  - Meeting between lawyers and mediator to create schedule for exchange of briefs

- **Making settlement offers back and forth**
  - These are covered by settlement privilege – can't be used in trial until it is over and then only for purposes of costs and damages

- **Consideration:** mediators want high settlement rate so can push settlement even if it isn't right (they want their rate to be higher – settle 90% of cases)

- **Mediation Agreements:** agree that everything in mediation is confidential – sign confidentiality
  - Covered by settlement privilege (common law right) but contract adds another layer of protection, more binding
  - Signing this doesn't trump the exception of actually proving the settlement under settlement privilege – full confidentiality would undermine settlement because they couldn't prove that settlement actually happened (Union Carbide v Bombardier)

- **Mandatory mediation:** only exempted from mediation in certain situations, Ontario mandatory mediation laws (OJ c HCD, Ontatio)
  - Amount at issue is small and travel costs to meet would be significant
  - Past ADR attempts had been useless
  - Issues to be adjudicated are of social import so should go to trial
  - Any other purpose to reduce delay
  - Notes: consent between parties wasn't important – mediators are trained in certain situations, like domestic abuse so parties can still go to mediation

Settlement

- **Overriding public interest to encourage pre-trial and litigation settlement – cheaper, faster, more creative and flexible awards**
  - Limits on what court can order – but settlement can be anything that works for parties
  - Implications for litigants health to do to trial – considered in settlement

- **Ability to settle any time before or during litigation up to release of judgment**
  - Possibly after judgment regarding costs and damages

- **Rule 9-2 – judicial settlement conference** (rare)
  - Judge that is NOT trial judge will see if they can help resolve issues
  - **Very different from mediation** – hear what the judge would rule and can make settlement decisions based on this analysis
  - Must be referred to get one – not a right

Formal Offers to Settle

- **Rule 9-1** – requirements to make formal offer
- **If parties reject reasonable offer to settle, can suffer consequences:**
    - Double costs from time of offer OR no costs if you win

Partial Settlement

- **Can settle with some D but not others** – used to have to settle everything or not at all
    - Encouraged, same benefits as full settlement
    - Often waiver of costs – find out case isn't great at trial, settlement is waiver of costs in exchange for consent dismissal order (client loses)
        - Still get damages if consent dismissal

- Must disclose any partial settlement deal but don't necessarily have to disclose the amount settled for (Sable Offshore Energy)

- **Mary Carter Agreements**
    - **P settles with some but not all D** – settling D remains in litigation and work with P to gang up on non-settling D (throw other D under the bus)
        - Liability is severed – can only recover from remaining D

    - **Do a deal with P:** any award P gets above what they agree to, is split between P and D so they want to increase damages as much as possible

    - Global assessment of damages is used which includes what P gets from settling D and rest – **D gets a cut of what non-settling D pays as long as it is over minimum amount agreed on**
        - Still have to pay P damages but can make some money back if the total damages is higher than amount agreed to

    - Risky – if less, D is SOL
        - If P gets more than amount, D gets some money back
        - If P gets less than amount, D still has to pay that amount – too bad

- **BC Ferries Agreement (Paringer Agreement)** – very common
    - **P settles with some but not all D** – settling D is gone from the suit ASAP and P expressly waives right to recover from settling D
        - Severs liability – P can only recover from remaining D
        - Amend claim to remove all references to settling D, events of D and D's liability
        - **Can only recover certain percentage of liability for remaining D** (if settling D was apportioned 30% liability, P can only recover 70% from other D)

    - **Agreement –** in exchange for money, P drops lawsuit against D and will not bring another one in the future
        - CAREFUL: at CL, if you sign this with 1, release ALL tortfeasors
        - Covenant not to sue is used instead – **won't sue settling D or do anything in the action to remain D's that would cause settling D to be brought back in**

    - Terms of settlement and existence of settlement must be disclosed but NOT the amounts that were settled for (Sable Offshore Energy)

Preparing for Trial

Admissions

- **Rule 7-7** – **acknowledge and agree on certain facts of case**
  - Can be made in pleadings or in response to notice to admit (requirements in rules)
  - **(5)** – cannot withdraw admitted fact without consent or leave of the court
    - **Once fact is deliberately admitted, very difficult to retract**
    - If admitted as a mistake, often allowed to withdraw

- **Purpose:** narrow or define issues, promote settlement, make trial more efficient
  - Helpful for summary judgment as well
  - Helps for non-contentious facts or dealing with authenticity of documents

Experts

- **If something is outside the ordinary experience or knowledge of trier of fact, get expert evidence to get that information in**
  - Ordinary witnesses cannot give opinions except for ordinary every day inferences

- **Rule 11-1(2)** – must be set out in case planning conference, no surprise

- **Rule 11-3** – parties can jointly appoint expert by consent or part of case planning order

- **Rule 11-5** – courts can appoint expert on their own initiative at any stage of action

- Role of expert:
  - **Behind the scenes** – part of counsel's preparation and advocacy
    - Don't have to file report
    - Can prepare discovery question, interpret medical evidence, prepare case, assist in cross examination of other expert
    - Caution: don't put much in writing, just telephone, because they have obligation to disclose entirety of file, including notes
      - Sort out questions to ask over telephone and then only put finalized question in writing

  - **Filing Expert Report** – if report filed for trial, expert shifts to become independent, non-partisan and objective, in theory, to assist the court (White Burgess v Halliburton)
    - **Rule 11-2** – **duty of experts:** serving report says that expert is objective and would say the same thing no matter what side appointed them
    - Report must include statement that they knew It was their duty to assist the court and not advocate for either party
    - Privilege waived over entire file

- Preparation of Report
  - Report should be disclosed 14 days before trial
  - Technically, counsel should not have any role in preparation but will usually have to review draft to help because expert doesn't necessarily understand court process
  - **Drafts are disclosed to other side so amount of assistance for counsel will go to weight the report has**

- **Rule 11-6** – content and structure of report must comply with rules
  - **(1)** – **set out qualifications of expert:** name, qualifications, area of expertise, instructions provided, nature of opinion sought, opinion and reasons, facts that were relied on
  - **(3)** – served at least 84 days before trial, rebuttal report within 42 days

- **Rule 11-7** – report stands as evidence unless other party wants to cross expert – must stand on its own!
  - **Cannot direct examine your own expert unless the other party wants to cross** or **(5)** expert needs to clarify terminology or make report more understandable
  - If intending to cross expert, must let other side know 21 days before trial

- **Admissibility:** R v Mohan
  1. **Relevance** – is it so related to fact in issue that it tends to establish it? Is it logically relevant?

  2. **Necessity** – is it outside ordinary experience and knowledge of trier of fact?
     a. Cannot go to ultimate issue – cannot usurp role of trier of fact
     b. Driving a car is within ordinary experience but not driving a semi truck so trier would need evidence about it (McEachern)
     c. Must be able to prove facts on which the report is based

  3. **Qualifications** – must have specialized knowledge based on experience, training or education, must be set out in report
     a. Can only give evidence that is within scope of qualifications (McEachern)

- **Consider if expert can fulfill duty to court** – apparent bias is not relevant, just a question of whether they are capable of being objective in each individual case (White Burgess v Halliburton)
  - Court has discretion to let evidence in – **weigh prejudicial effects against probative value**
    - Eg. Polygraph – prejudicial value outweighs probative value

Class Proceedings

- **All P in the same shoes and one P goes forward on behalf of the whole group** – if they win, their results apply to everyone in the same situation

- **Goals of Class Actions**
  - **A2J** – people with smaller claims can go to court and get outcome when it would be too expensive otherwise
  - **Judicial Economy** – if 1 suit can settle liability for 1,000 claims, better for court resources and busy judges
    - Embarrassment of court – want to ensure consistency of case outcomes
  - **Behaviour Modification** – make large corporations change their behaviour by holding them responsible for business risks (Pinto)

- **Starts as a regular law suit** – to become class action, must be certified under Class Proceedings Act BUT also a **CL test for jurisdiction without statute**:

1. **Pleadings must disclose a cause of action** – stand up to a motion to strike essentially

2. **Must be identifiable class of 2+ people**

3. **Claims of class members must raise common issues**
   a. Common issues must be necessary to the resolution of each class members claim – legal features of case would apply equally to all members (Rumley)
      i. Material facts or key legal features

   b. Has to be balance between commonality being too detailed so that class breaks down and being too general

   c. Varying degrees of injuries does not affect the class (court makes different quantum assessments down the road)

   d. **Sub-classes:** for cases where law is changing over time, different sub-classes for P's injured when law was in a certain form

4. **Court must determine if a class action would be preferable procedure for fair and reasonable resolution of the common issues** – main consideration

   a. Would a class action be the fair and efficient way of managing and advancing the claim? (Rumley)
   b. Is it preferable to other available procedures? (Rumley)

   c. **S.4(2) of Class Proceeding Act** – definition of preferable procedure
      i. Whether question of facts or law affecting all class members predominate over individual interests

      ii. Whether significant amount of members have valid interest in individually controlling prosecution of separate actions
         1. No control over the case, not getting legal advice and just waiting for cheque from case of another
         2. Most important for people that are seriously injured – separate case may be best procedure for them

iii. Whether class action would include claims that are subject of any other proceedings

iv. Whether administration of proceedings would create greater difficulties than if relief was sought through other means

5. **Representative P would fairly and adequately represent the interests of the entire class AND has produced a plan for the proceeding, with a workable method of advancing the claim on behalf of the class and notifying/finding potential class members**

    a. Must have finances and resources to find class members – TV/newspaper ads – and deal with a large litigation
    b. Cannot have common issues that are in conflict with the interests of other members

Public Law Theory of Class Actions

- **Mass torts result from systemic risk taking by businesses** – not one off situations

- **Main goal is deterrence** – effort to control systemic risk taking by businesses
    - Able to hold them accountable for risks and gives Ps an economy of scale to challenge the businesses (same clout and similar resources)
    - **Dis-incentivize businesses** – damages should reflect this, not coupon settlements (Famous Players)

- **Lawyer must act as a self interested attorney general essentially** – working for public interest and preventing similar injuries in the future
    - Must be able to incentivize lawyers to bring these cases forward or they would never be dealt with and there would be no check on businesses
    - Deserve to be paid for the risk in bringing a huge class action

- **Requires the largest class possible to take on the business** – aggregation of class into single claim must be complete as possible
    - **Best approach is opt out** – get certified and everyone who meets the class is automatically in, must take a positive step to opt out
    - Requiring positive step to opt in could reduce size and efficiency of class

Civil Litigation and the Constitution

- **Monetary damages for Charter breaches are available** (Ward)
    - **Quantum** – should be low because high awards don't serve the purpose of damage awards in this context
        - **A2J:** small award may prevent lawyers from taking on these claims because of the small pay off

Test for monetary damages for Charter breach: (Ward)

1. **Proof of Charter breach** – must have sued government, not individual

2. **Onus on P to establish functional justification for damages** – compensation, vindication or deterrence
    a. **Compensation:** personal loss where monetary damage is appropriate compensation

    b. **Vindication:** cannot let rights be whittled away by state without ability to hold them accountable – sometimes declaration isn't enough
        i. Vindication confirms constitutional values and shows how important they are

    c. **Deterrence:** damages could deter future breaches from other state actors
        i. Regulate state behaviour to get compliance with constitutional standards

3. **Onus shifts to government to show countervailing factors that would render damages inappropriate or unjust in the circumstances**
    a. Showing other remedies that would serve same/similar purpose would prove that damages may not be needed
    b. **Good Governance concerns** – amount of damages so large that it would affect government's ability to govern (likely only in class action context where amount would be huge)

4. **Onus shifts back to P** – court engages in assessment of damages

- **NOTE:** provincial limitation acts can extinguish charter claims IF they are of **general application** and apply to everyone, including the government
    - Government **CANNOT** rely on specialized limitation act that is only passed for benefit of government to extinguish claims