

CIVIL PROCEDURE QUICK(ISH) SHEETS



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KEY CONCEPTS

Organization of the Courts	
1-40 CJA	<p>Establish the courts and their jurisdictions</p> <ul style="list-style-type: none"> CA highest appellate court in the province (s.2; jurisdiction s.6; power to hear reference case under s.8) <ul style="list-style-type: none"> -matters heard by no less than 3 judges (s.7(1)) ; motions heard by 1 judge (s.7(2)) →then Court of Ontario (s.10) Which is split into the following 2 courts: <ul style="list-style-type: none"> -Ontario Courts of Justice (s.34) -Ontario Superior Court of Justice – handles all civil actions in the province (s.11) <ul style="list-style-type: none"> → consists of three branches, which it can hand matters to: Divisional court (s.18)– handles some specific matters including judicial review and certain appeals with applications – heard by three judges sitting together (jurisdiction s.19(1)) Small claims court (s.22)– claims for monetary value or recovery of possession of personal property valued up to \$25,000 excluding interest +costs (jurisdiction s.23, ON Reg 626/00) (Cannot grant equitable relief (s.96(3))) Family Court (s.21)– certain statutes steer matters here
CJA s. 96(1)	Courts administer concurrently all rules of equity and common law
CJA s.96(2) (3)	Where rules of equity conflict with rules of common law = equity prevails CA and Superior Court of Justice can grant equitable relief, except Small Claims court
CJA s.35	Sets judicial regions and Regional senior judges (courts of ON divided into regions)
CJA s.75	Sets officers of the courts
<i>Law Society Act</i>	s.29(1) Every lawyer in ON is an officer of every court of record in ON
Federal Courts Act	Establishes two courts: Federal Court of Appeal and Federal Court 15(1) judge of the Federal Court may sit and act at any time in any place in Canada and when they do so, the judge constitutes the court 17(1) FC has concurrent original jurisdiction in all cases in which relief is claimed against the Crown

Public Access to the Courts

CJA 135	All hearing open to the public. EXCEPT (2) where possibility of serious harm or injustice
CJA 137	(1) Public documents available on payment of prescribed fee <u>unless</u> act or order provides otherwise (docs filed in civ proc) (2) Sealing documents – by court order will not form part of public record
CJA 136	Prohibition against photography at court hearing 2) Exceptions: Handwritten notes or sketches in court hearing; audio recording approved by judge for supplementing notes

- There is a heavy onus on individuals seeking to keep court records private (*AG Nova Scotia v MacIntyre*) - private info of non-party +harm
- Publication ban regarding health records -mental health issues of non-party (*Frleigh*) – not voluntary participant in proceedings
- Publication ban regarding plaintiff's identity refused in action for damages for surgery (*Stubbs*)- embarrassment does not constitute harm

Key Concepts of Rules of Civil Procedure

Fairness, Flexibility & Proportionality

RULE 1: INTERPRETATION + APPLICATION	
RCP 1.02	Rules apply to all civil proceedings in the CA and Superior Court of Justice <u>EXCEPTIONS</u> : Do not apply to proceedings in the Small Claims Court, governed by Family Law Rules or if statute provides for different procedure

1.03 + 1.07	Definitions: Proceeding = action or application -Originating process= document that commences a proceeding - Court includes judges and masters (in TO and Ottawa) – Judgement is a type of order that usually finally disposes action
1.04	<u>General overarching principle of interpretation in applying rules:</u> (1) Rules are to be interpreted liberally , to ensure just, most expeditious and least expensive determination of a proceeding on its merits (1.1) Proportionality: Court shall make orders/directions that are proportionate to the importance & complexity of the issues + amount involved in proceedings (2) Matters not provided for = determined by analogy
1.05	Order under rules may impose any terms and directions as are just
1.06	Forms under rules can be used where applicable and varied as required
RULE 2: NON-COMPLIANCE	
2.01	(1) Failure to comply with rules = irregularity NOT a nullity • (a) Can be cured by an amendment • (b) Proceedings will be set aside only when necessary in the interest of justice
2.02	Motions to attack irregularities must be made promptly or before a further step is taken in proceeding= Except with leave • If not prompt deemed to have accepted irregularity
2.03	Court may dispense with compliance when necessary in the interest of justice
RULE 3: TIME	
3.01	Computation of time periods except where contrary intention: (a) Reference to a number of days between 2 events → exclude the day on which first event happened and include the day of 2 nd event (even if described as clear days or “at least” used) (b) 7 days or less = holidays not counted (c) Where time for doing act expires on holiday, act may be done on next day not a holiday (d) Service of a document made after 4pm or at any time on a holiday is deemed to have been made on the next day that is not a holiday (Does not apply to originating process)
3.02	(1) Court can extend prescribed time by order <u>on such terms as are just</u> (2) Motion to extend time can be made before or after expiration of time (4) Time prescribed can be extended by <u>filing consent</u> in writing

Court can extend time, **Nunc pro tunc**: “now for then” = so if time to apply to do something has expired -takes effect as of an earlier date

- Court will expect an explanation of the missed deadline and need to extend– can be simple inadvertence
- When applying to abridge or shorten time required to give notice to an opposite party – court will require justification (urgency or time period unnecessary)
- In the case of both extension and abridgement = court must be satisfied that **no prejudice suffered that cannot be remedied** by adding some terms to the order (adjournment, costs, more time for other side to respond)

Ignoring time periods or deadlines can be serious = non-compliance is fatal:

- Failing to list for trial within 5 years of issuing claim, to deliver notice of appeal within 30 days, have a notice of action or statement of claim issued/new party added within limitation period, to amend a pleading before commencement of trial, to act promptly to remedy a discovery omission

A court has jurisdiction to relive against strict compliance where trial fairness so demands (*Brandiferri*)

RESPONSIBILITY OF LAWYERS TO COURTS, CLIENTS AND OTHERS

RULES OF PROFESSIONAL CONDUCT

- Governed by the Law Society of Ontario
- LSO’s power originates in **Law Society Act**, R.S.O. 1990, c. L.8 **PG. 711**
- S. 10 “The benchers shall govern the affairs of the Society”

- Latest Complete Overhaul Originally Adopted by Convocation in 2010 (Based on Model Code), Amended from Time to Time
- Set General Obligations and Duties for Lawyers As They Navigate World

WHO IS A CLIENT?: RPC 1.1-1

RPC 1.1-1: a person who:

- A) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
 - b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf
- “...and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work”

RETAINER: RPC 3.6

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary 1: Explains what is fair and reasonable (will depend on factors like time required, difficulty of matter, results obtained, fees authorized by statute, client’s prior consent)

Commentary 2: Fiduciary relationship between lawyer and client requires full disclosure of all financial dealings between them, no fee without consent.

Commentary 3: Lawyer should provide to the client as much detail as possible about fees, disbursements and interest, in writing, before or within a reasonable time after commencement

Commentary 4: Lawyer should be ready to explain the basis of the fees and disbursements charged to client. Lawyer should confirm with client in writing on substance of all fee discussions.

- “When you are retained by a client, you should consider confirming the terms of the engagement with the client in writing in order to avoid any misunderstanding between you and your client.”
- “Essential terms of the engagement may be confirmed by way of retainer agreement executed by the client or engagement letter”
- “The content of the retainer agreement or engagement letter will vary depending on the client and the nature of the matter”
- LSO’s items to consider confirming in a retainer agreement or engagement letter:
- **Scope of Services:** client’s goals, key steps in matter, expected time to be taken, client’s steps, limits to representation, results to be achieved
- **Fees and Disbursements:** Estimate of fees and disbursements, whether fees will be hourly or flat rate, amount and payment date of initial retainer, billing
- **Communication with the Counsel:** How communications is to happen
- **Withdrawal from Representation:** When a lawyer may withdraw, consequences if instruction in adequate

CONTINGENCY FEES – DEVELOPMENT

- Contingency fees encourage hustling after injured sufferers, and win no matter what It is good we don’t have it in Ontario *Re Solicitor* (1907), 14 OLR 464 (ch.)
- Ostensibly impermissible due to champerty and maintenance
 - Long history of use of soft contingent agreements in personal injury action
 - *Class Proceedings Act, 1992*, s. 33(1) also enabled contingency fees

MCINTYRE ESTATE V ONTARIO (ATTORNEY GENERAL), (2002) 61 OR (3D) 257

Facts: Plaintiff estate suing tobacco company sought declaration that contingency fee agreement was valid. Court of Appeal found two-section *Champerty Act* not a bar

Held/Reasons: From a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has changed because of concerns about access to justice. Over time, the costs of litigation have risen significantly which results in many individuals with meritorious claims who simply not able to pay for legal representation unless they are successful in the litigation

CONTINGENCY FEES: RPC 3.6-2 & SOLICITORS ACT

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act*... that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided. *Solicitors Act*, s. 28.1, *Contingency Fee Arrangements*, Reg. 195/01 source of this right

Commentary: In determining the appropriate percentage or other basis for the contingency fee, the lawyer should consider a number of factors, including:

- **Likelihood of Success**
- **Nature and Complexity of Claim**
- **Expense and Risk of Pursuing It**
- **Amount of the Expected Recovery and Who Receives It**
- Contingency Fee Must be Fair and Reasonable
- *Contingency Fee Arrangements* Reg 195/04, s. 7 has 50% cap (“solicitors...shall not recover more in fees...than the plaintiff”)

CONFLICT OF INTEREST RPC 3.4-1

RPC 3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section

1.1-1 “Conflict of Interest” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer;

Bright Line Rule: “a lawyer may not represent one client whose interests are *directly* adverse to the *immediate* interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.” *R. v. Neil* 2002 SCR 70 at para 29

- Codified at Commentaries 7-8: “The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer’s representation of one client is directly adverse to another client’s legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.”

CANADIAN NATIONAL RAILWAY CO V MCKERCHER LLP, 2013 SCC *LEADING CONFLICTS OF INTEREST CASE

Facts: McKercher LLP is a big law firm in Saskatchewan. In 2008, they represented CNR on three matters: 1. Real Estate purchase 2. Personal Injury matter defended by CNR 3. A claim in receivership proceedings. McKercher was approached by a third party (Gordon Wallace) who wanted to sue CNR. The basis of Wallace’s claim was that CNR overcharged grain farmers (a 1.7-billion-dollar class action lawsuit, but unrelated to CNR’s legal work with

McKercher). CNR regards McKercher as their go to lawyers in Saskatchewan. In a class-action suit typically the lawyers have a contingency (won't be paid unless successful, and if successful lawyer's get 1/3 of the winnings - this would have been \$500million). No likelihood that McKercher's representation of CNR will impact the representation of Wallace or CNR. McKercher did not tell CNR. McKercher terminated their retainer on 2&3. CNR terminated the retainer on 1. CNR brought a motion to have McKercher removed as the counsel of record because they violated their duty of loyalty applying the bright line test. CNR claims they had adverse legal issues, that McKercher improperly terminated their retainers, and they might misuse confidential information.

Issues: Assuming that McKercher's representation of CNR would not have been affected, should McKercher be allowed to represent CNR in matters but oppose them in others? Did the bright line rule apply here or is the applicable test the substantial risk test?

Ratio: The *bright line test* and the substantial risk test are two separate tests. Apply the substantial risk test when the *Bright Line Test* (default test for concurrent represent, applies in both related and unrelated matters) doesn't apply (whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected).

STEPS FOR DEALING WITH CONFLICT OF INTEREST RULES

Step 1: Determine Who Your Client Is?

Step 2: Consider the Nature of Your Retainer and Duties Owed to Client Arising From Retainer?

Step 3: What Duties Do You Owe To Other Current, Former Clients or Other Third Persons?

Step 4: Is There a Substantial Risk That Your Duty to Client Would Materially and Adversely Affect Your Duties to Other Client Or Third Person?

Step 5: Are You Representing Both Sides of a Dispute? If so, You Can't

Steps 6-7: Can You Represent Both Clients Without Having a Material Adverse Effect on Duty? If No, You Can't

Step 8: If You Can Represent, Then You Can

DUTY OF COMMITMENT TO CLIENT'S CAUSE RPC 3.7

RPC 3.7-1: A lawyer shall not withdraw from representation except for good cause and on reasonable notice to a client

- **Commentary 1:** "Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating..."

RPC 3.7-2: Subject to...the direction of the tribunal where there has been a serious loss of confidence between the lawyer and client, the lawyer may withdraw

- **Commentary 1:** Sets out justifiable cause grounds, including refusal to accept and act upon the lawyer's advice, being persistently uncooperative,

RPC 3.7-3: Subject to...the direction of the tribunal where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw

DUTIES OF CANDOUR AND CONFIDENTIALITY RPC 3.2-2

RPC 3.2-2: When advising clients, a lawyer shall be honest and candid.

- **Commentary 1.2:** Can withhold information from client in select instances

- **Commentary 2:** ...The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits.

RPC 3.3-1: A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship...

- **Commentary 2:** This isn't an evidentiary rule, ethical rule is wider and applies without regard to the nature or source of information or the fact that others may share the knowledge
- **Commentary 3:** Duty survives the professional relationship and continues indefinitely after the lawyer ceases to act for the client
- *Canadian National Railway Co v McKercher LLP:* breached duties of commitment and candour - disqualification is presumptive remedy

JOINT RETAINER: RPC 3.4-5

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

ACTING AGAINST FORMER CLIENTS

3.4-10: Unless the former client consents, a lawyer shall not act against a former client in (a) the same matter, (b) any related matter, or (c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

3.4-11: When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act in the new matter against the former client provided that:

- (a) the former client consents...;
- (b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosures of the former client's confidential information to the other lawyer having carriage of the new matter.

3.4-18-21: Rules that govern when changing firms

3.4-20: If transferring lawyers actually possess confidential information the new law firm must cease its representation of its client in that matter unless:

- a) The former client consents to the new law firm's continuing; or
- b) The new law firm has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and advised the lawyer's former client, if requested by the client, of the measures taken

3.4-21: Unless former client consents, a transferring lawyer must not participate in the law firm's representation of its clients in the matter or disclose any confidential information respecting the former client

3.4-22: Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client

REFERRALS: RPC 3.6-6.0-3.6-6.1

3.6-6.0 In this rule and rule 3.6-6.1,

- “referral” includes recommending another lawyer or paralegal to do legal work for anyone except where the work is done through the same law firm in which the referring lawyer primarily practices
- “referral agreement” means a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral and the client, in the form provided by the Law Society from time to time.
- “referral fee” includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.

3.6-6.1 (1) A lawyer may accept and a lawyer may pay a fee for the referral of a matter provided that:

- (a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;
- (b) a referral agreement has been entered into at the time of the referral or as soon as practicable after the referral;
- (c) the lawyer or paralegal who receives the referral has the expertise and ability to handle the matter;
- (d) the referral was not made because the referring lawyer or paralegal (i) has a conflict of interest or (ii) was a lawyer or paralegal whose license was suspended when the referral was made...
- (e) the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the lawyer or paralegal who received the referral for the first fifty thousand dollars (\$50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of \$25,000...

(2) The lawyer who received the referral for which a referral fee is payable shall note the referral fee on the account sent to the client at the time the referral fee is paid or payable and obtain the client's acknowledgement of the referral fee failing which acknowledgement the lawyer must confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so

SELF-REPRESENTED INDIVIDUALS

RPC 7.2-9: When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

- (b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and
- (c) take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

TERMINATING A CLIENT

TODD FAMILY HOLDINGS INC. V GARDINER, 2015 ONSC 6590

Facts: After a five-month adjournment of a lengthy commercial trial, lawyers sought permission to withdraw from representation for non-payment, which was opposed by clients. Lawyer had obtained a security for an amount sufficient to satisfy accounts

Held: retention of present counsel outweighs the interest of counsel

Reasons: Court considers obligation under RPC 3.7-3 that a lawyer can't withdraw if serious prejudice results to client. Court applied test of Supreme Court in *R v Cunningham*, 2010 SCC 10 and concluded that not feasible for client to properly advocate for issues on his own, that he could not retain alternative representation at this late date and at the mid-trial juncture

RELATIONSHIP WITH COUNSEL, WITNESSES AND COURTS

RPC 2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

RPC 5-1.1: When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law

Commentary 1: Duty to “raise fearlessly every issue, advance every argument and ask every question, however distasteful” but this duty must be discharged by “fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat tribunal with candour, fairness and courtesy and respect.

Commentary 8: In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that merely delay or harass.

RPC 5.1-2: Sets out things that a lawyer shall not do, including:

- Abuse the process of the tribunal by means that are clearly motivated by malice on part of client
- Assist or permit client to do anything that the lawyers considers to be dishonest or dishonourable
- Endeavour to influence the decision or action of a tribunal in any case by any means other than open persuasion as an advocate
- Knowingly deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, suppressing what ought to be disclosed, etc.

COMMUNICATION WITH OPPOSING PARTY

RPC 7.2-6: If a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner (a) approach or communicate or deal with the person on the matter; or (b) attempt to negotiate or compromise the matter directly with the person.

RPC 7.2-8: A lawyer retained to act on a matter involving a corporation that is represented by a legal practitioner shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication or deal with a person:

- (a) Who is a director or officer, or another person who is authorized to act on behalf of the corporation
- (b) Who is likely to be involved in the decision-making for the corporation or who provides advice in relation to the particular matter
- (c) Whose act or omission may be binding or imputed to the corporation or organization for liability purposes

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably ought to know that the document was inadvertently sent shall promptly notify the sender.

Commentary: Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of this rule, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows

or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

COMMUNICATIONS WITH THIRD PARTIES

RPC 5.3-1: Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

COMMUNICATION WITH WITNESSES IN COURT

5.4-2 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;
 - (a.1) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;
 - (a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
- (b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;
- (c) (c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;
 - (c.2) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;
 - (c.3) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and
 - (c.4) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

COMMUNICATION OTHER LAWYERS: RPC 7.2-1 7.2-5

Courtesy and Good Faith

7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

7.2-1.1 A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

7.2-3 A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

Communications

7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

7.2-5 A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

GROIA V LAW SOCIETY OF UPPER CANADA 2013 LSDD *LEADING CASE IN CIVILITY REAFFIRMED IN 2016 ONCA

Facts: Joe Groia is a well-known lawyer in Toronto with a strong personality. Joe Groia was the lawyer for the people accused in R v Felderhof in the BreX scandal. BreX claimed to have found gold. Due to this their stock soared. They had not actually found gold. The incorrect claim was fraud. When it was discovered this claim was fraud people lost lots of money. The Ontario Securities Commission admitted there was no proof Felderhof knew the claim was fraud. He was accused of insider trading. At this trial he was represented by Joe Groia. The trial was crazy and Felderhof was acquitted. Throughout the trial Groia kept accusing the prosecutor of a witch hunt (finding someone to blame). He claimed they had failed in their duty to disclose and had adopted a convict at all costs and not just ensure all facts are presented.

Issue: Did Groia violate the rules of civility? Does it matter that his conduct was successful, in the sense that he won the case? Should there be a penalty?

Ratio: Counsel must have a reasonable basis and make allegations in good faith of prosecutorial misconduct or that impugn the integrity of opposing counsel. Determining when uncivil courtroom behavior crosses the line is contextual and fact specific.

Held: Mr. Groia engaged in professional misconduct by violating the rules of civility. This is not a reprimand case. A month suspension is justified.

Reasons: Mr. Groia's attacks were personal in nature and aimed at the integrity of the prosecutors. Nothing the prosecutors did justified this onslaught. Groia's argument about the rise of the civility movement in Ontario are false. This is not a retro application. His actions were already in the rules of professional conduct. Zealous advocacy did not require Mr. Groia to make the claims/ perform the actions he did.

DUTIES OF A LAWYER UNDER THE RULES OF CIVIL PROCEDURE

GETTING ON THE RECORD

- Commence an Originating Process (Statement of Claim or Application)
- File a Statement of Defence or Responding Application Record
- File a Notice of Intent to Defend (RCP 18.02)
- Easy to Get On Record Than Off

RCP/CJA

#	Rule
Duties of a Lawyer	
15.01	A lawyer is required for a party under disability (1); a corporation – except with leave (2); any other party may be represented (3)
15.05	A lawyer must continue to act on record until client delivers notice under 15.03 or removed under 15.04

15.03	Party may change lawyer by serving lawyer/parties with Form 15A (change of lawyer)
15.04	Lawyer can move to be removed as lawyer of record (1); client must appoint new lawyer within 20 days or appoint themselves (6-8); failure can result in dismissal/striking defense (9)
Self-represented Individuals	
15.01.1	If party is self-represented anything required by lawyer should be done by party
Communication With Court	
1.09	When proceeding is pending before court no party/lawyer shall communicate with court about the case unless all parties consent or court directs otherwise
86 CJA	Call judges your honour or Mr/Mdme Justice

PRIVILEGE

Solicitor-Client Privilege: Documents containing or reflecting confidential professional communications passing between the Plaintiff or their legal advisors directly related to the seeking or receiving of legal advice or legal assistance.

- All correspondence, memoranda, statements and documents passing between the clients and their solicitors.

Litigation Privilege: Documents comprised of notes, memoranda, reports, confidential correspondence, and copies thereof, prepared with the dominant purpose of obtaining or providing advice concerning this litigation, of obtaining or providing information and evidence to be used in this litigation and preparing for and prosecuting this litigation.

- All correspondence, memoranda, statements and documents prepared for the information, use and advice of the solicitors in relation to proposed or pending litigation.

Without Prejudice Communication Privilege: Documents containing or reflecting confidential professional communications of a without prejudice nature concerning the matters in issue in this litigation or written with a view to settlement of some or all of the outstanding matters between the parties.

CAPACITY TO SUE

PRESUMPTION OF CAPACITY

SUBSTITUTE DECISIONS ACT RULE 2

2(1) Presumption of Capacity - A person who is eighteen years of age or more is presumed to be capable of entering into a contract.

2(2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

2(3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.

LIMITATIONS ACT, 2002

Rule 7(2): also has the presumption of capacity.

LSO RULES OF PROFESSIONAL CONDUCT

RULE 3.2-9: CLIENT WITH DIMINISHED CAPACITY

When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary:

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions...

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

RIGHT TO BE UNREPRESENTED

LIMITS ON THE RIGHTS TO BE SELF REPRESENTED OR MAKE ONE'S OWN DECISIONS

1. Courts inherent right to appoint Amicus Curiae- (see *Gligorevic*)
2. In litigation concerning their capacity, appointment of legal counsel under section 3 of the *Substitute Decisions Act*
3. Appointment of Litigation Guardian under Rule 7 of RCP

SUBSTITUTE DECISIONS ACT, S3: COUNSEL FOR PERSON WHOSE CAPACITY IS IN ISSUE

- 3 (1)** If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
- a. the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
 - b. the person shall be deemed to have capacity to retain and instruct counsel.

CPACITY TO MANAGE PROPERTY

SUBSTITUTE DECISIONS ACT, S6

Incapacity to manage property - A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

PERSONAL CARE

SUBSTITUTE DECISIONS ACT, S45

45. Incapacity for personal care - A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

ABSENTEE ACT, RSO 1990, CA.3

Definition

1 An absentee within the meaning of this Act means a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead. R.S.O. 1990, c. A.3, s. 1.

Declaration by court

2 (1) The Superior Court of Justice may by order declare a person to be an absentee if it is shown that due and satisfactory inquiry has been made, or may direct such further inquiry to be made and proceedings to be taken as the court considers expedient before making any order. R.S.O. 1990, c. A.3, s. 2 (1); 2006, c. 19, Sched. C, s. 1 (1).

BUSINESS NAMES ACT, RSO 1990

2 (1) No corporation shall carry on business or identify itself to the public under a name other than its corporate name unless the name is registered by that corporation.

(2) No individual shall carry on business or identify his or her business to the public under a name other than his or her own name unless the name is registered by that individual.

(3) No persons associated in partnership shall carry on business or identify themselves to the public unless the firm name of the partnership is registered by all of the partners.

Ability to sue

7 (1) A person carrying on business in contravention of subsection 2 (1), (2) or (3) or subsection 4 (4) or (6) is not capable of maintaining a proceeding in a court in Ontario in connection with that business except with leave of the court.

Same

(2) The court shall grant leave if the person seeking to maintain the proceeding satisfies the court that,

(a) the failure to register was inadvertent;

(b) there is no evidence that the public has been deceived or misled; and

(c) at the time of the application to the court, the person is not in contravention of this Act or the regulations.

What is a “Person”?

1. In this Act...

“person” includes an individual, sole proprietorship, partnership, limited partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, and an individual in his or her capacity as trustee, executor, administrator or other legal representative;

RCP/CJA

#	Rule
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Capacity to Sue	
1.03	Disability is defined as a minor (a); mentally incapable person under s6/45 of the SDA, 1992; an absentee under the Absentee Act
7.01	A proceeding must be started, continued or defended on behalf of a party under disability by a litigation guardian (1); except an application to appoint a guardian of property/person
Litigation Guardian	
7.02	<u>Plaintiff</u> : A litigation guardian can be any person not under disability (1); if a mentally incapable person has no litigation guardian put a lawyer the lawyer shall act as the LG (1.1(b)); a committee of estate for an absentee shall act as litigation guardian (1.1(c)); Affidavit must be filed to consent to litigation guardian unless Children's lawyer or Public Guardian (2)
7.03	<u>Defendant</u> : litigation guardian must typically be court appointed (1); Children's lawyer will act for child interested in estate (2); mentally incapable same as 1.1 above (2.1); other requirements (3-10)
7.04	If there is no proper person willing and able to act as a litigation guardian the court will appoint the children's lawyer (if minor) or public guardian and trustee (if mentally incapable) (1) can also appoint for minor who is not a party if interest are affected (2) or same for mentally incapable non-party (3)
7.05	LG can do anything required for party (1); should act in the disabled party's best interest (2)
7.06	Form 7B allows LG to be removed when minor becomes of age (1)(a); no notice required if mentally incapable person because mentally capable (1)(b); LG can be replaced if not acting in the best interests of the party
7.07	Leave of judge required to note disabled party in default under rule 19.01 (1); notice must be served on LG and children's lawyer of Public Guardian and trustee (2)
7.07.1	Leave of judge required to discontinue if disabled person is a party under rule 23.01 (1); served to same people as above (2)
7.08	Approval of judge required for settlement of a claim in which one party is disabled (1)
Partnerships and Sole Proprietorships	
8.01	Can commence a proceeding against a partnership using the name of the firm
8.02	Defence shall be in the name of the firm
8.03	The plaintiff may serve partner's personally (1); deemed to be partner unless defends the proceeding separately denying he/she was a partner at the material time (2)
8.05	If a proceeding is commenced by/against a partnership any other party may serve notice requiring the names of all the partners at the relevant time (1); failing to comply with 1: claim may be dismissed/defence struck (2); partner may be served within 15 days (3)
8.06	Order against partnership can be enforced against partnership's property (1); any one served in rule 8.03 (2)
8.07	Sole proprietorships can be served using the business name
Estates and Trusts	
9.01	Can be brought by/against executor, administrator or trustee as representing an estate (1); except for exceptions in (2)
9.02	If there is no administer/executor of an estate a litigation administrator may be appointed by the court (1) but shall be personally bound (2)
9.03	If an executor/administrator is involved in a proceeding before probate or administration has been but receives it after it is deemed to have been proper from the start (1)
Representation Order	
10.01	Court may appoint representation of persons listed in (1); binding on the person (2)
10.02	Can continue without estate representative or appointment (1)
Transmission Of Interest	

11.01	If interest or liability is transferred to another person by assignment, bankruptcy, death or other means it is stayed until an order to continue by the other party has been obtained
11.02	Form 11A: order to continue – no notice required (1); shall be served on all parties (2)
11.03	Transfer of interest for a plaintiff can be dismissed on motion by defendant under 24.02/.05 for delay if no order to continue in a reasonable time
Intervention	
13.01	Non-party can intervene if has an interest in subject; may be adversely affected; issue in fact or in law with one party in common to the proceeding
13.02	Can intervene as friend of the court with leave or permission of the judge or master
Vexatious Litigants (CJA)	
140 CJA	Judge of ONSC is satisfied that a party is vexatious the judge may discontinue a motion or ban further proceedings

PRELIMINARY MATTERS TO CONSIDER BEFORE COMMENCING PROCEEDINGS

CAUSES OF ACTION

- The facts/legal elements that provide party with the right to sue for damages, property or rights
 - Common causes of action – contract, tort, assault, breach of fiduciary duty, defamation, interference of economic relations
 - Must be able to prove the elements of each
 - Example - contract – existence of contract (consideration), breach of contract
 - Negligence – proof of duty of care, standard of care and breach of each, resultant and foreseeable damages
 - Also need to ensure that there are actual damages – ex – wrongful dismissal but immediately obtained new job at higher salary

DEMANDS BEFORE ACTION

- **Formal Demands:**
 - Certain causes of action do not exist before a demand is made
 - Example – promissory note or other debt payable on demand
- **Informal Demands:**
 - Written request for payment or performance prior to commencement of action
 - Example – where damages known
 - Example - where real possibility of resolution

NOTICE REQUIRED

- **Form of Notice**
 - Must be clear – identify date, location, particulars of event
 - Include nature of complaint
 - Nature of claims asserted
 - Intention to bring action
 - Consult governing Statute for precise form
- **Actions Against Municipalities**
 - *Municipal Act, 2001*- s. 44(1) – when intention to claim injuries / damages arising from alleged failure by Municipality to maintain bridge or highway, or due to ice or snow on sidewalk – 10 days notice

- **Actions Against the Crown**
 - *Public Transportation and Highway Improvement Act*- ss. 33(2) and 94) – when intention to claim injuries / damages arising from alleged failure of Ministry of Transportation to keep a King’s highway in repair – 10 days
- **Libel**
 - *Libel and Slander Act* – s. 5(1) – when intention to claim damages arising from alleged libel in a newspaper or broadcast – 6 weeks of discovery of libel
- **Waiver of Notice**
 - Can be waived by judge- reasonable excuse - no prejudice

LIMITATIONS OF ACTIONS

Limitations Act, 2002 and Schedules:

- In Ontario, most limitation periods are governed by the Limitations Act, 2002
- **Basic limitation** period of 2 years from the date the claim is discovered (s. 4)
- It is important to understand any limitation periods that may apply to a claim and to understand when time starts running
- When a claim is “**discovered**” is not always straight-forward
 - Section 4 (basic limitation period) read with section 5 (discovery)
 - A claim is discovered when person knows or ought to know of injury, loss, damage that was caused by an act or omission of a specified person for which a proceeding may be commenced to pursue a remedy (s. 5)
- **Ultimate limitation Period:** 15 years from date on which act or omission took place
 - exceptions – minors, incapable persons not represented by litigation guardian, wilful concealment of injury, loss, damage
- **No Limitation Period:** No limitation in sexual misconduct of minor, taxes, support, money owing relating to student loans (s 16) and undiscovered environmental claims (17)
- Limitation period can be suspended or extended by agreement (22(3-5))

PROPER IDENTIFICATION OF DEFENDANTS

- **Individuals**
 - judgment in the name of the wrong person can be unenforceable
 - searches – driving record (if have driver’s licence number) – need to obtain authorization from Ministry of Transportation which restricts uses of search information but includes litigation and debt collection
- **Businesses**
 - Corporations – must sue in name of corporation
 - Partnerships – can sue in name of partnership or individual partners (Rule 8.01)
 - Sole Proprietorships – sue in name of owner
 - searches – business name search – MGCS - corporate profile searches: MGCS

ASSETS/SOLVENCY OF DEFENDANTS

- **Assets**
 - consider title search to see if real property owned and whether there is any equity in it
- **Bankruptcy**
 - search through Office of the Superintendent of Bankruptcy

- if Defendant is already bankrupt, any court proceeding will be automatically stayed consider instead filing a claim with the Trustee in Bankruptcy
- Secured creditors have priority over unsecured judgment creditors

Writ of Seizure and Sale / Execution Searches

- search in Sheriff’s office
 - must search each individual county – consider where Defendant is likely to have assets, lives, carries on business
 - are any other writs already filed against defendant
 - can still share pro-rata with other creditors unless priority, example – taxes, family support
- **Insurance Considerations**
 - always consider whether the Defendant may have insurance that would respond to the claim; automobile insurance, property insurance – covers liability for slips and falls, negligence, etc., commercial general liability policies, errors and omissions insurance in the case of professional negligence
 - consider pleadings carefully – emphasize negligence, downplay any intentional act
 - if aware of insurer – put them on notice immediately

RCP/CJA

#	Rule
Preliminary Matters	
96 CJA	Equity prevails of common law (2); only ONCA/ONSC (no small claims) for equity (3)
97 CJA	Only ONCA/ONSC (no small claims) may make binding declarations
98 CJA	Court may grant relief against penalties/forfeitures, on such terms as to compensation or otherwise as are considered just.
100 CJA	A court vest in any person an interest in real/personal property that the court has authority to order be disposed of, encumbered or conveyed.
109 CJA	Notice of <u>constitutional question</u> must be served on AG of Canada and Ontario its about constitutional validity or applicability of Parliament or legislature or a reg/by-law or rule of common law or remedy claimed under 24(1) of Charter (1) Where constitutional validity or applicability of an Act, regulation or by-law is challenged
4.11	Notice of con. question shall use Form 4F
Forum and Jurisdiction	
23 CJA	Small claims has jurisdiction for money or personal property up to \$25,000 (1)
110 CJA	Proceeding can be transferred to the proper court (1)
Simplified Rules	
76.02	claim for money, real or personal property (1) only valued at up to \$100,000 exclusive of interest and costs (2)
Commencement of Proceedings	
13.1.01	If statute requires proceeding started in a county then start there and county named in originating process (1); otherwise can be started at any court office in any county named in originating process (2); mortgage claims must be commenced in designated county in the region that property located (3)
13.1.02	Can be transferred to proper location if under 13.1.01(1) or if under (2) can be transferred if factors under (b) pg 977 are met
46.01	Trial shall be heard where proceeding commenced unless transferred
8.01	<u>Partnerships</u> – can sue in name of partnership or individual partners
9.01	Proceeding may be brought by/against executor, administrator or trustee as representing estate/trust/its beneficiaries without joining the beneficiaries as parties.

9.03	If brought before probate/administration but it is subsequently received, proceeding deemed proper from start
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COMMENCEMENT OF PROCEEDINGS

RCP/CJA

#	Rule
Commencement of Proceedings: Originating Processes	
14.01	Proceeding commence by originating process (1)
14.02	Every proceeding shall be bay action except where statute or rules state otherwise
14.03	<u>Actions by statement of claim or notice of Action</u> : originating process for action is statement of claim (Form 14A or 14B (mortgages) (1); insufficient time to prepare statement of claim – action can be stated by notice of action (Form 14C) (2) but statement of claim must be filed within 30 days (form 14D) unless consent or leave (3); statement of claim may alter or extend notice of action (5)
14.05	Originating process for application is notice of application (From 14E/E.1/68A/73A) or application for certificate of appointment for an estate trustee (Form 74.4/5 etc.) (1) or by application to ONSC if statute authorizes (2)
14.06	Originating process shall have title with names of all parties and their capacity (1); action - party commencing named as P and opposing as D (2); application – commencer named as applicant opposing as respondent (3) except rules 75/75
14.07	Originating process issued by registrar’s act of dating, signing, sealing and assigning file #
14.08	Statement of claim shall be served 6 months after issued (1); notice of action & SOC shall be served 6 months (2)
14.09	Originating process that is not pleading may be struck/amended in same manner as pleading
Applications: Jurisdiction and procedure	
38.02	An application shall be made to a judge
38.03	In notice of application applicant shall name the place and commencement (13.1.01)
38.04	Notice of application (Form 14E/E.1/68A/73A/74.44/75.5) shall state relief sought, grounds, documentary evidence
38.05	Application shall be issued as provided by 14.07
38.06	Notice of application shall be served on all parties (1) if its not judge can dismiss/adjourn application (2); must be served 10 days before hearing (3); proof of service must be filed 7 days before hearing (4)
38.07	R served with notice of application shall deliver notice of appearance (Form 34A) (1); no notice of appearance = no documents/notices/filing of material/be heard (2)
38.08	A may abandon application by delivering notice of abandonment (1); if A fails to appear shall be deemed to have abandoned (2); if abandoned R is entitled to costs (3)
38.09	A shall serve application record and factum to be filed 7 days before hearing (1) does not apply to rules 74/75 (7/8)
38.09.1	A party who makes an application to another party shall confer/attempt to with other party no later than 2pm day before hearing and give registrar confirmation of application (Form 38B) (1) or application will not be heard (2)Ju
38.10	Judge may grant relief, dismiss, adjourn (1) or order for trial, (2)
38.11	A motion can be set aside if an affected party wasn’t given notice/failed to appear by accident, mistake or insufficient notice (1)
38.12	Rule 25.11 applies, with necessary modifications, with respect to striking out any document filed on an application

38.13	Applies to applications under s140(3) CJA (Vexatious proceedings) (1); shall be heard in writing (2); commenced by filing notice of application (14E.1) and application record (3); no factum required (4); AG must be served (6)
Evidence on Motions and Applications	
39.01	Evidence on application/motion may be given by affidavit (1); shall be served with notice and filed with proof of service 7 days before hearing (2); affidavits in opposition shall be filed 4 days before (3); can contain hearsay/belief (4/5); motion without notice requires A to make full/fair disclosure of all material facts or order can be set aside (6); Expert evidence shall include the information listed under subrule 53.03 (2.1)
39.02	once served every affidavit which party intends to rely/completed all examinations under rule 39.03 may cross-examine any affidavit served by adverse party (1) does not apply to 140 (3) CJA (1.1); must be exercised with reasonable diligence (3)
Court Documents	
4.01	Format
4.02	Contents: have a heading form 4A (actions) or 4B (applications) (1) but does not apply to proceedings under rules (1.1);
4.03	If you are entitled to see doc under 137 CJA – pay registrar fee and they will issue certified copy
4.05	Documents must be filed on personal attendance at court office by party or someone on their behalf (1); or electronically if permitted (1.1); must be filed at the court office in which proceeding commenced (2); if filed electronically must keep original until 13 day after expiry for appeal/make available for inspection 5 days after request (10)
4.05.1	“Civil Claims Online Portal” means the software authorized by the Ministry of the Attorney General (1); documents that may be filed electronically (2)
4.06	Affidavits shall be in Form 4D and sworn (1); statement of facts within personal knowledge (2)
4.07	Binding rules
Duty of Expert	
4.1.01	Duty of expert to provide opinion evidence that is fair, objective, non-partisan, only within area of expertise (1)
Joinder of Claims and Parties	
5.01	P/A may in the same proceeding join any claims against an opposite party (1)
5.02	Persons represented by same lawyer may join as P/As where they assert any claims arising out of same transaction or occurrence or series of (1); may join as defendants if the same (2)
5.03	Every person whose presence is necessary to enable court to adjudicate effectively/completely issues in proceeding shall be joined as party to proceeding (1); P/A entitled to relief to which another person is jointly entitled shall join (2); assignor shall join (3); court can add parties (4); if party does consent in 1-3 shall be D/R (5)
5.04	Proceeding not defeated by misjoinder or non-joinder (1); court can add/delete substitute party at any point as long as no prejudice (2); person’s consent required (3)
5.05	Court can separate hearings; claims; compensate a party for attending; stay proceedings pending another hearing if joinder unduly complicates/delays/prejudices
Service of Documents	
16.01	Originating process shall be served personally (rule 16.02) or by an alternative rule 16.03 (1); party not served but submits defence or notice of intent to defend/appear deemed to have been served with originating process (2); no other documents need to be personally served (3); can be served on lawyer – 16.05, person acting in person by mail, personal service, electronic document exchange (4)
16.02	Personal service: individual; corporate officer; member of board; person carrying on business in Ontario for the person; crown CAN -23(2) <i>Crown liability and proceedings act</i> , crown ON – s10 <i>Proceedings Against the Crown Act</i> ; disabled LG; partner; sole proprietor

16.03	Alternatives to Personal Service: lawyer (lawyer must accept and endorse) (2); mail (4); residence - if not there can leave with any adult or mail (5); head office, principal place of business, or mailing or lawyer for corporation (6)
16.04	Court may substitute or dispense service of originating process or documents if necessary in the interest of justice (1)
16.05	Service on lawyer can be mailed to office, left with lawyer/employee in office, document exchange, electronic document exchange, faxed, couriered, emailed if accepted under 16.06.1 (1)
16.06.1	If no consent to email court can order document be served by email (2)
16.07	Where document does not reach person may request adjournment, extension or set aside consequences
16.08	Court may make order validating service if it came to notice of person served
16.09	Service of document may be proved by affidavit of person who served (Form 16B)(1)
Service Outside Ontario	
17.01	“originating process” includes a counterclaim against only parties to the main action, and a crossclaim.
17.02	Originating process may be served outside ON without leave where proceeding involves claims listed under this rule (where ON is obviously proper jurisdiction)
17.03	Court may grant leave for others (1) affidavit or other evidence require to show where person is probably found (2)
17.06	Party outside ON who’s been served may move to set aside or stay (1); court may grant if service outside not bound, ON is not convenient forum (2)
17.05	Service outside ON governed by Hague convention
Time for Delivery of Statement of Defence	
18.01	Statement of defence (Form 18A) shall be delivered 20 days after statement of claim (ON) or 40 days elsewhere in CAN/US or 60 days any where else
18.02	Notice of intent to defend (Form 18B); entitled to 10 days +18.01 if delivers one (2)
Multiplicity of Proceedings	
138 CJA	Multiplicity of proceedings shall be avoided
139 CJA	If 2 or more proceedings in respect of same damage, P only entitled to costs in one (2)

PLEADINGS AND JURY NOTICE CONSIDERATIONS

RCP/CJA

#	Rule
Pleadings	
25.06	Shall contain concise statement of material facts but not evidence (1); can plead points of law but no conclusions without material fact support (2); allegations of performance/occurrence of all conditions implied but party who contests shall plead non-performance/occurrence (3); can make inconsistent allegations in alternative (4); new ground/inconsistency must be amendment (5); If notice alleged, satisfactory to allege notice as a fact unless from or precise term of notice is material (6); if fraud, misrepresentation, breach of trust, malice or intent are alleged – particulars must be provided so case to be met is clear (8)
25.07	In defence party admits every allegation of fact in opposite party’s pleading that not disputed (1); party shall plead it’s own version of facts in defense (3); Shall plead any matter intend to rely upon to defeat the Plaintiff’s claim (4)
25.04	Reply must be delivered within 10 days after service of statement of defence (3)
25.08	Party who intends to prove version of facts different from pleaded in opposite party’s defence shall deliver reply setting out different version, unless already in claim (1)

128 CJA	Pre-Judgment interest: entitled to claim at prescribed rate calculated from date cause of action arose to date of order (1); Exception for non-pecuniary loss on personal injury: rate payable on general non-pecuniary losses can be different (2); prejudgment interest for past pecuniary loss (special damages) is calculated at end of each six month period and at date of order (3); Exclusion: interest under s. 128(1) is not payable on exemplary or punitive damages, interest, costs, future losses (4)
130 CJA	Interest awards are ultimately in the discretion of the Judge (1); factors (2)
Counterclaims	
27.01	Assertion of a claim against P including claim for contribution and indemnity in respect of another party's claim against D
27.02	Shall included in same document as statement of defence (Form 27A/27B)
27.05	20 days to deliver a defence to counterclaim
27.08	Shall be tried at trial of main action
Crossclaims	
28.01	Claims between D's for P's claim or independent claim from same transaction (1) or contribution/indemnity under <i>Negligence Act</i> (2)
28.02	A crossclaim (Form 28(A)) shall be included in same doc as statement of defence
28.05	Defence to crossclaim submitted (28B) 20 days after service (1) but not needed if no other claim than for contribution/indemnity under <i>NA</i> (2)
Third Party Claims	
29.01	Form 29A – may start a claim against 3 rd if liable to defendant for P's claim or something from same transaction
29.02	2 rd party claim shall be issued within 10 days of statement of defence
Jury Notices	
47.01	A party to action may require that issues of fact be tried or damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before close of pleadings, unless section 108 CJA or statute requires that action be tried without a jury.
47.02	Judge may strike jury notice if inappropriate

JURISDICTION

The test for jurisdiction is the “real and substantial connection test” (*Club Resorts*)

CLUB RESORTS LTD V VAN BREDA, 2012 SCC – REAL AND SUBSTANTIAL CONNECTION TEST; PRESUMPTION CONNECTING FACTORS (P 1031)

Facts: Canadians injured abroad

Issue: Can these Canadians bring in action in ON or does it have to be brought in the jurisdiction where the injury took place?

Ratio: A state's jurisdiction is limited to its territory. The test for the assumption of adjudicate jurisdiction is the real and substantial connection test. The **presumptive connecting factors** are:

- The defendant is domiciled or resident in the province;
 - o The “presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor.” (*Club Resorts*) Where damages are sustained is not listed as a presumptive connecting factor. A distinction may be drawn between the jurisdiction in which the plaintiff suffers harm, an injury or a loss, and the jurisdiction to which the plaintiff returns and sustains damages.

- The defendant carries on business in the province;
 - o Advertising in the province does not, on its own, establish a connection sufficient for the assumption of jurisdiction
 - o Must go “well beyond” promotion and advertising (are Ontario bookings targeted or reasonably foreseeable?)
- The tort was committed in the province;
- A contract connected with the dispute was made in the province.

BURDENS OF PROOF

The party arguing that the court should assume jurisdiction (the plaintiff) has the burden of identifying a presumptive connecting factor. The identification of the presumptive factor can (and should) be done through the statement of claim.

The presumption can be **rebutted** by a defendant by establishing facts which demonstrate that there is no real and substantial connection between the subject matter of the litigation and ON. Affidavit evidence should be required to rebut the presumption.

EXAMPLES

PRODUCTS LIABILITY CASES

It is difficult to establish jurisdiction for foreign products or a product with foreign components that is market and sold in Ontario, and the harm, injury or loss is suffered in Ontario. It is easier to establish jurisdiction if there was a failure to warn when the company ought to have known there was a defect. The duty would extend to anyone who could be reasonably foreseen to use the product (and jurisdiction to any province where the product could be reasonably foreseen to be used)

MOTOR VEHICLE CASES

No jurisdiction for out of province accidents – no real and substantial connection.

MEDICAL TREATMENT CASES: BROCK V HSU, 2006 ONSC

Facts: A child in Ottawa had leukemia (60% survival rate) and was receiving on going treatment at the hospital. The standard practice is changed regularly based on experience from other patients. The child suffered severe neuro toxicity. The doctors at the hospital provided treatment similar to the standard practice. It became apparent that there had been dialogue between the treating physicians in Ottawa and a physician in the US. Investigator who established medical procedures also named.

Issue: Was there jurisdiction over the US doctor/investigator?

Held: Connection established.

Reasons: The US physician was engaging specifically with the patient in Ontario, therefore we can establish a nexus between the US physician and Ontario. Based on the allegations of failure to warn and a foreign physician ultimately deciding the protocol.

PROVINCIAL TOBACCO LITIGATION

In NB the parent company alleged that it did not have sufficient connection to the manufacturer of cigarettes or sale of cigarettes in Ontario. We alleged that they directed and control with issues germane to Ontario. The ultimate parent is merely a holding company. Successful because we satisfied the court that it should be brought in ON because of stat. language; the cigarettes are sold here and there is business activity between the parent and the subsidiary. There was also the concern that Canadian Court would not want to assume jurisdiction unless there were a case with good merit and the parent wasn't just being named to extort money.

Evidentiary requirements (*Ontario v. Rothmans Inc.*, 2012 ONSC 22):

- *If the foreign defendant files affidavit evidence challenging the allegations in the statement of claim that are essential to jurisdiction, the threshold for the plaintiff to meet is that it has a "good arguable case" on those allegations....*
- *A "good arguable case" has been compared to a "serious issue to be tried" or a "genuine issue" or "with some chance of success". The threshold test is low....*

ATTORNTMENT

Common law: by participating in a court proceeding you are agreeing (attorning) to the jurisdiction (see also rule 17.06)

WOLFE V PICKAR 2011 ONCA 347

Facts: Patent dispute between Western prof and US multinational Wyeth. Western doctor disclosed information to Wyeth which took out patent. Fought litigation in Pennsylvania related to issue but didn't determine merits. Wyeth took position that Pennsylvania litigation determinative and no real and substantial connection to Ontario.

Issue: ON jurisdiction

Held: ON had jurisdiction because of attornment.

Reasons: By seeking to have the court stay because issue had already been dealt with Pennsylvania Wyeth had attorned. When a party to an action appears in court and goes beyond challenging the jurisdiction of the court based on jurisdiction *simpliciter* and *forum non conveniens*, the party will be regarded as appearing voluntarily, thus giving the court consent-based jurisdiction. That is what happened here.

VAN DAMME V GELBER, 2013 ONCA 288

Facts: Defendant obtained judgment in New York requiring Plaintiff to deliver a painting held in Ontario.

Held: Attornment to NY court.

Reasons: Court said by seeking summary judgment beyond jurisdiction "he implicitly accepted that the New York court had jurisdiction to decide those issues. That is attornment."

Note: Intricate jurisdictional issues: forum selection clause, foreign court findings. Court ignores those and decides solely on basis of attornment

FORUM CLAUSES

Contractual clauses about which jurisdiction should determine disputes arising from it “are common component of international commercial transactions” and have “been applied for ages in the industry and by the courts” (*ZI Pompey Industrie v ECU-Line NV* 2003 SCC 27 at para 20)

You can choose a forum and separately choose a jurisdiction whose laws apply (*Expedition Helicopters*). Forum selection clauses should be enforced unless there is strong cause that the case is exception and FSC should not be enforced (*Expedition*).

Legislature can also opt-out of forum selection clause (i.e. *Consumer Protection Act*)

TEST – *POMPEY*

1. Is the clause valid, clear and enforceable?
 - a. Consider contractual language (very clear) - *Expedition*
2. Onus shifts to parties seeking to displace cause. Must show “strong cause” factors including convenience of parties, fairness of parties and the interests of justice, favour unenforceability?
 - a. “Strong cause” (*Expedition*)
 - i. Consider fact that party attorned in foreign jurisdiction (commencing action)
 - ii. Assesses prejudice that would be suffered by litigating in that court (none)
 - iii. Context for contract (commercial)

DOUEZ V FACEBOOK, 2017 SCC

1. Clause when registering is clear – governed by state of California
2. “Strong Cause” Standard Met
 - a. Contract of adhesion, no bargaining between parties, take-it-or-leave-it
 - b. Consumer contract that activates public policy considerations – need to protect government’s right to protect privacy
 - c. “Grossly uneven” bargaining power

ENFORCING FOREIGN JUDGEMENTS

1. “Real and Substantial Connection” Between Foreign Court and The Parties
2. Any defences?
 - a. Fraud: Are there new allegations undetectable by the foreign court?
 - b. Natural Justice: Were the foreign proceedings contrary to fundamental justice?
 - c. Public policy: Is foreign law contrary to Canadian view of basic morality?

CHEVRON V YAIGUAJE, 2015 SCC

Facts: Hotly contested fight over foreign enforcement of an \$18 billion judgment of an Ecuadorian court. Chevron brought motion for an order setting aside *ex juris* service, and an order staying case

Issue: Does *Van Breda* apply to enforcement of foreign judgments?

Ratio: *Van Breda*. Should have “generous and liberal approach” to the recognition and enforcement of foreign judgment.

Reasons: Foreign enforcement of judgment “based not on the original claim...but rather on the obligation created by the foreign judgment”. Only jurisdiction concerns is if the foreign court had a “real and substantial connection” to the

dispute (Ontario not part of analysis). As a result, no concerns about parties location, etc. Presence of assets also not a prerequisite. Court points to 17.02(m) and how language is only “on a judgment of a court outside Ontario”

LETTERS ROGATORY

A mechanism where a party in a foreign legal proceeding can obtain evidence. Letters rogatory means “letter of request” – a communication sent by a court in one country to a court in a foreign country requesting the assistance of the court. Remedy comes from s. 60 of *Evidence Act*

- Requires a series of basic preconditions
 - Competent Court
 - Relating to a matter pending in a foreign court
 - Witness in Ontario
 - Evidence is relevant and not otherwise obtainable, not overly broad
 - No public policy concerns
- Applicant bears onus

RCP/CJA

#	Rule
Jurisdiction	
17.02	Party outside ON can be served with originating process without leave of court if the dispute is about: Real or personal property in Ontario (17.02(a)); a contract made in Ontario that provides governed in accordance with the law of Ontario or breach of contract was committed in Ontario (17.02(f)); Tort committed in Ontario (17.02(g)); Against person ordinarily resident or carrying on business in Ont. (17.02(p))
17.04	Originating process served outside ON shall disclose the facts and refer to rule 17.02
17.03	If 17.02 doesn't apply can get leave under 17.03 to serve (1) must be supported by evidence showing the place or country the person is to be found and grounds for motion
17.06	Person served with originating process outside ON can move for an order setting aside service or a stay (1); court can grant if not appropriate/convenient (2)/unauthorised (3)
CJA	
106	A court can stay any proceeding where it is just
110	Courts can transfer proceedings or a step in proceedings if brought in the incorrect court
Attornment	
17.06	Party can only challenge jurisdiction “before delivering a defence, notice of intent to defend or notice of appearance” (can only fight jurisdiction before challenging merits) (1) Challenge to jurisdiction is not itself submission to the jurisdiction of the court (4)
Enforcing Foreign Judgements	
73	Reciprocal enforcement of UK judgements: process see rule 73
17.02	service <i>ex juris</i> with respect to a foreign court is fine (m)

MULTIPLICITY OF PROCEEDINGS RCP 6/CJA 138, VEXATIOUS PROCEEDINGS, JURY NOTICES

- WHEN:
 - Common questions of law / fact
 - Relief claimed arises out of same transaction / occurrence or series of transactions or occurrences
 - For any other reason acceptable by court

- HOW:
 - Consolidation (revised title of proceedings, one court file, one set of pleadings)
 - Hearing at the same time
 - Hearing one immediately after the other
 - Stay of one proceeding until other is determined
 - Amend to counterclaim
- AT TRIAL
 - Trial judge has ultimate power to decide how matters will proceed if previously ordered to be tried together or one immediately after the other
- RELEVANT FACTORS:
 - Convenience and expense
 - Whether jury notices in all actions – if not, unlikely to consolidate
 - Status of the actions
 - Legal representation – if not identical, unlikely to consolidate

VEXATIOUS PROCEEDINGS

- Frivolous:
 - Black's Law Dictionary: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".
- Vexatious: they were instituted without any reasonable ground (*Foy*)
- *Gao v. Ontario WSIB*, 2014 ONSC 6497: Many of these proceedings bear some of the unmistakable hallmarks of querulous litigant behavior such as:
 - Form:
 - Curious formatting.
 - Many, many pages.
 - Odd or irrelevant attachments—e.g., copies of letters from others and legal decisions, UN Charter on Human Rights etc., all usually, extensively annotated.
 - Multiple methods of emphasis including:
 - highlighting (various colours)
 - Underlining
 - capitalization.
 - Repeated use of “”, ???, !!!.
 - Numerous foot and marginal notes.
 - Content:
 - Rambling discourse characterized by repetition and a pedantic failure to clarify.
 - Rhetorical questions.
 - Repeated misuse of legal, medical and other technical terms.
 - Referring to self in the third person.
 - Inappropriately ingratiating statements.
 - Ultimatums.
 - Threats of violence to self or others.
 - Threats of violence directed at individuals or organizations.

JURY NOTICES

Facts: P brought a motion under s108(3) CJA.

Reasons: *Cowles v Balac*, 2006 ONCA. The principle or test is:

- (a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
- (b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

The plaintiffs bear the onus of demonstrating that they satisfy the test to be met on the motion. The right to a jury trial is not to be taken away lightly (*Hunt (Litigation guardian of) v Sutton Group Incentive Realty Inc.*, 2002 ONCA)

RCP/CJA

#	Rule
Multiplicity of Proceedings	
138 CJA	Multiplicity of proceedings shall be avoided
107 CJA	Consolidation of proceedings in different courts if common questions of law/fact; relief claimed arises from same transaction (1); out of small claims requires consent of P (2)
6.1.01	Bifurcation: can order separate hearings on issues including liability and damages
Amendment of Pleadings	
26.01	Court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment
26.02	Can make without leave before close of pleadings if the amendment does NOT alter parties to the action, on written consent, with leave
26.03	Shall be made on the face of the copy filed in the court office, except that where the amendment is so extensive as to make the amended pleading difficult or inconvenient to read the party shall file a fresh copy of the original pleading as amended, bearing the date of the original pleading and the title of the pleading preceded by the word “amended” (1); shall be underlined (2); additional amendments = additional lines
26.04	Shall be served forthwith on every a party to main action or to counterclaim, crossclaim or third party claim (1); proof of service shall be filed (2)
26.05	A party shall respond to amended pleading within time remaining for responding to original pleading, OR within ten days after service of the amended pleading, whichever is the longer period (1)
26.06	Where a pleading is amended at trial, does need not be filed or served
Demand for Particulars	
25.10	Party may demand particulars of allegation – response must be delivered within 7 days
Striking Out Pleadings	
25.11	Court may strike out part or all of a pleading with or without leave to amend if may cause prejudice/delay; scandalous, frivolous or vexatious; or abuse of process
Vexatious Proceedings	
2.1.01	Court may stay proceedings or dismiss if frivolous, vexatious or abuse of process (1)

140 CJA	Vexatious proceedings – can order trial not continued
Jury Notice	
47.01	Jury notices allowed excepted for under s108 CJA before the close of pleadings
47.02	May be struck where statute requires trial without jury or after pleadings (1); jury would be inappropriate (2)
Transfer	
11.01	Where interest or liability of a party is transferred/transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the original party
Default Proceedings	
19.01	If D fails to deliver statement of defence P may require registrar to note D in default (1); or if statement of D was struck without leave of another (2)
19.02	D who is noted in default is deemed to admit truth of statement of claim (1)
19.03	The noting of default may be set aside on such terms as are just (1); default set aside if consent of P and D delivers statement of defense (2)
19.04	If D noted in default P may require registrar to sign judgement against D in claim for debt, recovery of possession of land or personal property, foreclosure, sale or redemption of mortgage (1)
19.05	Where D noted in default P may move before judge for judgement against D
19.06	P is must be entitle to judgement based on facts
19.07	Default does not prevent P from proceeding against D on other relief
19.08	Default judgement may be set aside on terms that a just

MOTIONS

A motion is an interim (i.e. short of trial) step in a proceeding that requires a formal determination by a court (i.e. requires an order, not a case conference).

Typical Steps:

1. Prepare and serve notice of motion detailing relief
 - a. Notice of motion is the originating process for a motion
 - b. Must include (Rule 37.06):
 - i. Relief Sought
 - ii. Grounds to Be Argued, Including Any Stat. Provision/ Rule Relied Upon
 - iii. List documentary evidence to be used at the hearing
 - c. Purpose is to give parties a general understanding of issues to argue
2. Prepare and serve motion record containing evidence (sometimes 1 and 2 combined)
 - a. Affidavits and notice of motion shall be served together in a motion record (37.10)
 - b. Generally provided by way of affidavit rule 39.01 (relaxed rules of evidence)
 - c. Evidence required: Any evidence required to demonstrate a fact required to justify or negate the relief sought on motion
 - d. Consider every element of legal test, look at prior cases
 - e. Consider appropriate source of information
 - i. While can provide evidence on information and belief, much more probative if affiant has direct knowledge of facts
 - ii. Typical approach – pick affiant with best factual knowledge of issues
 - iii. Sometimes counsel or clerk affidavit attaching public documents sufficient (may be done deliberately to avoid cross-examination)

3. Cross-examination of affiants (if any)
 - a. Prima facie right to cross but can be taken away (*Canada v Mennes*, 2014 ONCA)
 - b. Cross-examinations occur in front of a court reporter, written transcripts are obtained
 - c. As all examinations are cross-examinations, examination questions are typically posed as leading questions
 - d. Unlike discovery examination, which has mechanisms to insulate downside risks, party examining bares all risk on motion
 - e. Counsel has right to ask for undertaking to obtain information
 - f. Counsel has right to refuse inappropriate questions (if wrong see rule 37.10(10))
 - g. Scope (*Rothmans*, 2011 ONSC):
 - i. Scope is narrower than examination for discovery
 - ii. Questions must be relevant to (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.
 - iii. Standard is "semblance of relevancy"
 - iv. examining party runs the risk associated with cross-examinations that the answer to a question may not help his or her case, and unlike evidence from an examination for discovery, party does not control what use can be made of transcript
4. Prepare and serve factums
 - a. No more than 20 pages (30 toronto)
 - b. Overview; statement of facts; legal argument; relief sought; schedule A/B
5. Argue Motion (in writing or orally)
6. Get Order Issued

INJUNCTIONS

- An injunction is an extraordinary remedy, rooted in equity with near-endless flexibility
- Different types:
 - **Prohibitive:** Order that restrains someone from doing a specific act (most typical)
 - **Mandatory:** Order that requires a defendant to do something positively
- Injunctions can be sought at any stage in a proceeding
 - **Interim Injunction:** Pre-Trial Relief, Typically Very Brief
 - **Interlocutory:** Also Pre-Trial Relief, But Often Runs Until Trial
 - **Permanent:** After final determination at trial
- Awkward relationship between interlocutory and permanent injunctions. Some "interlocutory" orders have permanent effects. See discussion at beginning of Rule 40.

RJR-MACDONALD INC V CANADA (ATTORNEY GENERAL) – INJUNCTION TEST

Facts: Tobacco companies sought injunction delaying tobacco marketing regulations pending determination of constitutional validity of regulations. Said it would require 60 days to dismantle advertising and shouldn't be required to do so given lower court declaration of unconstitutionality of marketing.

Ratio:

1. Is there a serious issue to be tried? (can't be vexatious or frivolous)
 - a. **Mandatory injunction:** *R v CBC*: is there a strong prima facie case?
2. Would the person applying for injunction suffer irreparable harm if injunction not granted?
 - a. Irreparable is about nature of harm

3. Does the balance of convenience favour granting injunction?
 - a. Which party will suffer greater harm from granting/refusing interlocutory injunction?
 - b. Public interest may be considered

Held: Court denied request

CERTIFICATE OF PENDING LITIGATION

ACCESS SELF-STORAGE INC V 1321645, 2017 ONSC 6037 - TEST

- The test is met where there is sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts, and on which the plaintiff could succeed at trial.

INTERPLEADER

- Interpleader occurs where someone (i.e. financial institution or law firm) is in possession of, but claims no interest money or property.
- Person can move to pay money/property to court through the interpleader process and then parties in dispute over that money cannot claim against holder of that money

SEALING ORDERS

SIERRA CLUB OF CANADA V CANADA, 2002 SCC 41 - TEST

- **Necessity:** only seal where necessary to prevent serious risk of important interest, including a commercial interest, in the context of litigation because no alternatives
- **Proportionality:** Effects of confidentiality order, including the effects on right to fair trial, outweigh its deleterious effects

RCP/CJA

#	Rule
Motions	
CJA 1(1); RCP 1.03	defines a motion as a “motion in a proceeding or an intended proceeding”; Attorney General guide says “A motion is a process that is used to make a request to a judge for an order.”
1.03	Moving Party: person who makes a motion; Responding Party: person against whom a motion is made; Person: <u>includes</u> a party to a proceeding (i.e. not just a party)
37.03	All motions to be heard in county where proceeding commenced, unless transferred
37.02	Judge has jurisdiction to hear all motions (1); Master: CJA s 87(2) says master has jurisdiction conferred by the rules. 37.02(2) and “court” definition in 1.03 gives master “jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge...”, including jurisdiction to hear motions under Rule 37, except in select circumstances; Registrar: gives registrar limited powers, including power to issue an order on consent of the parties, assuming consent is filed and no one is under disability, and power to amend pleadings, add or delete parties (3)
37.02 (2)	Masters use depends on region

39	Evidence on Motion
Prac. Direc.	Part III: More procedure (scheduling – regional prac. Direc. If not then rule 37.05)
37.06	Notice of motion (form 37A) shall state: relief sought; grounds; evidence
37.04	motion shall be made to court if within jurisdiction of registrar or master, otherwise to be made to the court (or specific judge if known)
37.07	Notice must be served on anyone affected by order (1) unless impractical/unnecessary (2); failure to serve relevant party can result in dismissal or adjournment (5); atleast 7 days unless practice direction says otherwise – Toronto (6/8)
Evidence on Motion	
39.01	Evidence generally given by affidavit (1) must be served with notice and filed 7 days before (2); relaxed rules of evidence as long as source and fact of belief are specified (4) [no live evidence]; if moving without notice then must provide full and fair disclosure in evidence (6); expert affidavit allowed but must include same info as expert report at trial (7)
4.06	Format of affidavit – must be signed (1); note: (2) overruled by 39.01(4); exhibits allowed and documents to be served with affidavit unless impractical (3)
Motion Records	
37.10	Must be filed 7 days before (1); contents (2); responding record if respondent thinks incomplete filed 4 days before hearing (3)
Cross-examination on Affidavit	
39.02	Opposing party can cross examine any affiant (1); must have served all affidavit (1-2); right to cross-examination shall be exercised with reasonable diligence and court can refuse to adjourn for the purposes of cross-examination if party failed to act with reasonable diligence (3)
37.10	If refusals are inappropriate – bring another motion to compel answer and undertaking (10): Moving party must serve and file a chart 7 days before hearing - sets out issue subject to refusal, details where question is and the exact wording of questions; Responding party must fill out moving party’s chart to show answer provided or explain the basis for the refusal
Evidence from Third Parties	
39.03	a “person” (i.e. not necessarily a party) may be examined as a witness before the hearing of a pending motion or application (1); cross-examined (2); reasonable diligent (3); summoned same way as at trial (5)
Factum	
37.10	Party <u>may</u> serve on every other party a factum “consisting of a concise argument stating the facts and law relied on by the party.” To be served and filed seven days before motion if moving party, four days if responding (though in a typical, moderately complex motion facta delivered after exchange of evidence) (6-8)
Prac. Direc.	3A: factums required for long civil motions and encouraged for all other motions unless otherwise directed by judge (30 page max in Toronto)
Oral Argument	
37.12.1	Motions on consent (or unopposed) can be heard in writing as long as consent is filed
37.10.1	Must confirm motion 3 days in advance after conferring with partiesv(1)
37.13	Judge hearing motion can grant relief/dismiss/adjourn with or without terms and can order a trial of an issue, convert motion to judgment, place case on speedy trial list (1)
Injunctions	
101 CJA	In ONSC interlocutory/mandatory injunctions allowed or <u>appointment of receiver</u> (1) with terms that are just (2)
40.01	Injunction may be obtained by motion to judge

40.02	If motion made without notice cannot last longer than 10 days (1); extensions only granted with notice unless exceptional circumstances (2) unless extension is less than 10 days than no notice (3)
40.03	Moving party shall undertake to abide by any order concerning damages
40.04	Factums required
Appointment of Receiver	
41.02	Can be appointed on motion to judge
41.03	Must name person appointed, specify amount of security to be furnished, must state whether they are a manager
41.04	can use reference mechanism in Rule 54 to determine conduct of receiver
41.05	Receiver can get directions from a judge at any time by way motion
41.06	Receiver must be discharged by order from judge
Certificates Pending Litigation	
103 CJA	the commencement of an action does not serve as notice to the public of the existence of that dispute (1); certificate must be issued by court and registered with land office; CPL can be discharged where can be compensable by damages alternatively, the claim isn't prosecuted diligently or there is no reasonable claim to the land (6)
42.01	Can be issued only by registrar after court has issued order (1) can be obtained without notice (3); claim made in originating process (2); must be served forthwith (4)
Interpleader	
43.02	Where two or more persons have made adverse claims in respect of property and person has no beneficial interest in it (1); Where has been seized by sheriff through an enforcement action sheriff can also move for interpleader in certain circumstances (2)
43.04	Court can order that property be deposited with a court officer or paid into court and obtain a declaration that the liability of applicant is extinguished
Interim Recovery of Personal Property (Pre-trial Remedy)	
104 CJA	In action where it is alleged property was unlawfully taken or detained by a defendant Court may order interim recovery (P needs substantial grounds: <i>RN Holdings</i>)
44.01	Motion needs to be accompanied by an affidavit setting out details (1)
44.02	Order shall contain enough details to make property identifiable and state value
44.03	Court can force plaintiff or defendant to pay into court twice as much as value of personal property and can potentially move without notice
Interim Preservation of Property	
45	not just about property in issue but also about preserving evidence; test: whether there is a serious issue to be tried regarding claim (<i>BMW Canada</i>)
45.01	Can authorize entry into any property to preserve of party or non-party (1); order sale of perishable product (2)
45.02	order specific funds into court
45.03	including in circumstances where a party is holding the property as security for a debt
Sealing Orders	
135 CJA	All court hearings open to public (1)
137 CJA	Person entitled to see any document filed in civil proceeding in court, unless court or legislation say otherwise (1); Court may order any document filed before it be treated as confidential, sealed and not form part of the public record (2)

DETERMINING ISSUES BEFORE TRIAL

SUMMARY JUDGEMENT MOTION

Test (*Hryniak v Mauldin*, 2014 SCC):

*Most appropriate when cases are document driven, few witnesses and limited contentious factual issues

1. No genuine issue requiring trial when the process:
 - a. Allows the judge to make the necessary findings of fact
 - b. Allows the judge to apply the law to the facts
 - c. Is proportionate, more expeditious and less expensive
 - d. If there is a genuine issue can trial under step 3?
2. The interest of justice: What are the consequences of the motion in the context of the litigation as a whole?
3. Power to hear oral evidence should only be used when (20.04 (2.1) and (2.2)):
 - a. oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time;
 - b. any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and
 - c. any such issue is narrow and discrete

PARTIAL SUMMARY JUDGEMENT

Should be rare and only used for the resolution of an important claim against a key party that could significantly advance access to justice and be the most proportionate, timely and cost-effective approach (*Hryniak*).

Butera Factors:

1. Motions cause the resolution of the main action to be delayed.
2. A motion for partial summary judgment may be very expensive.
3. Increases judges issues that do not dispose of the action.
- 4.

RCP/CJA

#	Rule
Summary Judgement Motion	
20.01	On motion after delivery of defence or a notice of motion by a defendant (3); Plaintiff may move, without notice, to serve a notice of motion with the statement of claim; leave may be given where special urgency is shown (2); Affidavit evidence is required
20.02	Affidavit may be on “ <i>information and belief</i> ” but adverse inferences may be drawn from failure to provide <i>personal knowledge of contested facts</i> (1); responding party must set out specific facts showing that there is a genuine issue requiring a trial
20.03	Factums are required (1); 7 days before for moving party (2); 4 days for responding (3)
20.04	Court will grant summary judgement if no genuine issue requiring trial (2a – 2.1) or parties agree (2b); question of law must be adjourned to judge (4)
20.05	Where a summary judgement is refused/granted only in part court can order specifying issues (1) – potential orders (2)
20.06	Court may fix and order costs on a substantial indemnity basis if party acted unreasonably/ in bad faith
Determining Issue Before Trial	
21.01	Move for determination of a question of law before trial or strike out because no reasonable cause of action (1); no evidence is admissible except with leave or consent (2); General attack claims with no reasonable cause of action or being “frivolous or vexatious” (3)

21.02	Should be made promptly
21.03	Factums required
22.01	Request to have a judge address a question of law in the form of a special case; Parties need to concur in station a question of law to be determined (1)
22.03	May use rule to apply directly to CA for leave to have a special case determined
22.02	Factums required
Discontinuance and Withdrawal	
23	Discontinuance permits the plaintiff to cease the proceeding but litigate the issues again. See conditions rule 23.01 – plaintiff;
Dismissal of Action for Delay	
24.01	Action will be dismissed if plaintiff failed to comply with procedural steps under rule; motion filed by defendant
24.03	Counterclaiming defendants must serve notice of election to proceed within 30 days or the counterclaim will be deemed to be discontinued without cost
48.14	The court SHALL dismiss after the later of 5 years of the action being commenced or two years from being struck from the trial list

DISCOVERY

- Purpose of discovery:
 - Fact finding, assessment of credibility, obtain admissions, narrow issues, avoid surprise, facilitate resolution
 - apply to actions vs. applications

RULES OF PROFESSIONAL CONDUCT

- Lawyer’s Duty Rule **5.1.3.1**
 - lawyer must explain necessity of making full disclosure of all documents, duty to answer any proper question to best of knowledge (own personal observation), information (hearsay) and belief (inferred with same basis) BUT not required to guess
 - parties required to make positive efforts to inform themselves
 - lawyer must assist their clients in doing so
 - lawyer must not make frivolous requests for documents or evidence
- **Rule 5.4-2** governs communication with a client during testimony
 - cannot discuss evidence in midst of cross-examination

RCP/CJA

#	Rule
Discovery	
Discovery Plan	
29.1.03	Parties shall agree to discovery plan if party intends to obtain evidence under 30-31 (1); must be agreed earlier: 60 days before or before attempting to obtain evidence (2); shall be in writing (3); parties must consult and have regard to “The Sedona Canada Principles Addressing Electronic Discovery” (4)
29.1.01	Does not apply to parties who are subject to discovery plan establish by court
29.1.04	Must be updated to reflect any changes in information in 29.1.03(3)

29.1.05	Court may refuse to grant relief under 30-35 if not updated (1); if parties fail to agree to plan court may impose one (2)
48.04	obligation for a discovery plan continues despite setting down for trial (2)(b)
Proportionality	
1.04	general principle of proportionality when applying the Rules (1.1)
29.2.03	In making determination as whether party or other person must answer question or produce a document, the court shall consider timing, expense, prejudice, interference, available from another source (1)
29.2.02	Applies whether party/person must answer question/produce document under 30-35
Discovery of Documents	
30.02	Scope of documentary discovery: any document relevant to matter in issue shall be disclosed (1); shall be produced for inspection if request (unless privileged) (2); insurance policy shall be disclosed (3); all relevant documents that are not privileged from party's subsidiary/affiliated corporation, or corporations controlled by party (4)
30.01	Document includes sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form
30.03	Affidavit of documents (form 30A/30B) shall be served disclosing full extent of party's knowledge and documents relevant to any issue (1); separate schedules for privilege, in possession/not (2); statement that nothing else (3); lawyer's certificate (4)
30.04	Entitled to inspect non-privileged documents if serves request to inspect (form 30C) (1); All documents shall be produced at trial (4)
30.05	Disclosure or production of document is not admission of relevance/admissibility
30.06	Affidavit incomplete or improperly claimed privileged court may order disclosure, inspect, order cross-examination; order better affidavit of documents
30.07	Must serve supplementary affidavit if error or new documents discovered
30.08	Failure to disclose or produce for inspection court may not allow use of favourable document or make just order if unfavourable (1); fails to serve affidavit of docs or produce doc for inspect court may dismiss action (2)
30.09	Claim of privilege must be abandoned by written notice with copy of document at least 90 days before trial. Otherwise can only be used to impeach the testimony of a witness or with leave of the trial judge.
30.10	Court can order relevant document for inspection
Deemed Undertaking	
30.1	All parties and their lawyers are deemed to undertake not to use evidence/information obtained under 30-25 for any purposes other than those of the proceeding (3); unless filed with the court (5), can be used to impeach another proceeding(6), in a subsequent action -31.11(8) (7) or interest of justice outweighs prejudice (8)
Inspection of Property	
30.2	Court can order inspection of property if necessary for determination (1)
Oral Examinations for Discovery	
31.02	Examination by one party can be written or oral but not both (1); more than one party examining than oral unless agreed otherwise (2)
31.03	Can examine adverse party (1); corporation can be examined by examining officer (2); partner (3); LG -disabled (5); assignee (6); trustee (7); nominal/beneficial party (8)
31.04	When? After statement of defence and affidavit of documents
31.05.1	Total of 7 hours for each party (2 for simplified rules) (1); considerations for leave (2)
31.06	Must answer any proper question to best of ability (1)
31.07	Party may not introduce evidence on questions they refused to answer
31.08	Questions answered by counsel may be deemed to be answer of the person examined

31.09	Must correct incorrect or incomplete answers (1) if fails to correct cannot introduce at trial if favourable or just order if unfavourable (2)
31.10	<u>Non Parties</u> : can examine non-party with leave if believed they have relevant information to material issue (1); test: unable to obtain from party; unfair to proceed without examination; it will not undue delay, cost, unfair to person examined (2)
Procedure on Oral Examinations	
34.02	Must be before an official examiner or reporting service (1) and at time and place set out in Notice of Examination or Summons unless court orders otherwise (2)
34.03	Where person lives in ON should be in county where person resides unless on consent or by court order
34.04	Served notice (Form 34A) if lives in ON or summons (24B)
34.05	Person to be examined resides in ON: not less than 2 days-notice
34.07	Person to be examined resides outside ON: court shall decide where, when, place, minimum notice period, before whom, attendance money (1-4); examining party must obtain transcript and serve on all other parties at no cost (7)
34.08	person to be examined must take oath or make an affirmation
34.09	Interpreter can be used but must swear oath (1); paid for by party (unless French) (2)
34.10	person to be examined must bring all relevant documents that are not privileged
34.11	party may be re-examined by own lawyer or any other lawyer adverse in interest to examining party immediately after the main examination (1) BUT cannot be by way of cross-examination (3)
34.12	where object to a question, must state the reason on the record
34.14	Improper Examination if abuse due to excessive improper questions, interruptions or objections; bad faith with embarrassment of person being examined; evasive unresponsive answers; improper refusal to produce relevant document (1); offending person may be ordered to pay costs of motion, costs thrown away and/or costs of further examination personally (2)
34.15	Contempt order can be issued for misconduct by examinee (failure to attend, take oath, procedure doc or answer)
34.16	Examination shall be recorded in its entirety to allow for transcript
34.17	official examiner shall prepare a transcript when requested by a party and provide copies to all who pay (1) and shall be certified as correct (2)
34.18	party who wishes to rely on transcript at hearing shall file a copy with the court (1)
34.19	Examination may be videotaped or recorded on consent of parties or by order of the court for use at hearing
Written Examination for Discovery	
35.01	Examining party must serve list of questions to be answered on all parties (Form 35A)
35.02	Answers shall be answered by affidavit (Form 35B) within 15 days
35.03	Answer can include objection and reason for it
35.04	examining party can request clarification or present new line of questioning if suggested by an answer within 10 days using same process (1); court can order oral examination if answers unsatisfactory (3); or can strike/dismiss action (4)
35.05	Court can terminate/limit scope of written discovery where abuse, excessive questions, bad faith
35.06	Written answers can be used in same manner as transcript of oral examination at trial
Evidence before Trial	
36.01	party or non-party can be examined under oath before trial for purpose of having testimony available at trial on consent of parties or with leave (2); test for leave: convenience; possibility of death, illness; possibility that person will be beyond the jurisdiction; expense of bringing person to trial; whether person ought to give evidence at trial; any other relevant consideration (3); applies to experts (4); court can order moving party pay costs in advance (5)

Use of Discovery at Trial	
31.11	Can read examination from discovery into evidence (1); can be used to impeach testimony of witness (2); can be used if person has died, ill, refuses to take oath (6); test for leave: extent to which party was cross-examined at discovery; importance of the evidence; general preference to hear evidence at trial; any other relevant factor (7)

MEDIATION AND PRE-TRIAL PROCESS

RCP/CJA

#	Rule
Pre-Trial Process	
Mandatory Mediation	
24.1.01	Purpose is to reduce cost and facilitate early and fair resolutions
24.1.04	Applies after January 1, 2010, for actions commenced in Ottawa, Toronto and the County of Essex (1) Does not apply to: Rule 75.1 actions; <i>Insurance Act</i> mediations; Commercial List; Mortgage Actions; <i>Construction Act</i> ; <i>Bankruptcy</i> ; <i>Class Proceedings</i> , unless certification has been denied (2-2.1)
24.1.05	Court may make an order exemption a party from this rule
24.1.08	Mediation co-ordinator shall maintain list of mediators (1); mediation shall be conducted by person chosen from list by parties; person assigned by co-ordinator; not on list but with parties consent (2);
24.1.15	Mediators report required within 10 days of mediation
Pract. Direc.	Part III: 55-59
Listing for Trial	
48.01	Any party not in default may set an action down for trial
48.02	Set for trial by serving and filing trial record
48.03	Trial record must include (a)-(h) listed here
48.05	Un defended action is placed on trial list after filing filing trial record (1)
48.06	Defended action placed on trial list 60 days after action is set down for trial or earlier on consent (1)
48.07	Being placed on trial list means deemed ready for trial
48.08	Separate lists for jury and non-jury trials
48.04	There is a continued obligation of disclosure
48.14	Actions not set down for trial within 5 years shall be dismissed or struck off and not restored within 2 years unless (1) unless on commercial list Toronto/class action (1.1)
48.12	Parties to inform registrar promptly of any settlement of the action and confirm in writing if the action is on a trial list or not.
Offers to Settle (Rule 49 Offers)	
49.10	<u>Plaintiff</u> : Must be made 7 days before hearing; not accepted by defendant or withdrawn, if P obtains judgement at trial at least as favourable: Partial indemnity costs to the date of the offer; substantial indemnity costs thereafter (1); <u>Defendant</u> : must be made 7 days before hearing; P unable to beat D's offer; P gets partial indemnity to date of offer; D gets partial after (2); Burden is on party claiming benefit (3)
1.03	Partial indemnity: in accordance with Part I Tariff A; Substantial: 1.5x what would otherwise be awarded Part I Tariff A
49.04	Offer may be withdrawn in writing at any time before accepted (1); if offer specifies time to be accepted, deemed withdrawn after that time (3); offer may not be accepted after court disposes of claim (4);
49.13	Offers not made in time or those withdrawn may still be considered by the court when awarding costs

49.07	Offer that does not provide for costs: P's offer P gets costs on acceptance to the time offer is accepted; D offer: P gets to the time of service of the offer if made to the P(5); can accept original offer if counteroffer is rejected unless withdrawn (2)
Pre-Trial Conference	
50.01	The purpose of PTC is to discuss settlement and obtain necessary orders to ensure ready for trial
50.05	Lawyers must attend (in person or by phone if too far – rule 1.08)
50.02	Pre-trial to be scheduled within 180 after action scheduled for trial (1)
50.04	Brief must be filed 5 days before pre-trial
50.08	PTC report shall be written indicating steps to take before ready, anticipated length of trial, any other relevant matter (1); Lawyer's duty to ensure they have authority to deal with the matters referred to in Rule 50.06 (4)
50.09	No disclosure to TJ about any statement made at PTC except under 50.07/.08
50.10	Pre-trial judge cannot be trial judge unless parties consent otherwise
50.11	All documents intended to be used at trial must be available to judge
Admissions	
51.02	Party may at any time request other party to admit truth of fact or authenticity of document (form 51A)
51.03	Other party has 20 days to respond (Form 51B) (1); no response is a deemed admission (2); denial must contain a reason otherwise deemed admission (3)
51.04	If proven true at hearing court may take denial into account when determining costs
Evidence Act Notices	
52 EA	10 days notice to be given to all other parties in order to introduce medical reports, which includes reports prepared by treating physicians (1)
35	Business records admissible if made in usual and ordinary course of business (7 days notice required) (2)
Civil Case Management	
77.01	Despite this rule greater share responsibility for managing proceeding and moving speedily to trial is still with parties (1); Does not apply to those listed in (2);
77.04	A judge/case management master may extend time, adjourn case conference, set aside registrar's order, establish/amend timeline, make orders/award costs (1)
77.05	In considering whether to assign a proceeding for case management, the regional senior judge, other judge or case management master shall have regard (4)

SIMPLIFIED PROCEDURE AND COSTS

General principle: loser indemnifies winner. The court is required to consider what is fair and reasonable in fixing costs (*Boucher v Public Accountants*, 2004 ONCA).

- Order Denying successful party costs exceptional (*Georgian Bluffs v. Moyer* (ONCA 2012))
- Unrepresented party: compensated: extent job foregone *Mustang Investigations v Ironside*
- **Partial:**
 - The norm for an action or application.
- **Substantial:**
 - Where court wishes to express its disapproval (*Net Connect v Mobile Zone* (ONCA 2017))
 - E.g. Dishonesty, fraud, prolonging proceeding
 - Can include conduct that gave rise to litigation (*Mars Canada v Bemco*, ONCA)
 - Valid Rule 49 offer not accepted and offering party does as well or better at trial- substantial indemnity costs after the date of the offer
- **Full indemnity:**

- Contract- e.g. Mortgage
- Court of opinion party should not have to pay anything: Trustees, Litigation guardians, parties under disability, failing to comply with settlement or court order or extraordinarily egregious conduct
- **No costs**
 - Divided Success
 - Unsuccessful Public Interest litigation
 - Novel legal issues on a matter of public importance
 - Impecunious unsuccessful litigant
 - Wrong court or procedure- Small Claims Rule 57.05 Simplified Procedure Rule 76.13(3)
 - Misconduct of party who conducted litigation
 - CCAA Insolvency proceeding where no expectation of recovery (Indalex)
- **Disbursements:** 100% recovery (tariff A):
 - Items not listed but reasonably necessary for the litigation- yes (*Hamfler v 1682787* – provided it is fair and reasonable and charged to the client)
 - Voluntary procedures outside litigation (Voluntary mediation no *Saltsov v Rolnick*)
- **Against Lawyer** (rule 57.07) – not concerned with discipline or punishing a lawyer but compensation for unnecessary or unreasonable costs (*Galvano*)
- **Multi Party Costs:**
 - **Sanderson Order:** unsuccessful defendant pays costs successful defendant
 - Was it reasonable for the plaintiff to have joined the successful defendant as a party? If so, would a Sanderson order be appropriate in the circumstances (one consideration being whether the successful defendant will actually be able to collect from the unsuccessful defendant) *Moore v Wienecke* (2008, ONSC)
 - **Bullock Order:** Plaintiff may recover costs it is required to pay a successful defendant, from an unsuccessful defendant
 - Was it reasonable for plaintiff to have sued both defendants (either or both may have been liable)
 - Each case is evaluated on its own facts *Rooney v Graham* (2001, OCA)
- **Appeals:** Reasonableness applies, very rare

If order arising from motion to does not refer to costs, that means no costs are recoverable in respect of that motion *Kerr v. Danier Leather* (ONSC, 2005). **Remedy:** Seek to amend order before it is formally issued

SOLICITORS ACT ASSESSMENTS

- A lawyer or his or her client can apply to court to have the lawyer's bill to the client assessed under the Solicitors Act.
 - Must be exercised within one year or beyond that, with leave, in exceptional circumstances
 - Procedure involves a hearing with sworn evidence and exhibits and formal submissions
 - Lawyers take this route to turn fees into enforceable certificates (judgments)
 - Clients may use to challenge an account and potentially obtain return of money already paid
- Key considerations are:
 - what did the parties agreed to (initial retainer)
 - any agreed changes to retainer
 - Was client kept informed and warned of costs
 - Did the lawyer do anything that was unnecessary or beyond scope of retainer
 - Where the lawyer's services of some value

- Is the fee reasonable in light of value and complexity of matters in issue, importance to client, result achieved (none of these being singularly determinative)
- Did client instruct lawyer to proceed in light of warning regarding costs or risks or value to client (and is this documented)?

SECURITY FOR COSTS RULE 56

- If defendant's alleged wrongful conduct has caused plaintiff's financial position it may be denied relief (*Mazzika*).
- Proportionality is relevant consideration (*Moosa v Hill Property*).
- **Shifting onus:** moving party shows it appears ground established and then responding party must demonstrate grounds to apply e.g. Resides in Ontario or has assets which are available to respond to and will be capable of satisfying adverse costs decision
- **Defence:** plaintiff is impecunious but has meritorious case and terms will deny it access to justice
- Unpaid costs on judgment under appeal do not qualify as "unpaid costs"
- Corporation can take advantage of impecunious argument, but to do so, it will have to establish it does not have access to funds through shareholders and that it has made unsuccessful attempts to borrow funds
- If creditors of impecunious plaintiff will reap reward of litigation they can be required to post security

RULE 49 OFFERS AND COSTS

- If offer has fixed amount for costs it will not be considered because it requires court to do an *ad hoc* assessment of costs as of either date of offer or date of decision.
- Offer can be staged (i.e. \$ X if accepted on this date or \$Y if accepted on this date)
- For evaluation purposes cannot be variable (i.e. \$X less the costs the offeror incurs up to date of acceptance (see *Yepremian v Weisz*)) - this would require an assessment of to determine whether it was favourable
- Any variation between the offer and what was obtained at trial may invalidate it for Rule 49.10 purposes. Including something in the offer which cannot be awarded by a court may invalidate it, but see *Hodgson v Canadian Newspapers*- defamation action, where publication of apology was part of offer, court could not order that, but offer accepted as valid for Rule 49.10 purposes
- **Proving offer is more or less favourable:**
 - If offer is silent on costs- party and party costs to date plaintiff's offer is accepted or defendant's offer is served
 - If offer is "plus costs", then fixed or assessed costs are not included as part of comparison of offer to result
 - If offer is \$X inclusive of costs (i.e. cost portion is not specified) then it cannot be compared and Rule 49.10 cannot be applied
- **Unless court orders others:**
 - A court may order otherwise for technically valid offer if it is not a bona fide attempt to settle.
 - plaintiff's offer that is just below actual claim e.g. \$497,000 on \$500,000 OR
 - defendant's offer that is nominal e.g. \$1000 on a \$500,000 claim, does not reflect an element of compromise - particularly if there is a legitimate issue to be determined
 - The point of the rule is to encourage bona fide settlement, not increase risk.
 - It is an error for court to ignore offers that demonstrate a genuine and continuing effort to settle and determining costs (*Bifolchi v Sherar* (1998, OCA))
- **7 days before hearing:**
 - In a trial, commencement of hearing is the commencement of calling evidence (*Elbakhiet v Palmer* (2014 OCA))
 - In a motion or application, though, it is likely the commencement of argument because there is no other "starting point"

- *Konig v Hobza* (2015 OCA) You have to take into account Rule 3.01 - when time period of 7 days or less is prescribed holidays are not counted

COSTS AND OTHER PROVISIONS

- Discontinued:
 - If party never had a *bona fide* claim, costs may be ordered on substantial indemnity basis (*Enerworks v Glenbarra* (2016, Master))
 - If action is discontinued, and plaintiff had a *bona fide* claim but discontinued for other reasons, it may avoid costs (*Golda Development v Dawe*)

TYPES OF ORDERS

- Many other types of orders in addition to damages, interest and costs, and procedural orders:
 - Declaratory orders CJA 97
 - Injunctive relief
 - Interlocutory relief s 101- injunctions, mandatory orders, appt of receiver. CPL
 - Relief against forfeiture and penalties s 98
 - Vesting orders s 100
 - Interim recovery of personal property 104
 - Stay of proceedings 106
 - Dismissal or stay because of Vexatious proceedings s 140

ENFORCEMENT

- **4 types of orders that may need enforcement**
 - Payment of money
 - Repossession of Land or Property
 - Directing a judicial or administrative official or enforcement authority to do something
 - Directing a party or non-party to perform an Act or Cease or Refrain from an activity
- **Effect of Bankruptcy**
 - Assignment into bankruptcy suspends all enforcement activity and judgment creditor can only deal with trustee in bankruptcy thereafter
 - Judgment creditor is simply another creditor of bankrupt, occupying same position as other general creditors entitled to share in bankrupt's exigible (i.e. non-exempt) property

RCP/CJA

#	Rule
Costs	
131 CJA	Court can award costs and incidentals to a proceeding
1.04	Partial indemnity costs: awarded in accordance with Part I of Tariff A (4); substantial indemnity costs: awarded in an amount that is 1.5x Part I of Tariff A
57.01	Factors in discretion of costs(1); courts can refuse or award costs or award to a party acting in person (4); can be awarded against successful party – see also 57.06 LG (2); costs outline (form 57B) filed before hearing (6); after hearing bill of costs (form 57A) (5)
1.04	Costs should be proportional (1.1)

57.03	On a motion without notice – no courts (unless court order) (3); on a contested motion court shall fix costs and order paid within 30 days – rule 58 for exceptional cases (1); if party fails to pay courts court may dismiss, stay, or strike out defense
57.07	If a lawyer caused unreasonable costs or undue delay court can disallow costs, order lawyer reimburse the client, or require lawyer to pay costs of any party (1)
133 CJA	Must have leave if only matter is costs (b)
56.01	Security for costs: put a deposit if there is risk plaintiff might not pay (conditions in 1)
56.09	Any party may be ordered to provide security as a term of relief in respect of any motion being granted
Costs and Rule 49 Offers	
49.10	Where an offer to settle is made by P 7 days before hearing, does not expire/is withdrawn before hearing, is not accepted by D and P gets a judgement as favourable or than the terms offer P is entitled to partial indemnity costs to date offer was served and substantial from date offer was served unless a court orders otherwise (1); if D makes offer and P gets as favourable or less favourable P is entitled to partial indemnity to date of offer and D is entitled to partial indemnity from that date unless court orders otherwise (2); burden is on party claiming benefit (3) Note: Result includes prejudgment interest
49.02	Applies to all hearings where an issue is decided including motions (2)
49.14	Applies to counterclaims, crossclaims and third party claims
49.13	Court can still consider offer if it doesn't meet 49.10 as long as in writing
3.01	For a period of 7 days or less prescribed holidays are not counted
49.11	Different offers can be made to different defendants but if they are jointly or severally liable and rights of contribution and indemnity exist between defendants Rule 49.10 cannot apply unless plaintiff's offer is made to all defendants to settle against all defendants, and in the case of offer to a plaintiff the offer is to settle claim against all defendants and to pay costs of defendant who has not joined in offer or offer is made by all defendants and is to settle all claims against defendants, who, by terms of offer, must be jointly and severally liable for the whole amount of the offer.
Costs and Summary Judgement	
20.06	Court may order costs of a motion on substantial indemnity basis if party acted in bad faith or unreasonably in making or responding to motion
Costs and Other provisions	
23.05	If all/part of action is discontinued any party may make motion for costs within 30 days
24.05.1	If action dismissed for delay any party may make motion for costs within 30 days
37.09	If motion abandoned party served entitled to costs
29.02	Party who Cross-examines on affidavit must pay the partial indemnity costs of every adverse party in respect of the cross examination unless court orders otherwise (4)(b)
50.12	Court may order costs for PTC
51.04	Court may consider refusal to admit truth/authenticity of act or document when exercising discretion re: costs
Simplified Procedure	
76.02	Started by statement of claim or notice of action that being brought under this rule (4); Used when P's claim is exclusively for money or real/personal property and value less than \$100,000 exclusive of interest and costs (1); Each P/D is considered separately (2/2.1); P can elect to use this rule (3) unless D objects (5)
76.13	P cannot recover costs if awarded <\$100,000 unless action started under 76 at beginning of trial, reasonable to have start normally or to have not abandoned claims or part of it (3); P may be ordered to pay D's costs (6); If D objects to rule 76 on the basis >\$100,000 and court finds less D shall pay substantial indemnity to P costs that would not have otherwise been incurred under this rule (7); no 49.10 offer can override this (4)

76.03	Must provide copies of all Schedule A documents along with AOD (1); list of potential witnesses (2)
76.04	No cross-examination on affidavit or written discovery (1); oral discovery limited to 2 hours (2)
76.05	Moving party shall serve Form 76B (1); basic motions may be made without supporting material or motion record (3); Basic procedural motions that are uncontested or on consent may be dealt with by registrar (4); no formal order for motion required (7)
76.08	Mandatory settlement discussion within 60 days of delivery of first statement of defence or notice of intent to defend to consider whether all documents have been disclosed and whether settlement of any issues is possible
76.09	P shall is set down matter for trial within 180 days of first notice of intend to defend or statement of defence having been delivered by serving “notice of readiness for pretrial conference” (1); if P doesn’t any other party may (2)
76.10	Registrar shall serve notice of PTC atleast 40 days before scheduled date (1); docs (4); PTC judge shall determine mode of trial (or parties can agree) (6)
76.12	<u>Summary Trial</u> : each party puts its case in by affidavit and a 10 minute examination of affiant, and opposite party may cross-examine, with each parties cross-examinations limited to 50 minutes; Oral argument for each party limited to 45 minutes (1); Judge is expected to deliver judgment immediately thereafter (4)
Orders, Judgments and Enforcement	
1.03	“order” includes a judgment; “judgment” means a decision that finally disposes of an application/action on its merits and includes a judgment entered in consequence of the default of a party
97 CJA	ONCA/ONSC (no small claims) can make binding declarations of right
59.02	Endorsement of every order shall be made on the appeal book and compendium, record, notice of motion or notice of application by the court, judge or officer making it, unless impractical (1) Where written reasons are delivered, in an appellate court, an endorsement is not required; in any other court, the endorsement may consist of a reference to the reasons (2) reasons shall be filed in the court file
59.03	Any part affected by order may prepare draft final order and send to all parties for approval (1); shall be in 59A/B/C format (2)
59.04	Order shall be submitted and Registrar reviews and must be satisfied as to form and if so, signed by Registrar on judge’s behalf.
59.05	Every order shall be filed after signed and entered
59.06	An order that contains an error arising accident or omission or requires amendment in any particular which court did not adjudicate can be made on motion (1); motion can be made to vary based on fraud, facts arising or discovered after order made or to suspend operation of order or obtain different relief(2)
37.14	Correcting motions
121 CJA	Foreign money obligations (order made in CAD to purchase amount in foreign currency at close of business day before the day the payment of obligation is received)
123 CJA	If a judge has commenced hearing with other judges but is unable to finish (i.e. dies) remaining judges may complete and decide but if tied party can make an order to CJ for matter to be reheard (3); judge sitting alone unable to continue – same motion to CJ (4); if judge doesn’t give decision within 6 months CJ can extend time or relieve judge of duties until decision given (5)
59.07	Formal acknowledgment/proof that order has been complied with, requested from the party which benefited from the order
60.01	party owed “judgment creditor/execution creditor” ; party owing is “judgment debtor
60.02	An order for payment/recovery of money may be enforced by writ of seizure (60.07); garnishment (60.08); writ of sequestration (60.09); appointment of receiver
60.18	Examination in Aid of Execution
60.03	Possession of land – enforced under 60.10
60.10	Leave required of writ of possession

60.04	Possession of personal property – <u>writ of delivery</u> if not effect can seek under 60.09
141 CJA	orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement (1)
142 CJA	person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario
60.05	An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11
34.15	Failure to comply with order regarding conduct at examination = contempt order
60.11	<u>Motion for Contempt</u> : must be served personally (2);
60.19	<u>Costs of Enforcement</u> : partial indemnity

CLASS PROCEEDINGS

The class action is a procedural device for people who have suffered a common wrong. One or more plaintiffs can bring an action on behalf of many, and in this way have an efficient mechanism to achieve legal redress. The three public policy purposes that underlie the modern class action are: (1) access to justice; (2) behaviour modification; and (3) judicial economy, including the avoidance of a multiplicity of proceedings.

STEPS IN A CLASS PROCEEDING

- Commencement of action or application – *CPA* s. 2(1); RCP
- Appointment of case management judge – s. 34(1)
- Motion for certification – *CPA* s. 2(2) to 6; RCP
 - *CPA* s5: requirements for certification
 - *Pro-Sys Consultants v Microsoft Corporation*, 2013 SCC: The first certification requirement requires that the pleadings disclose a cause of action ... this requirement is assessed on the same standard of proof that applies to a motion to dismiss. [t]hat is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed.
 - Class representative must show some basis in fact for each certification requirement (*Pro-Sys*)
 - **Defining the Class**: proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action (*Cloud*)
 - **S1 – Common issues** means common but not necessarily identical – low bar
 - The underlying commonality question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. The Court instructed (*Pro-Sys*):
 - The commonality question should be approached purposively.
 - An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
 - It is not essential that the class members be identically situated vis-à-vis the opposing party.
 - It is not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
 - Success for one class member must be success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.
 - **Preferred Procedure** (*Cloud*):
 4. whether or not the class action would be a fair, efficient and manageable method of advancing the claim
 5. whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

- If successful on certification motion:
 - Notice of certification and opt out – *CPA* s. 9 and 17
 - Discovery: documentary and examinations – *CPA* s. 15, RCP
 - Pretrial conference – RCP
 - Common issues trial – RCP; *CPA* s. 27
 - Individual issues trials (or alternative dispute resolution of individual issues) – *CPA* s. 25; RCP
- With settlement:
 - if necessary, consent certification
 - motions for approval of settlement and class counsel fee – *CPA* s. 29, 31, 32, 33
 - administration of the settlement
- **Issues:** *Agnew-Americanano v Equifax Canada*, 2018 ONSC offers good example of modern carriage decision. Issues include:
 - Factors overlap
 - Sometimes courts favour the most comprehensive theory, sometimes the least
 - Courts understandably have great reluctance to make findings about who is the more experienced or better counsel
 - They are being asked to speculate about the outcome on a case at the earliest possible stage
 - They don't care about timing unless one party has gotten significantly head
 - Result: there is limited predictability for the outcome of carriage cases

DEVIATIONS FROM RCP

- Review:
 - s. 35 The rules of court apply to class proceedings
 - Use of s. 12 on carriage motion
- However, the class action judge has discretionary power:
 - The court may determine the conduct of the proceeding
 - s. 12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
- The court may stay any other proceeding
 - s. 13 The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it consider appropriate.
- *Mangan v Inco Ltd* (1996), 30 OR (3d) 90
 - The CPA does not contemplate that the certification motion be held prior to delivery of the statement of defence
 - However, the court has discretion pursuant to s. 12 of the CPA to dispense with the requirement that the defence be filed in advance of the certification motion
 - The Court noted s. 35 (the rules of the court apply to class proceedings) and that the CPA must be read in conjunction with the RCP, as the Act provides for exceptions to the rules
- *Cannon v Funds for Canada Foundation*, 2010 ONSC 146:
 - Certain defendants requested directions on scheduling of a motion to strike portions of the statement of claim (Rule 21.01)
 - The general principle in class actions is that certification should be the first procedural motion to be heard (paragraph 7)

- There is ample authority, however, for the proposition that Rule 21 and Rule 20 (summary judgment) motions and motions to determine evidentiary issues can be brought before certification in appropriate cases (paragraph 9)
- The Court held that in this case the Rule 21 motion would be held at the same time as certification
- The court set out factors relevant to exercise of discretion (paragraph 15):
 - Whether the motion will dispose of the entire proceeding or substantially narrow the issues to be determined;
 - The likelihood of delays and costs associated with the motion;
 - Whether the outcome of the motion will promote settlement;
 - Whether the motion could give rise to interlocutory appeals that would affect certification;
 - The interests of economy and judicial efficiency; and
 - Generally, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding.

MULTIJURISDICTIONAL ISSUE IN CLASS PROCEEDINGS

- Another example of unique issues that arise out of class proceedings
- Many of the issues that are litigated in class actions involve pan-Canadian or even global issues
- As a result, possible for multiple provinces to have jurisdiction over a single dispute
- But under the Constitution, the Superior Courts of each province have inherent jurisdiction so no obvious mechanism to resolve situations where overlapping class proceedings in different jurisdictions
- Mignacca v Merck Frosst Canada Ltd., 2009 CanLII 10059 another example of same challenge
 - Two certified class actions, with overlapping national classes, in two different jurisdictions (Ontario and Saskatchewan)
 - Defendant attempted to stay Ontario action in favour of Saskatchewan, arguing principle of first certified action trumps all other actions and pointing out that constitution requires mutual recognition of judgment (“full faith and credit”)
 - Lower court and Divisional Court rejected that argument and pointed out that certified actions are merely an interlocutory motion
- Para 50: “Generally, to date in class action proceedings, through the co-operation of counsel and guidance from the court, issues of potentially overlapping jurisdiction have been worked out on a practical basis in the interests of litigants.” This mostly remains the case.
- Court was motivated partially by behaviour of one counsel group, which, having been denied carriage in Ontario, proceeded to expand Saskatchewan action to a national class, essentially bypassing that decision
- Saskatchewan decision mostly ignored the Ontario carriage decision
- Court said comity is a two-way street
- Long history of unethical behaviour by Saskatchewan lawyer didn’t help either

CANADA POST V LEPINE, 2009 SCC

- Canada Post sold CD-ROMS across Canada promising lifetime internet service that was discontinued one year after sales began
- Series of class actions commenced across Canada, including in Quebec and Ontario
- Ontario court approved a settlement agreement that had been agreed to by plaintiffs in BC and Ontario actions that encompassed Quebec residents
- Canada Post tried to then get agreement approved in Quebec and have extant Quebec action discontinued
- Quebec action was certified (“authorized”) the day after the Ontario settlement was approved, over the protestations of Quebec counsel

- Hope was that these facts would put the SCC in a position to develop a mechanism or rules to resolve interjurisdictional disputes
- But they mostly punted on the issue, focusing on the intricacies of Quebec civil procedure regarding the recognition of foreign judgments and whether it was appropriate to recognize the judgment of the Ontario court
- Court basically said, no, Ontario judgment can't be recognized, notwithstanding the clear connection between Ontario and the Defendant because the notice to class informing them of the existence didn't make clear the implications for Quebec residents
- Court resolved immediate issue but didn't really offer much of a recipe going forward (notice issue could have been easily been fixed without resolving more fundamental tensions)
- The settlement of class actions ... raises some unique issues for the administration of justice. There are two principal concerns: first is the concern that the entrepreneurial elements of a class proceeding not be abused; and second is the concern that class members, who are not usually involved in the prosecution of the class action, receive substantive justice for the wrong done to them.
- Discontinuance, Abandonment and Settlement
 - CPA s. 29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
 - (2) A settlement of a class proceeding is not binding unless approved by the court.
 - (3) A settlement of a class proceeding that is approved by the court binds all class members
 - (4) in dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
 - (a) an account of the conduct of the proceedings;
 - (b) a statement of the result of the proceedings; and
 - (c) a description of any plan for distributing settlement funds.
- Approval of Class Counsel Fees
 - *Smith Estate v National Money Mart Company*, 2011 ONCA 233:
 - Class counsel appealed a decision approving only a portion of requested fees with compensation to representative plaintiff from those fees and certain payments (expert and other lawyers) to come from disbursements
 - The court found no basis to interfere with the fee, but ordered that the representative plaintiff be compensated from the settlement fund
 - Discussed the difficulties of settlement approval process because it is usually unopposed – considered the benefit of appointment of amicus curiae or guardian of the settlement fund or independent counsel
 - Relevant factors in assessing the reasonableness class counsel fees (paragraph 80):
 - The factual and legal complexities of the matters dealt with
 - The risk undertaken, including the risk that the matter might not be certified
 - The degree of responsibility assumed by class counsel
 - The monetary value of the matters in issue
 - The importance of the matter to the class
 - The degree of skill and competence demonstrated by class counsel
 - The results achieved
 - The ability of the class to pay
 - The expectations of the class as to the amount of the fees
 - The opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement
 - Settlement and Fee Approval

- *Leslie v Agnico-Eagles Mines*, 2016 ONSC 532:
 - Settlement and legal fees approval on a securities class action, certified on consent
 - Counsel had negotiated a \$17M settlement and sought approval of the settlement and fees
 - The Court noted that judicial approval of settlements should “viewed with some suspicion” and “seriously scrutinized by judges” given that the parties interests align and there is the potential for conflicts of interests with the absent class
 - At the judge’s request, counsel filed additional affidavit evidence to explain the ranges of damages and the risks of the case and the settlement was approved
 - Third Party Funding

THIRD PARTY FUNDING IN CLASS PROCEEDINGS

- Not exclusively an issue for class proceedings but issue is made more acute given their size and complexity
- Vast majority of class proceedings are contingent, with the representative plaintiff being indemnified by their law firm against risk of adverse cost award
 - As has been widely recognized, without indemnity, incentives are not there to be a rep plaintiff
- Carrying costs and risks borne by law firm in complex proceedings are significant.
- Third Party Funding in Class Proceedings (cont.)
- Firms have a finite capacity to bear the risk and at same time, the potential upside to cases are significant and risk/reward proposition is enticing to some types of investors
- Traditionally courts were reluctant due to principles of champerty and maintenance – absolute bar on third parties benefiting from civil litigation
- As a result, the Class Proceedings Act has created a public entity, the Class Proceedings Fund that offers cost protection in exchange of 10% of settlement
- Third Party Funding in Class Proceedings (cont.)
- Courts have mostly distinguished champerty and maintenance and have begun to approve funding agreements in class proceedings
- *Houle v St Jude Medical Inc.*, 2017 ONSC 5129 (CanLII) is part of second phase of funding approvals
 - Para 43-70 – offers excellent summary of historical legal tension
- Gone beyond private entity stepping into role of the Class Proceedings Fund and offering settlements on similar terms
- Court approved a hybrid retainer that sees lawyer mostly paid hourly rate in exchange for a most of fee upside

CARRIAGE MOTIONS

- Function of reality of class proceedings that more than one law firm and plaintiff is capable of representing the same class
- S12 CPA: The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

VITAPHARM CANADA, 2004 ONSC

Facts: Ten class proceedings brought by 5 sets of firms against alleged co-conspirators in a conspiracy to fix the price of vitamins

Issue: What groups/actions should move forward?

Ratio: Main criterion is what “is in the best interests of all putative class members while at the same time fair to the Defendants”. factors to be considered:

- Nature of and scope of cause of actions to be advanced
- Theories advanced by counsel as being supportive of the claims advanced
- The state of each class action, including preparation
- The state and involvement of the representative plaintiffs
- Relative priority of commencement
- Resources and expertise of counsel
- Court also considered existence of a conflict between retail purchasers and other purchasers of vitamins

Note: see *Kowalyshyn v Valeant Pharmaceuticals International* 2016 ONSC 3819 for full list):

- State of the action and preparation
- Fee and consortium arrangements
- Class Definition
- Defendant selection
- Correlation of Plaintiffs and Defendants
- Class Period
- Prospects of Success
- Interrelationship between class actions in different jurisdictions

TRIAL PREPARATION

WTINESS PREPARATION

- Identify testifying witnesses and availability
 - Lay Witnesses:
 - Obtain summonses and serve on every witness with conduct money
 - Prepare witness statements
 - Interview or re-interview witnesses
 - Determine if undertaking was given to provide list of witnesses before trial
 - Expert Witnesses
 - Meet and review documents (ensure have all documents)
 - Service of reports in accordance with Rules and Evidence Act
 - CV and Acknowledgment of Duty
 - **Litigation Experts:** witnesses retained by a party to the proceedings, who the party intends to call as an expert at trial, must comply with Rule 53.03 before to give expert evidence at trial.
 - **Participant Experts:** witnesses whose evidence is derived from their observations or involvement in the underlying facts, including treating doctors and fire marshals, do not have to comply with Rule 53.03 to give expert evidence at trial.
 - **Non-Party Experts:** experts hired by a non-party (such as accident benefits insurers), do not have to comply with Rule 53.03 to give expert evidence at trial.
 - Party
 - Provide transcript and documents
 - Meet to review documents and evidence

#	Rule
Trial Preparation	
Listing for Trial	
48.01	Set action down for trial after close of pleadings
48.02	Serve and file trial record
48.12	Whether action has been placed on trial list or not, every party shall promptly inform the registrar in writing of settlement of the action
Offers to Settle	
49.10	Offer must be made 7 days before hearing (1); cost consequences here too
Pre-trial Notices	
51.02	Any party can request other party admit fact or authenticity of documents (1)
51.03	Response must be given within 20 days of request
35 EA	notice of intention to adduce business records – 7 days before trial
30.09	Notice of intention to waive privilege: 90 days notice in writing before trial of a party's intention to abandon the claim of privilege in respect of a document
Trial Procedure	
52.01	All parties fail to attend: judge may strike off trial list (1); a party fails to attend, judge may: proceed in absence, allow Plaintiff to prove claim and dismiss counter, allow defendant to prove counter and dismiss claim or make any order that is just (2); set aside or vary a judgement against a party who failed to attend (3)
52.02	Judge may postpone or adjourn a trial to such time and place, and on terms, as are just
52.03	Judge may appoint independent expert to report on question of fact or opinion relevant to issues in action
52.04	Exhibits marked and numbered consecutively & registrar makes list giving description
52.05	"Field trip rule" Judge or Jury can inspect any property concerning which any question arises in the action or the place where the cause of action occurred
52.06	A witness may be excluded until giving evidence (1) (can't be a party or witness instructing lawyer – (2))
52.07	Order of presentation in jury trials (see pg 1446 if needed)
52.08	If jury doesn't answer some or all of the questions the TJ may order it be retried but if there is no evidence for the plaintiff TJ must dismiss (1); if answered to some then judgement for those and (1) for the rest (2)
52.09	Jury verdict shall be endorsed on the trial record
52.10	If a party fails to prove some fact or document, judge/jury can proceed and verdict takes effect when proven
Expert Witnesses	
53.03	Within 60 days after an action set for trial, parties must agree to schedule for service of expert reports (2.2); must served Original report:90 days before pre-trial (1), responding report 60 days before pre-trial (2), Supplementary report 45 days before trial (3)(b), Responding supplementary report 15 days before trial (3)(c); content of report (2.1)
12 OEA	where it is intended by a party to examine as witnesses persons to give opinion evidence, not more than 3 such witnesses may be called upon without leave of the judge
4.1	Duty of the expert to be fair, objective and non-partisan; only within area of expertise
52 OEA	Definition of "practitioner": Member of a College pursuant to the <i>Regulated Health Professions Act, 1991</i> ; Drugless practitioner pursuant to <i>Drugless Practitioners Act</i> ; Or similar person licensed or registered to practice in Canada
Non-Expert Witness	

53.04	Summons can be issued to person in ON (Form 53A) requiring attendance (1); must be personally served (4); warrant for arrest if fails to comply form 53B (7)
53.05	Summons for a person outside ON must be in accordance under <i>Interprovincial Summonses Act</i> (Form 53D)
53.07	Adverse Party as Witness – Serve at least 10 days before
Production	
30.03	Production must be complete (3)
30.07	Supplementary affidavit of documents if new documents are discovered
30.10	Production from non-parties with leave if material (1)
30.08	Failing to disclose/produce a document it cannot be used if favorable or if it is not favorable court may make any order which is just (1); failure to serve affidavit: right to examine for discovery suspended, action/defense dismissed, any order that is just (2)
Evidence at Trial	
53.01	Witnesses examined orally in court with direct, cross and re (1); TJ to protect witness from undue harassment or embarrassment, may disallow vexatious/irrelevant questions (2); can be recalled for further examination (3); leading questions allowed if witness is unable or willing to answer (4); interpreter can be used (5/6)
53.02	Affidavit evidence allowed with leave
53.08	If timelines missed under rules : 30.08(1) – failure to disclose a document; 30.09 – failure to abandon claim of privilege; 31.07 - failure to answer on discovery; 31.09(3) - failure to correct answers on discover 53.03 - failure to serve experts report; 76.03(3) - failure to disclose witness; evidence admissible with leave on such terms as are just
53.09	Damages for future pecuniary (income/care) loss: discount rate (1); Gross Up (2); Transition (3)
53.10	Prejudgment Interest Rate for Non-Pecuniary Damages: 5% per year
118 CJA	Court may give guidance to the jury on the amount of damages in actions for damages for personal injuries (prevents outlandish awards)

SIMPLIFIED PROCEDURE CHANGES

- Monetary increase to \$200,000 (any claim under cannot be longer than 5 days)
- No jury trials permitted except for slander, libel, malicious prosecution false imprisonment- if there is a jury notice, it continues as ordinary procedure
- No more summary trials
- Evidence can be adduced by affidavit
- Limitations on Cost recovery
- Monetary increase to \$200,000 - all claims with a value below that shall be brought under Rule 76, or the party commencing may face cost consequences under Rule 76.13
- Jury trials will not be longer be permitted for Rule 76 claims, except for claims for slander, libel, malicious arrest or prosecution and false imprisonment
- If a jury is permitted and there is a jury notice filed, the actions switches to ordinary procedure
- If jury a notice is struck out the action is to be continued under Rule 76
- Cases assigned to Case management may be moved out of Simplified Procedure (i.e. more complex cases)- one way to get out is to bring a motion under Rule 77
- The limitation on total hours of discovery a party may conduct is increased from two hours to three hours
- Expert reports must be served in compliance with Rule 53.03 but the report shall be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action
- Procedure for scheduling pretrial conference Rule is changed to reflect what already happens in many regions

- “Trial Management Plan” must be agreed upon and filed prior to pre-trial containing
 - List of every witness
 - Allotted times for opening statement, presentation of evidence in chief, cross examination of deponents, re-examination and oral argument- not to exceed 5 days
- Statement of issues for pretrial is expanded to 3 pages
- At pretrial, the presiding judge or master shall fix the number of witnesses, dates for delivery of any witness affidavits, and date of trial (subject to practice of that region) and approve or modify and approve the Trial Management Plan
- Trial Record must contain (in addition to the usual stuff) the trial management plan and all affidavits, including expert’s affidavits, being relied upon
- Summary trials are eliminated
- At trial the parties may opt to adduce evidence in chief by affidavit, with right of parties adverse in interest to cross-examine, and right of the party who served the affidavit to re-examine following cross examination
- Trial judge can vary times in the approved trial management plan provided the duration of the trial shall not exceed five days.
- Judgment to follow “immediately after trial”
- Legal fee cost recovery is limited to \$50,000
- Disbursement recovery is limited to \$25,000
- Transition rules
 - Actions already commenced under ordinary procedure will not be affected by the changes, provided that they exceeded the previous \$100,000 threshold when commenced
 - The \$50k/25k cost limitation will not apply to actions already commenced under Rule 76
 - If Jury notice already delivered it may proceed as a jury trial under Rule 76
 - However it appears that the following will apply to Rule 76 actions commenced prior to 2020:
 - changes to discovery (an additional hour)
 - changes to pre-trial and trial documents and procedures, including the ability to adduce evidence by affidavit
 - the requirement for a “Trial Management Plan”
 - the 5 day limitation on the length of trial
- What we expect
 - Some parties currently under rule 76 will amend their claims, cross claims etc. to \$200,000 to stay within Rule 76 but increase the downside for defendants
 - Some parties may attempt to move their action into Rule 76, with battles between those who want that procedure and those who will want more discovery or longer trials
 - The body of law on when it is reasonable to remain in ordinary procedure is likely to expand considerably, and quickly

SMALL CLAIMS COURT

Differences under CJA (ss22-32)

- **Procedure:**
 - As in the case of the Rules of Civil Procedure the Small Claims Court rules are to be liberally construed and court may dispense with compliance
 - If matters are not covered by the rules, the court may give directions and make any such orders as it deems just, and practice may be decided by analogy to these rules and, if the court considers it appropriate, by reference to the Rules of Civil Procedure

- Pleadings can be less formal, although certain standards are still expected when a lawyer or paralegal is involved- for law offices it is common to attach a proper pleading as a schedule although it is not necessary
- The means of calculating time is similar to the Rules of Civil Procedure except that there is no special rule relating to time periods of seven days or less
- Other rules mirror the Rules of Civil Procedure but with less formality
- Parties are expected to attach relevant documents to their pleadings
- If not attached, 14 days before settlement conference each party will serve on the other a copy of any document to be relied upon at trial, including an expert report and a list of proposed witnesses and other persons with knowledge of the matters in dispute
- At a settlement conference the deputy judge can direct the production of further documents
- **Motions:**
 - Parties can bring motions to add parties, amend pleadings, strike out all or part of a document, etc.
 - **sRule 12:** A judge hearing a motion can order that an action be stayed or dismissed
- Rule 14: offers to settle made at least seven days before trial can have cost consequences: the court may award a party an amount not exceeding twice the costs affordable to a successful party from the date the offer was served
- A document or written statement that has been served on all parties at least 30 days prior to trial shall be received in evidence unless the trial judge orders otherwise
- This applies to a signed written statement of any witness and a written expert report to the extent that the statement relates to facts and opinions to which the witness would be permitted to testify in person
- If the adverse party wants to cross-examine the witness whose evidence is being adduced in this manner, the onus is upon him or her to summons the witness
- Procedures mirror those of the Rules Of Civil Procedure except that examinations in aid of execution take place in court before deputy judge

RCP/CJA

#	Rule
Small Claims	
22 CJA	Small Claims is a branch of ONSC (1); every judge of ONSC is also a judge of small claims (2)
23 CJA	Has jurisdiction in any action where the amount claimed or the value of property in issue does not exceed the prescribed amount \$25,000 (1); actions started in ONSC can be transferred to small claims on consent before trial if only claim is for money or recovery of personal property or claim is within small claims jurisdiction (2)
96/97 CJA	Does not have the right to issue declarations or grant equitable relief
31 CJA	Appeal lies to division court but cases with value of less than \$2500 cannot be appealed
25 CJA	The court is to determine questions of law/fact in a summary way and "make such order as is considered just and agreeable to good conscience". This section doesn't abrogate basic principles of procedural fairness, jurisdiction or statutory interpretation – <i>Princess Cruises v. Nicolazzo</i> (2009, Divisional Court)
27 CJA	<u>Evidence</u> : Unless another statute provides contrary, court may admit evidence and act upon any oral testimony/document /other thing, "whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court" Expert reports should still be prepared in writing and served at least 30 days (<i>Prohaska v. Howe</i> (2016 Divisional Ct.)) [hearsay admissible]
29 CJA	Costs award other than disbursements shall not exceed 15% amount claimed (or value of issue property) unless necessary of interests of justice or unreasonable behaviour

30 CJA	person can be held in contempt and subject to imprisonment by Small Claims Court judge for up to 5 days for contempt
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COMMERCIAL LITIGATION

- In Toronto Region, commercial matters may end up on Commercial List.
- Must be a “material connection” to the Toronto region (other than simply location of counsel)
- Proceedings under the BIA are automatically on the commercial list.
- Other matters that may be placed on the commercial list on a **voluntary basis**
 - e.g. matters involving *the Companies’ Creditors Arrangement Act*, *Construction Lien Act*, *the Repair and Storage Lien Act*, *the Bulk Sales Act*, *the Bank Act*, *Canada Business Corporations Act*, *Ontario Business Corporations Act*, *Personal Property Security Act*, *Limited Partnerships Act*, and complicated matters under the *Arthur Wishart Act* (franchise disclosure) and such other matters as a judge may direct
- There are special procedures mandated by practice direction for matters on the Toronto Commercial List with respect to title of proceedings, electronic filing, settlement and case management, etc.
- Beyond the Commercial List, there are special procedures that apply to actions proceeding under the Construction Lien Act, as prescribed in that Act including bridge time periods different filings and procedures, and different rules relating to appeals (eg. shorter period to appeal, appeal to Divisional Court)
- Similarly, outside of Toronto there are special procedures for other types of commercial matters such as matters under the *Bankruptcy and Insolvency Act*

ESTATE LITIGATION

- Proceedings Involving:
 - Estates, Trusts and Substitute Decisions Proceedings
 - Wills (proof of, validity of, interpretation of, rights under)
 - Administration of estates, with or without a will (intestacy)
 - Dependent's Relief Claims under *Succession Law Reform Act*
 - Claims against estate under *Family Law Act*
 - Proceedings relating to actions of a person acting under Power of Attorney
 - Proceedings relating to the appointment, removal or replacement of a guardian or the actions of a guardian
 - Variations of trusts
 - Proceedings relating to passing the accounts of an estate trustee or an attorney or guardian
- **Estate litigation in Toronto**
 - Estate applications must be brought where the deceased resided at the time of death
 - Practice Direction mandates matters in Toronto Regions be placed on “Estates List”
 - These matters are subject to a practice direction dictating how matters are brought before the court, scheduling motions, applications and hearings, engaging in mediation etc.
- **Mandatory Mediation**
 - Normally, estate litigation takes place in the county or region in which the deceased was residing at the time of death
 - Mediation is mandatory in proceedings commenced in Ottawa, Windsor and Toronto
 - Within 50 days of an estate proceeding being commenced in these locations, the applicant must bring a motion for directions with respect to when or how mediation will be conducted
 - Mediation prior to commencement may be accepted as meeting the requirement if it dealt with all issues being presented in the application
- **Optional Mediation**

- Outside of Ottawa, Windsor and Toronto, the court may order mediation under rule 75 or 74 or the parties may voluntarily engage in mediation
- For court ordered mediations rule 75.2 applies and provides the procedure to be followed
- Costs of a Court ordered mediation are recoverable as costs in a proceeding
- Costs of a voluntary mediation are not.
- **References (rules 54/55)**
 - Extensive examination of documents that cannot be conveniently undertaken at trial
 - to take accounts related to a substantial issue (e.g. an estate or amount owing under a mortgage);
 - to oversee the conduct of a sale;
 - to oversee the conduct of our receivership
 - An assessment of a lawyer's Bill or of a party's bill of costs is a specialized type of reference dealt with under rule 58 and the *Solicitor's Act*
 - A review of a trustee or guardian's accounts is another specialized type of reference governed by Rule 74
 - Order for reference is directed to another officer of the court or to a person agreed upon by the parties
 - the order will direct the general terms of the reference
 - the referee will make a report which may be confirmed by the judge who directed the reference
 - or the order directing the reference may provide it is confirmed 15 days after delivery if there are no objections filed
 - procedure is governed under rule 55
 - the referee may add parties to the proceeding and give directions concerning what evidence is to be received and how documents are to be approved
 - witnesses shall be examined orally
 - attendance of witnesses can be compelled by summons

RCP/CJA

#	Rule
Estate Litigation	
14.05	Parties may apply to court for opinion, advice or direction of court affecting rights of a person in respect of administration of an estate or execution of a trust; order directing executors, administrators or trustees to do or abstain from doing something in respect of an estate; order to remove or replace an executor administrator or trustee; An order to determine rights that depend upon the interpretation of a will or other instrument (3)
74	Provides procedure for dealing with estates in respect of which the validity of the Will is not being contested but other issues must still be dealt with
74.15	confers upon parties the right to seek an "order for assistance" which may: direct an estate trustee to accept or refuse an appointment as trustee , require an estate trustee to file with the court a statement of the nature and value of estate assets being administered, require an estate trustee to pass his or her accounts (1)
75	"contentious proceedings" where validity is being challenged
75.06	Request for Directions from court on the procedure that will be used to resolve a dispute

ACTIONS AGAINST GOVERNMENT

- *Crown Liability and Proceedings Act* (Federal):
 - Suing Government of Canada or one of it's ministries or employees or officers
 - The federal *Crown Liability and Proceedings Act* states that:

- one may commence proceedings against the Crown in the name of the Attorney General of Canada
 - If suing a Crown agency, one may simply name the agency as a defendant
 - In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction, the Superior Court of the province in which the claim arises has concurrent jurisdiction and the limitation periods for that province shall apply
- *Crown Liability and Proceedings Act* (Ontario)
 - notice of claim containing sufficient particulars to identify "the location out of which the claim arose" must be served upon the crown at least 60 days before the commencement of the action; or the action is a nullity – huge problem if there is a limitation period
 - Actions against the province should describe the defendant as "her Majesty the Queen in right of Ontario" without reference to the specific ministry (which can be identified in the body of the statement of claim)
 - (but often don't and no one seems to care)

JUDICIAL REVIEW

- *Federal Courts Act*:
 - The federal court of appeal has jurisdiction to hear and determine applications for judicial review of decisions made by federal boards, commissions and tribunals
 - Procedure is governed by that Act, and by the Federal Court Rules
- Ontario: *The Judicial Review Procedure Act*
 - Rule 68 of the Rules of Civil Procedure: Application to Divisional Court
 - Rule 68 provides, among other things, a prescribed form of application (Form 68A) as well timelines and procedures for proceeding with judicial review
 - Provisions of Rule 38 also apply
 - Attorney General must be served with Notice of Application JRPA s 9
 - If constitutional question raised, must also serve AG Canada CJA s 109
 - Practice directions for Divisional Court proceedings in Consolidated Practice Direction for Divisional Court Proceedings
 - Additional practice directions may apply on a Region to Region basis
 - Divisional Court sittings 8 locations; permanently in Toronto
 - Divisional Court composition- urgent motions vs. normal panel
 - Interim orders for stay of decision- prima facie case and balancing of interests- jurisdiction for stay is CJA s 106

NAMING PARTIES

- Government of Ontario: "Her Majesty the Queen in right of Ontario"
- Government of Canada or Ministry: "Attorney General for Canada"
- Municipal government : "The Corporation of the City of Sarnia"
- Crown Agencies : by their names
- Deceased individual with no estate trustee named or appointed: "The estate of XX", (but a motion should be brought to have a litigation administrator or representative appointed under Rule 9 or 10.02 and concurrently amend the title of proceedings under Rule 5)
- Deceased individual with estate trustee: "Jim Brown in his capacity as estate trustee of the estate of Alice Brown"
- Trustee: "Jill Brown in her capacity as trustee for (describe the trust)"

- Incapable person, unrepresented : The person's name, but an application should be brought under Rule 7 to have someone appointed as a litigation guardian to correct irregularity and concurrently amend title of proceedings under Rule 5)
- Incapable or minor person represented by guardian: “Alice Brown, by her litigation Guardian, Jim Brown”
- Party suing in personal and representative capacity: “Jim Brown personally and as litigation Guardian for Alice Brown” (or as estate trustee for the estate of Alice Brown)
- Partnership: - the partnership name, “Siskinds LLP”
- Sole proprietorship or partnership carrying on business under a business name:
 - either “Joe’s Coffee Shop”, or “Mary Jones, carrying on business as Joe’s Coffee Shop”
- Company carrying on business under different name: “834261 Ontario Ltd. carrying on business as Joe’s Coffee Shop”
- Unincorporated Association: a member may be authorized to bring a proceeding on behalf of all under rule 12.08; Defendants must individually be named
- Unknown or unascertained party: “Jane Doe” “Jane Doe Corporation” etc. - to be corrected as soon as identity of party is determined by motion under Rule 5;
- *Limitations Act* provides that in an action involving a “misnomer” (i.e. against a “John Doe”) the correct party can be substituted after limitation period has expired, provided the “John Doe” action was brought before the limitation period expired (*Limitations Act*, section 21(2))

A PRIMER ON AUTO INSURANCE

INJURY LAW BACKGROUND

- “Tort” – allows an injured person to recover financially against the person who caused injury
 - Injuries caused intentionally and unintentionally (negligence)
 - This applies to automobile “accidents” (which are usually unintentionally caused)
 - Entitlement in Tort is based on degree of fault
 - Damages are awarded for pain and suffering and some categories of economic loss.

AUTO INSURANCE

- For a fee, insurance companies accept the risk for losses arising from automobiles (or other insurable risks)
 - The risk is transferred from the at fault driver to their insurer for both direct and indirect losses
- In Ontario, auto insurance is regulated to protect consumers, requiring a minimum standard of coverage (\$200,000) for all insured persons.
- OPCF44R clause allows liability limits to be extended to family members of “insured persons”
- **1990 Introduction of “No Fault” Auto Accident Benefits (AB)**
 - Decreased the ability of individuals to sue in “tort”;
 - In exchange, created “Statutory Accident Benefits” for anyone injured regardless of who was at fault in the accident;
 - Only applies to injuries involving automobile accidents
 - What constitutes an “automobile” is expansive but complex– cars, trucks, motorcycles, in some cases ATV’s, snowmobiles, tractors, construction equipment.
 - “Automobile accident” includes where an automobile comes into contact with a pedestrian.
 - Note: Did not eliminate the right to sue the “at fault” person after a car accident but reduced the circumstances in which one could sue
 - New system has been tinkered with by successive provincial governments since being introduced in 1990
- **Damages for Non-Pecuniary General Damages**
 - Trilogy Cap (*Andrews* [1978] SCJ No. 60 applies to pain and suffering amounts – not more than \$100,000.

- Must meet ***threshold***:¹
 - Death
 - Permanent serious disfigurement
 - Permanent serious impairment of an important physical, mental or psychological function.
 - Subjective standard
- Threshold determined by Judge, generally at the end of trial.
- Claim must exceed ***deductible***:
- Statutory deductible changes came into force as of August 1, 2015 via Ontario Regulation 221/15, amending Ontario Regulation 461/96.
- The deductible used to be \$30,000 unless claim exceeded \$100,000
- New Deductible: The new provision, incorporated into section 267.5 of the *Insurance Act*, indicates that the prescribed deductible until December 31, 2015 is now \$36,540 (increased by nearly 22%) and thereafter will increase every January 1st by inflation.
 - the \$100,000 vanishing deductible limit was also increased by nearly 22% to \$121,799 and is to be increased with inflation every January 1st.
 - the deductible on claims by family members was increased to \$18,270 unless the amount exceeds the new inflated vanishing FLA deductible amount of \$60,899.
- **Tort – Family Law Act Claims**
 - Threshold applies– if no threshold injury to primary plaintiff, no derivative claims
 - s. 61 of FLA – immediate family members for damages including
 - *(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.*
 - Statutory deductible of \$15,000 (October 1, 2003 to July 31, 2015)
 - New Statutory deductible of \$18,270 (August 1, 2015 to December 31, 2015 – O. Reg. 461/96)
- **Tort – Economic Loss**
 - 70% of gross income loss up to date of trial
 - 100% of gross income loss from date of trial forward.
 - Income loss before trial reduced by some collateral benefits—
 - IRB – usually \$400 per week unless optional benefits purchased
 - CPP Disability – maximum \$1,362 per month
 - Long term disability benefits
 - See *Cadieux v. Cloutier*, 2018 ONCA 903
 - Income loss after trial is awarded, but the defendant is entitled to an assignment of collateral benefits.
- **Tort – Future Care Costs**
 - Future care costs after trial are awarded, but the defendant is entitled to an assignment of collateral benefits just as with income losses.
 - *Insurance Act*, s. 267.8(4):
 - **Health care expenses**

(4) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for expenses that have been incurred or will be incurred for health care shall be reduced by the following amounts:

 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the expenses for health care.

2. All payments in respect of the incident that the plaintiff has received before the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law. 1996, c. 21, s. 29.

- Limitation Period
 - Tort:
 - 2 year limitation from when client knew or ought to have know of the cause of action.
 - Exceptions with children (under 18) and those lacking capacity.
 - Accident Benefits:
 - Two years from the denial of benefit
- **Statutory Accident Benefits – “SABS”**
 - Most recent incarnations are:
 - *O.Reg 34/10, the Statutory Accident Benefits Schedule – Effective September 1, 2010.*
 - *O. Reg. 403/96, the Statutory Accident Benefits Schedule – effective June 1, 2016*
 - Paid by an Auto Insurer– everyone in Ontario gets benefits from somewhere if they are in an auto accident (“no fault” benefits)
 - Private medical or disability coverage pays first, then the Auto Insurer pays.
- **Accident Benefits**
 - Coverage includes:
 - medical care and rehabilitation
 - i.e. physio, chiro, SLP, medications, transportation etc.
 - housekeeping and maintenance (optional)
 - income losses (up to \$400 per week unless optional benefits are purchased)
 - some family related losses
 - others
- **Weekly Disability Benefits**
 - **Income Replacement Benefits**
 - Eligibility:
 - working at time
 - worked 26 out of last 52 weeks
 - have a contract for work in place
 - Maximum of \$400 (up to 70% of Gross)
 - Deductions for other income continuation plans
 - First 104 weeks
 - inability to do your own employment
 - After 104 weeks
 - inability to do any employment you are reasonably suited for given your training, education and experience
 - **Non-Earner Benefits**
 - a complete inability to carry on a normal life
 - Either:
 - do not qualify for income replacement benefit
 - received caregiver benefit, but no one in need of care any longer
 - enrolled in school
 - or completed schooling less than one year before MVC and not employed in that field
 - **Caregiver Benefits**
 - You purchased optional benefits and:
 - residing with a person in need of care

- the primary caregiver for that person
 - not being paid for the caregiving activities
- Expenses incurred to replace the care previously provided (family, friend, other)
- Up to \$250 per week to care for one individual
- \$50 for each additional person in need of care
- **When does client need a lawyer?**
 - If the income replacement benefit is at the cap of \$400 per week (to pursue excess economic losses);
 - Any catastrophic injury;
 - Most orthopedic injuries;
 - Significant scarring cases;
 - Brain injury cases;
 - If it appears that the client will be unable to return to work within a reasonable period of time;
 - Most personal injury lawyers do not charge for a consultation, or for the initial investigation stages.
 - Most lawyers work on a contingency fee– if the client does not win, she does not pay.
 - Most lawyers can find ways to fund the cost of litigation without payments from the client.
 - Clients will almost invariably obtain a better outcome with a lawyer than without.

RCP/CJA

#	Rule
MVA	
7.08	Settlement requires judge's approval if person under disability
7.09	Money shall be paid into court if person under disability
72	Money can be paid be out of court on consent
105	Defence medical exam
CJA	
33	Court can order medical examination

APPEALS

STANDARD OF REVIEW

- **legal issues:** the standard is correctness. Did the judge apply an incorrect legal test?
- **factual issues,** the test is whether the judge committed a “palpable and overriding error.”
- If the legal and factual issues are inextricable, eg. for a finding of negligence, the standard of review is palpable and overriding error.
- If the reasons for judgment are deficient, the appellate court may review the reasonableness of the findings.

FINAL VS INTERLOCUTORY ORDER

- If the order finally disposes of the rights of the parties it is final; otherwise it is interlocutory
- An order granting judgment, or dismissing an action, is final.
- An order granting summary judgment is final; whereas an order dismissing a motion for summary judgment generally is interlocutory (except if a question of law is decided and is res judicata).
- order dismissing a motion to strike a claim is interlocutory.
- order adding a defendant is interlocutory, but an order refusing to add a defendant is final.
- An order finally determining a limitation issue is final.

- An order determining a point of law is final; whereas an order dismissing a motion to determine a point of law is interlocutory.
- Procedural or production orders among the parties are interlocutory.

LEAVE TO APPEAL INTERLOCUTORY

- The test for granting leave from an interlocutory order is onerous. Leave will not be granted where the decision is well reasoned and the issues raised are not of general importance.
- It is necessary to show a difference in legal principles, not just a difference in the exercise of a court's discretion.

RCP/CJA

#	Rule
Appeals	
6 CJA	Appeal lies to ONCA from divisional court that is not a question of fact alone; ONSC final judgment more than \$50,000
19 CJA	ONSC less than \$50,000 – divisional court; interlocutory order from ONSC – divisional court; final order of master – div court
17 CJA	interlocutory order of master - ONSC
132 CJA	Judge shall not sit as a member of a court hearing an appeal from his or her own decision.
133 CJA	No appeal lies without leave of the court to which the appeal is to be taken from a consent order or discretionary costs order
134 CJA	Appellate court may make any order/decision that ought to have been made or order new trial (1); shall not order new trial unless substantial wrong or miscarriage of justice (6); may draw inferences of fact from evidence (4)
61.03	Notice of Motion for Leave within 15 days after the making of the order or decision unless a statute provides otherwise
61.11	Appellant's Factum
61.12	Respondent's Factum
62.02	Motion for leave shall be heard in writing (2)
61.09	Perfecting Appeal