**Winter**

20

Civil Procedure Summary

Professors Armstrong and Emmett

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# INTRODUCTION

Why is Procedure Important?

1. Plays an important role in legitimizing the decision;
   * If the procedure wasn’t followed, then the CA doesn’t really have a basis to assess the case. With procedure, the CA can focus on its role of assessing errors.
2. Fair process means that it is more likely for the parties to feel that they had ample opportunity to influence the outcome or played a role in the outcome;
   * The greater role the parties have, the more likely they may be to accept the legitimacy
     + An “instrumentalist view” of civil procedure (influence over process).
3. Even if decision is not favourable, parties can accept that the process is fair;
   * Parties may accept the legitimacy of a judicial decision in resolving a dispute because that decision was the result of a “fair process” even if the decision is not favourable
     + A “normative view” of civil procedure (depends on fairness of process rather than influence over process).
   * “Legitimacy” relates to the social context (classic English liberalist views, rather than communitarian views)
     + If we see the social context shift, that may influence the legitimacy accorded to decisions
4. Procedural decisions can often be final decisions (e.g. limitation period); and,
   * Procedurally, it’s possible to bring summary judgment motions and have a case dismissed if it’s past its limitation date
   * Decisions of procedure can be extremely important and even definitive in the resolution of disputes (e.g. limitation periods)
   * Effective use of procedure can have a significant effect on the final outcome of a decision.
5. Procedural strategy may have a dramatic impact on a case

* In a litigation practice, procedure can become as important as the substantive law when advising clients (see examples below)

**(1) Heenan Blaikie Meltdown**

* + - The Toronto office of Heenan Blaikie owes $27,000 for office supplies it purchased in the last quarter of 2013 from “StableStaples”. The owner of StableStaples reads about HB’s very sudden “winding up” and quickly forwards an invoice for payment. It goes unpaid. [There's no question on the facts, the contract or the breach, so it's just all procedural here]

**(2) CIBC v Genuity Capital**

* + - Ten former CIBC employees leave to create their own venture capital firm, Genuity Capital. CIBC alleges that the employees are stealing client information and poaching employees and it wants you, as their legal counsel, to stop it.
      * There are substantive law issues here – i.e. non-compete agreement signed, etc.
      * Potential disputes about the facts – i.e. did they really take it or did the clients call them afterwards?
      * Time is of the essence – if you decide to sue them, that’s not a very fast process. Lawsuits can be slow, and this won’t necessarily help CIBC here (they might need an injunction or a cease-and-desist order)
      * Options- Lawsuit possible, but by the time it works through the court system "damage" (information stolen) may be done and recovery not possible, so may need to do something more immediate such as seeking an injunction
      * Forum- Small claims court not possible because it cannot provide equitable relief, so need to go to another court that can provide a cease and desist
      * Have procedural options that may be informed by what the law and facts are, but are sometimes independent

**(3) Internet Shopping**

* + - You act for a buyer who purchased faulty goods over the internet and the seller refuses to refund the purchase price. The seller’s place of business is in Arizona.
      * There are provisions that dictate where you can take legal action against another party, especially if there’s an intentional element to it. International dimension dictates required procedure so must analyze under Rules of Civil Procedure to determine if the Ontario courts have jurisdiction over the dispute and the D

**(4) The Cost of Doing Business**

* + - You act for a D who has a strong legal defence, but who is upset about the cost of defending the action
      * It’s going to cost a fortune just to defend themselves. If you go to court, it’s inevitable that it’ll take a long time and will cost a lot of money. If you understand summary proceedings, you will know how to get a matter in front of a judge much faster and potentially save costs.

Methods of Dispute Resolution

* Do nothing (legal system not involved)
* Use force to remedy the breach – i.e. take your friends and go get your two pizzas
* Negotiated agreement - Try to work it out (legal system may not be involved)
  + (a): the law could provide a mechanism that makes the parties' agreement more likely to work out (e.g. mediation)
  + (b): the law could ask the parties to try to work it out, but failing that, one of the Parties gets to make the decision (“parent-child” model of adjudication)
* The law could provide a basic binding response
  + I.e. In the form of a random decision/arbitrary response
  + May be regarded as unfair (as decision is not tied to merits), but it is accessible, cheap, fast, and neutral
* The law could create a compensation system and thereby eliminate the dispute
  + E.g. Mandatory state-sponsored insurance scheme where money is deposited into a fund which compensates customers who have been short-delivered on their pizza, for instance
  + Commonly done: workers’ compensation, no fault auto, etc.
    - E.g. WSIB - companies pay into scheme which is used to compensate the injured party
* The law could provide a 3rd party to resolve the dispute (civil procedure – i.e. a judge)
  + Makes a final and binding decision based on the parties putting forward their best arguments
  + This is the traditional model of civil procedure

Features of the Traditional model of Civil Procedure

1. Third party adjudication
   * Third parties (who are not involved in the dispute and not interested in the outcome) determine the resolutions to disputes (judges/arbitrators observe dispute and make decision)
   * Lawyers are intermediaries and make arguments in front of third-party decision makers
2. Operates case-by-case
3. System is controlled by the parties
   * We decide when we’re going to start the lawsuit, when we’re going to conduct examinations, what experts we want to rely on, etc.
   * High degree of **party control**:
     + Parties decide the issues, the facts, the evidence they will call, etc.
     + Parties decide what is in issue and the **parameters** of the dispute.
     + Parties bring the dispute before the judge—“courts ought not to function as self-propelled vehicles of justice and right.”
4. Court is reactive, passive and restrained
   * Judge is reactive and sits back: lets the parties bring their case and then makes a decision (neutral, impartial observer)
5. Binding Decisions: Decisions are narrow, often binary (i.e. the P wins or D wins – an “all or nothing” approach) and mandatory (judge **must** decide case and that case **must** be binding).
6. Carried out in a specialized setting
   * Removal to a specialized setting (with specialized furniture, uniforms, and intermediaries).
7. Highly adversarial
8. Considerable amount of time spent on **facts** rather than the law – the judges in civil litigation primarily render findings of fact
9. No “trial by surprise”
   * There’s obligations to disclose and share information. The judge is the only one getting it for the first time
   * Our system has evolved to a point where it’s desirable for matters to resolve short of trial
   * **Emphasis of fairness:** ROCP seek to remove the possibility of “civil trial by surprise” by processes such as notice requirements, statement of claim, pre-trial disclosure of factual information (“discovery”), etc.
     + All of this was done to help avoid what used to turn into wasted time due to 'surprises'
     + This also helps encourage settlements

Guarding against Bias/Partiality

Must be able to bring forward the relevant evidence before an impartial trier of fact. Judge must give impassionate and impartial consideration.

Phillips v. Ford Motor Co. of Canada, [1971] 2 O.R. 637 (C.A.)

**Facts:** Motor vehicle accident case. D appealed the judgment of the TJ.

**Issue:** The TJ constantly intervened. He kept asking questions and essentially became a part of the trial (he asked questions when counsel didn’t ask questions he should have).

**Held:** New trial ordered. The CA said these questions were of such a serious nature that it was necessary to have a new trial.

* + The TJ therefore failed to restrain himself as an adjudicator. The excessive interruptions diverted counsel from their task.

**Ratio:** The CA held that a trial is not intended to be a scientific exploration, rather it is a **forum established for providing justice to**

**the litigants**. On the facts of the case, the trial judge overstepped his role by failing to remain a **neutral, passive observer**.

Osterbauer v. Ash Temple Limited, (2003), 63 O.R. (3d) 697 (C.A.).

**Facts:** Wrongful dismissal. Appeal by the employer from judgment against it. Ash Temple said O was to pay certain funds. The notice of appeal was based on bias.

**Issue:** The TJ continuously expressed his opinion that the case ought to be settled. It was an egregious example of pre-deciding issues before all evidence was in. The lawyer said that’s not the only issue.

* + D argued that he was denied the opportunity to properly assert his defence because the TJ had already made up his mind

**Held:** The CA agreed that the TJ had pre-judged the issues and a new trial was ordered. This was not the role of the judge!

* + CA stated that the judge didn’t accept the D’s theory of the case and had created a perception of bias against the line of argument put forward by the D. The appellant had been denied the ability to present its defence.

**Ratio:** Judges may not create a perception of bias through their actions

* + **Test for reasonable apprehension of bias:** “What would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?”
    - Basis of appeal is under bias

Ross v. Hern, [2004] O.J. No. 1186 (C.A.).

**Facts:** P sued D for 1/3 of the winnings of a lottery ticket. They were supposed to split the winnings 1/3 each. The TJ found that the P had purchased the ticket and was entitled to this payment. There were numerous interruptions and interventions by the TJ. The D (Hern) appealed from judgment in favour of Ross.

**Held:** The CA allowed the appeal and ordered a new trial. The CA found the TJ was sarcastic and condescending and found that the TJ acted inappropriately. TJ was very involved in the cross-examination and examination-in-chief. This amounted to unwarranted interference of counsel.

* + Judge interrupted witnesses over 200 times each. Interruptions of the Ds were very condescending.
  + CA said this was not acceptable - violates the presumed role which should be **'quiet impartial listener'**
  + He effectively took case into his own hands and out of the hands of the parties' counsel
  + The image of impartiality was destroyed by his involvement

**Ratio:** Judges should not take the role of the parties or act too interventionist.

Reasons for Procedure

**Legitimacy:**

* Even if decision is not favorable, parties can accept that the process is fair
* Plays a significant role in **legitimizing** decisions.
  + Parties may be satisfied that they had an appropriate opportunity to **influence** the outcome. The greater role the parties have, the more likely they may be to accept the legitimacy.
    - An “**instrumentalist view**” of civil procedure (influence over process).
  + Parties may accept the legitimacy of a judicial decision in resolving a dispute because that decision was the result of a “**fair process**.”
    - A “**normative view**” of civil procedure (depends on fairness of process rather than influence over process).
  + “Legitimacy” relates to the social context (classic English liberalist views, rather than communitarian views).
    - If we see the social context shift, that may influence the legitimacy accorded to decisions.
* Procedural decisions can often be **final** decisions.
  + Decisions of procedure can be extremely important and even **definitive** in the resolution of disputes (eg: limitation periods, etc.).
* Effective use of procedure can have a significant effect on the **final outcome** of a decision.
  + The effective use of procedure may play into influencing a **settlement** (95% of disputes settle) or improving your position at trial.

**Fairness**:

* + Since we cannot demand 100% accuracy, we can at a minimum demand fairness—a **fair process**.
  + Fair process includes:
    - Parties have sufficient notice of the procedure(s);
    - Notice of each step in the proceeding;
    - Must provide notice so the other side has the opportunity to disagree with you
    - Participation in the procedures;
    - Neutral decision maker;
    - Right to an appeal;
    - Freedom from abuse (e.g. frivolous claims)
    - There are safeguards built into the system to shut down claims that are frivolous

**Pre-Trial Strategies:**

**Finality:**

**Efficiency**:

* + Minimizes the time and cost involved in legal procedures.
  + However, this is often at odds with fairness—eg: how much evidence should you allow a litigant to bring in a case? What if the judicial costs outweigh the claim itself?
  + Efficiency concerns: someone has to pay for the courthouses and judicial salaries, support staff, etc. There is also a high social cost (i.e a witness testifying is a day the witness is not working).
    - Time and cost are closely related.

Preliminary Considerations at the Outset of Litigation

### (a) Conflict of Interest: Can the lawyer act for the client?

* Do a conflict check to rule out conflict of interest before a client provides you with too much info
* **Definition of conflict of interest**: An interest that is likely to adversely affect a lawyer’s judgment due to loyalty to a client or prospective client OR may prompt lawyer to prefer the interest of a client or prospective client
* Also dealt with in **Rule 2.04** of the *Rules of Professional Conduct*
* Can a company seek to retain a lawyer who has a **financial interest** in the company (i.e. owns shares in the company)?
  + No, conflict of pecuniary interests
* Can a lawyer act against a **former client**?
  + Not in the same or any related matter – generally not improper to act against a former client in a new and unrelated matter
  + If it was a very long time ago and the matters have nothing to do with what occurred before, then perhaps they can. Best approach would be to contact the former client and give them a heads up.
  + Key: confidential information cannot be used
* Can a lawyer act for **two defendants** who have been sued by the same plaintiff in a contractual dispute?
  + Maybe – if they might blame each other, then there’s a conflict
  + However, assuming they’re not pointing the blame to each other, their strategic interests may still diverge
  + If there doesn’t appear to be any conflict between the two of them, there are certain steps that must be taken according to the law society’s ROPC:
    - Must tell them they’re both being represented by you and get their consent; and
    - Must tell them that anything one of them tells you cannot be kept from the other one
  + There is a risk that you might have to withdraw from both
* Can a law firm accept a retainer to act against a **current client** without the client’s consent (even if it’s for an unrelated matter)? – **see *McKercher* case below**
* Note: these examples have been set out under the rubric of a sole practitioner. However, this is a significant problem in large firms (e.g. a lawyer may be retained to sue another partner’s client). Law firms have developed intricate systems to respond to conflicting interests. Boutique litigation practices thrive on the clients that big law firms are unable to retain due to conflict of interest - big firms safely refer litigation to these firms.

**“Bright Line Rule”:** Canadian National Railway Co.v. McKercher LLP, 2013 SCC 39

**Facts:** McKercher was CNR’s main firm. CNR was one of McKercher’s biggest clients. A farmer wanted to retain McKercher for a class action suit against CNR worth millions. McKercher took the retainer and didn’t tell CNR. CNR found out when McKercher sent them a statement of claim. The same day, McKercher immediately withdrew as counsel for 2/3 of CNR’s active claims. CNR fired McKercher from the 3rd. CNR wanted to remove M as opposing counsel. At the time they were served, bright line test applied (because M was counsel for CNR, who was receiving the SOC, and counsel for the new client who was sending statement).

**Held:** SCC upheld the bright line rule. SCC found a breach of the bright line test, but said it might not be appropriate to remove McKercher as counsel in this case (sent it back to trial).

* + McKercher owed a duty of loyalty to CNR

**Ratio:** A lawyer cannot concurrently represent clients whose immediate legal interests are directly adverse, in related or unrelated matters, unless both clients consent after receiving full disclosure and independent legal advice.

**Bright line rule:** applies only where the *immediate legal interests* of the clients are *directly* adverse in the matters on which the lawyer is acting (*Strother*). It applies to **concurrent representation in both related and unrelated matters**. It applies only to legal interests (not commercial or strategic).

* + The bright line rule does not apply where:
    - It does not apply to condone tactical abuses (i.e. it cannot be raised tactically)
    - It does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters (i.e. sophisticated party exception not applicable)
  + If the situation falls outside of the scope of the bright line rule, use the **substantial risk test:** whether the concurrent representation of the clients creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interest or by the lawyer’s duties to a current client, a former client, or a third party (*Neil* and *McKercher*)
    - Onus on client to establish (on BOP) the existence of a conflict
  + The Court will also consider 3 things to determine whether disqualification is appropriate:

(1) behaviour which disentitles the complaining party from seeking disqualification (e.g. delay)

(2) prejudice to the new client’s interests (retaining laywer of choice is a fundamental right)

(3) whether the law firm accepting the retainer had a reasonable belief that they were not violating this rule

* + So the court will apply the bright line test where it’s reasonable to do so (considering the factors above); if not, use the substantial risk test
* **See also**: Rule 2.04, LSUC Rules of Professional Conduct, Avoidance of Conflicts of Interest

### (b) Other Dispute Resolution Options

(i) Arbitration: there may be an arbitration clause in the contract that would preclude litigation.

* + This may be favourable because it helps reduce costs and get disputes resolved in a more timely manner
  + **First thing you should look at:** is there an arbitration clause in the contract?

(ii) Even if an arbitration clause is not in place, lawyers may discuss arbitration or mediation as alternatives to litigation.

(iii) A formal “demand letter” putting the other side on notice that you are prepared to “up the ante” in the dispute.

* + Can issue a demand letter to initiate negotiation

### (c) Assets: Ability of D to satisfy a judgment

* At the outset of a trial, must consider the ability of the defendant to satisfy a judgment (assets) – Will the defendant be able to pay your client in the event of a successful litigation?
  + Can conduct investigations to determine whether there are assets
  + Is there a valid **insurance policy** that will respond to the claim? Insurance has a right to be involved with their own representation. If you don’t include them, they may refuse to pay, even if you obtain a judgment.
* Issues to keep in mind:
  1. Does the defendant have assets **in our outside the province**? Want to make sure they don’t put their assets elsewhere
  2. What is the status of those assets?
  3. Is the defendant covered by an **insurance policy**? If no assets, doesn’t matter because the insurance will pay
     + The problem with this rule is that it doesn’t apply until the actual litigation takes place
     + If client is D in litigation, before you start handling the defence you need to find out if your client is covered by a policy of insurance that would satisfy the P’s claim. If so, **the insurer** has significant rights and control over the defence of the action (as a lawyer, you cannot waive these rights - must consult with insurer how they want to handle case, etc.).

### (d) Venue

* Where do you want the litigation to take place (i.e. what jurisdiction)?
  + E.g. Disney cruise case where little boy cut his finger. Can you sue in Canada for something that took place in the U.S. or Cuba?
* Consider: how useful will that judgment be anywhere else in the world?
  + If there’s an international element, consider how effective your judgment might be in other parts of the world
  + In choosing jurisdiction, consider:
    - Where event happened; damages sustained; convenience of witnesses/parties; whether court facilities available at other county
    - Considerations are technical in nature, so consider factors outlined in ***Rule 13***
* Once you decide on a **jurisdiction** (Ontario, for example), also consider in which **region** in Ontario you want the litigation to take place (e.g. London)
  + Venue is a significant consideration in civil jury trials, especially if the litigation involves local concerns
  + Once you decide on a **region** within the jurisdiction, must decide on the **specific court** you want to litigate in
  + The P picks the venue at first outset, but the D can bring a motion to change the venue **(*R.13.1.02(2)*** **– test)**
  + Must determine whether there are rules requiring the litigation to be started in a certain place

**R.13.1.02(1):** Allows for the party or the court on its own initiative to transfer the proceeding to the county where the claim should've been commenced (in case a mistake was made)

* + **R.13.1.01(1)**: If a statute or rule *requires* a proceeding to be commenced, brought, tried or heard in a particular county, the proceeding shall be commenced at a court office in that county and the county shall be named in the originating process.

**R.13.1.02(2):** If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,

**Test** [look at complete list in rule]:

* + - Where the substantial facts took place (e.g. where was the crash)?
    - Where were the damages sustained?
    - Convenience of the parties and the witnesses
    - Whether court facilities are available

### (e) Legal Opinion on the Cause of Action

* Common scenario: client asks if he/she will win at the outset of the litigation. It is dangerous to give any guarantees when giving an opinion on the potential success of an action.
* This may require a **researched opinion** on their likelihood of success
* Opinion will be based not only on the *assumption that the client’s facts are correct*, but also *how effectively the client will be able to prove those facts during the litigation* (for example, during discovery and at trial) 🡪 assess strength as witness
* Consider cost of undertaking opinion and seek and confirm clear instructions from the client
  + Consider cost of undertaking opinion as this is costly, so need to find out how much the client is willing to spend and get clear instructions from the client on what they want

### (f) Retainer Agreements

**(a) Meaning and Scope:**

* Three meanings:

(i) the act of **authorizing or employing** a lawyer;

(ii) the **document** that evidences the hiring of the lawyer (i.e. a contract); and

(iii) the **money** paid up front on account of services to be performed later.

* The **scope** of the retainer agreement must be clear: **for what, as the lawyer, are you being retained?** (I.e. what is it for? E.g. to give advice, to litigate, etc.) 🡪 retainer agreements should be in writing
  + The more general the agreement, the more open it is for client to say: “I thought *you* were handling that”
  + Courts will side with clients on broad agreements to favour the party with less bargaining power
  + Can be limited to legal advice on a potential action

**(b) Termination Agreements:**

* Termination triggers are also important—i.e. when do you stopacting for your client?
* Sometimes a court won’t let you terminate a retainer agreement.
  + - Court will often refuse to let lawyer go if it’s at a **critical point** in the trial
* Clients are free to leave at any time, but lawyers can only terminate agreements under set circumstances (which must be put into the retainer agreement)
* Common termination provisions (note: **must** be built into retainer agreement):
* If client stops paying, lawyer may terminate the agreement
* Lawyer may terminate agreement on reasonable notice to client (e.g. if lawyer “loses confidence” in the client)
  + E.g. Lawyer discovers that client lied about key facts of the case
  + Note: Court will consider prejudice to client if you're trying to drop them (i.e. ease of finding other representation)
* Client may terminate agreement on **reasonable notice**

**(c) Money Issues:**

* These must all be built into the retainer agreement
* Must set out **detailed costs** of the litigation (**who** will be working on the file and their rates, administrative costs, etc.), **when** payment is going to happen, **contingency fees**, etc.
* Must put in the retainer who is working on the file and their rates
* The client must also understand the “**cost exposure**” of the litigation
  + I.e. Risk that if they lose in the litigation, may also have to pay a fairly significant portion of the other side’s legal costs
* What is in the retainer agreement will protect the lawyer(s) at a later date

# JURISDICTION OF THE ONTARIO COURTS

Jurisdiction over the subject-matter, over D

* Jurisdiction refers to the power and authority of a court to hear and rule on a dispute
* In Ontario, plaintiff does *not* need to be a resident of Ontario to commence litigation
* How is jurisdiction determined?
  + At the outset, plaintiff has the right (initial right) to elect the jurisdiction in which the matter will proceed;
  + But, there are jurisdictional restrictions on the courts of Ontario;
  + In addition, different courts hear different kinds of disputes
* **Subject matter jurisdiction:** does the court have the jurisdiction to hear this particular type of dispute?
  + E.g. SCC lacks jurisdiction to hear trials. Provincial court can't hear immigration matters since in federal domain.
* **Personal Jurisdiction over the Defendant:** Crucial question is how will the choice of jurisdiction affect the defendant?
  + While taking jurisdiction over the P is uncomplicated (because they are accepting the court’s jurisdiction), the court will have to ask questions about the connection of the forum and the D in order to determine whether it has jurisdiction over that party (*Van Breda*)

Creation of the Ontario Courts

***Constitution Act, 1867***

* **s. 92:** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject hereinafter enumerated, that is to say . . .**(14)** The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
* **S. 96**: The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick
  + **Federal government appoints the judges of the s. 96 courts** (provincial judges)
  + The provinces administer s. 96 courts (provinces have exclusive control of administration of justice here) which are created under the authority of the *Constitution Act*,but do *not* appoint the judges within them
* **S. 101:** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Law of Canada.
  + Authority for the **Federal Court of Canada** and the **SCC** is derived from this section. These two courts are run by federal employees.

The ***Courts of Justice Act* (CJA)** sets up the court system in Ontario (authority provided under s. 92(14) of the CA, 1867).

* The only thing the Ontario Legislature cannot do is appoint s. 96 judges (but the province administers the s. 96 courts)

(1) Superior Court of Justice (SCJ – s.96)

### (a) Composition and Role: *Role and Jurisdiction*

* ***CJA,* s. 10(2):** the SCJ [formerly, Ontario Court (Gen. Div.)] is one of two **divisions** of the “Court of Ontario”
* ***CJA, s*. 11(1):** the SCJ is a “**court of record**”
  + Keeps record for all proceedings; record is kept permanently
* Court has **power to punish** (fine or imprisonment) for **contempt**
  + A power other junior courts don’t have

**Jurisdiction (*CJA,* s. 11(2))**

* + SCJ is a court of **inherent jurisdiction** (SCJ is a common law court)**:** “has all the power jurisdiction, power and authority historically exercised by the courts of common law and equity in England and Ontario.” 🡪 has jurisdiction over [criminal](http://www.ontariocourts.ca/scj/criminal/), [civil](http://www.ontariocourts.ca/scj/civil/), and [family](http://www.ontariocourts.ca/scj/family/) cases
* **“Inherent jurisdiction”** = jurisdiction that is “unlimited and unrestricted in substantive civil law matters” (defined in ***80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd****.*, [1972] 2 O.R. 280)
  + ONLY the SCJ has inherent jurisdiction
  + This gives the court the ability to do pretty much whatever it wants, within reason. As long as the Court acts reasonably, it’s acting within its right 🡪 has a lot of discretion to do what is appropriate
  + It controls its own process – it can bend the rules, create rules, do things which seem right in equity, etc.
  + SCJ is a s. 96 court, so the judges that sit there can only hear **provincial matters**

**Appeals (*CJA* s. 17)**

* + SCJ is a trial court, but not entirely a first-instance court
  + Has **some appellate jurisdiction** (act as appeals court) under **s. 17**—provides for appeals to the SCJ from the “interlocutory order of a master” or a certificate of assessment of costs
    - * Masters program: Ottawa, ON, Windsor are the only jurisdictions that have masters
      * **Interlocutory order:** a decision made that does not finally dispose of the action (i.e. everything that isn’t a final order). **Final order:** order finally disposes of the action (e.g. win trial, motion to get trial dismissed)
      * The appeal route depends on whether the matter is interlocutory or final

**Composition of the SCJ (*CJA* s. 12:)**

* + Composed of: Chief Justice, Associate Chief Justice, Regional Justices, Senior Judge of the Family Court, and a collection of other Superior Court Judges (over 200 of these judges) 🡪 **all appointed federally**
  + Note: as the SCJ is a s. 96 court, justices are appointed by the Governor General under s. 96 of the *CA 1867.*
* ***CJA* s. 15:** court is broken down into **regions** – judges are assigned to a specific region. There has to be at least 1 judge per region.
  + In ON, we have 8 regions: New Market, Hamilton, Ottawa, Thunder Bay, Sudbury, etc.
* ***CJA* s. 16:** the court sits as a **single judge** (no panels) in **all instances**(even appeals)

### (b) Intro to Rules of Civil Procedure

***CJA* ss. 65** and **66**: the statute gives delegate powers to the “**Civil Rules Committee**”—this group creates the **Rules of Civil Procedure.**

* + There’s a requirement that a Rule cannot conflict with an Act.

**R. 1.02(1):** these Rules apply to the **ONCA and SCJ**, but do NOT apply to **Small Claims Court**, to **Family Law**, or if a statute provides for a different procedure

**Definitions**

* **R. 1.03(1):** a long list of **definitions** that are important for our purposes (“action,” “deliver,” “originating process,” and “proceeding”). 🡪 **Important to know these definitions [see rule for full list]**

**“action”** means a proceeding that is not an application and includes a proceeding commenced by,

* + - (a) statement of claim,
    - (b) notice of action,
    - (c) counterclaim,
    - (d) crossclaim, or
    - (e) third or subsequent party claim.

**“deliver”** means serve and file with proof of service, and “delivery” has a corresponding meaning

**“originating process”** means a document whose issuing commences a proceeding under these rules, and includes,

* + - (a) a statement of claim,
    - (b) a notice of action,
    - (c) a notice of application,
    - (d) an application for a certification of appointment of an estate trustee,
    - (e) a counterclaim against a person who is not already a party to the main action, and
    - (f) a third or subsequent party claim,
      * but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion.

**“proceeding”** meansan action or application

**Interpretation**

* **R. 1.04(1)\*:** helpful for guidance on **how to interpret** these rules — “these Rules shall be **liberally construed** to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”
  + R.1.04 goes back to the essentially unlimited power of the court. This allows the court to bend rules to adjust it.
    - A catch-all provision – Professor recommends in our practice to refer to this rule when we bring a motion for something. This rule allows us to argue fairness which is important.
  + This is a **crucial rule** telling us the rules are liberally construed
* **R. 1.04(2):** if a matter is not provided for the in *Rules*, the practice shall be determined by **analogy** to them
  + If a matter isn’t provided for in the rules, then under 1.04(2), it’s to be done by analogy and counsel can get creative (“this is a similar analogous situation and that’s why we should do something similar”).
    - The ability to order costs comes from here
  + R.1.04 are the **rules of last resort** for lawyer – use as reliance for an argument if no case law can be found for support or if there is an ambiguous precedent. This rarely occurs, however (weak, last resort argument).
  + R.1.04(1.1) – New provision with regards to **proportionality** 
    - Make orders and give directions that are proportionate to importance and complexity of issues

**Compliance with Rules**

* **R. 2.01(1):** a **failure to comply** with the Rule is an **irregularity** and does *not render* a document or a step in a proceeding a *nullity*—the court can grant any necessary **amendments** to perfect it.
  + **Important rule:** the rules are flexible 🡪 the court has the power to grant any necessary amendment to fix an issue
* **R. 2.03:** the court may **dispense with compliance with any rule**, at any time, but only where it is “**necessary in the interest of justice**.”
  + Builds in further flexibility, especially for tough cases. Can bend the rules if in the best interest to do so.

**Time**

* **R. 3:** regards computation of **time deadlines**
  + Holidays: go back to **Rule 1** and check the definition of holiday and then go back to rule 3 (note: Sat and Sun are holidays)
  + I.e. if Xmas, Boxing Day and Sundays are included in the definition of holiday, then it will extend to the day after that
  + **MUST know this rule (frequently part of exam questions)**
* **R.3.01:** **Computation** 
  + **3.01(1)** In the computation of time under these rules or an order, except where a contrary intention appears,

**(a)** where there is a reference to **a number of days between two events**, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words “at least” are used;

**(b)** where a period of **7 days or less** is prescribed, holidays shall not be counted; 🡪 **if > 7 days** count holidays

**(c)** where the time for doing an act **expires on a holiday**, the act may be done on the next day that is not a holiday; and

**(d)** service of a document that is **NOT an originating process** made after **4 p.m.** or any time on a holiday shall be deemed to have been made on the next day that is not a holiday.

* + **Holidays**: if less than 7 days, do not count holidays; if more than 7 days, count the holidays (**3.01(1)(b)**)
  + **3.01(2)** Where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally.
* **R 3.02:** court has power to **extend or abridge** time deadlines (if you’re late or you screwed up) on such terms as are just **[R 3.02(a)]** and a motion for this to occur may be made before or after the expiration of the time prescribed **[R 3.02(b)]** 🡪 always include this provision in motion materials

(2) Ontario Courts of Justice (OCJ)

**(i) General Principles**

* ***CJA* s. 10(2):** the OCJ is the other division of the “**Court of Ontario**,” along with the SCJ.
  + The OCJ is a **separate branch** from the SCJ, and it is an **inferior court** (**not a s. 96 court**) 🡪 more limited in what it can do

**(ii) Composition**

* These judges are **provincially appointed**, NOT federally appointed
* The composition of the OCJ is very similar to that of the SCJ **[CJA 35]**, the main difference **is that for the OCJ the province appoints the judges as detailed in [CJA 42] 🡪** The Lieutenant Governor in Council on the recommendation of the Attorney General may appoint provincial judges as are considered necessary
  + As far as assignment to regions, the Chief Justice of the OCJ will assign judges to a region **[CJA 37]**
  + Same approach as SCJ vis-à-vis regional assignment, except the regions and boundaries are different

**(iii) Jurisdiction**

* ***CJA* s. 38:** **jurisdiction of the OCJ**
  + OCJ has **statutory**, not **inherent** jurisdiction (contrast with SCJ)
  + In order to fall within OCJ’s jurisdiction, must satisfy **statutory requirements**
* Only has ability to deal with **criminal matters, provincial offences, youth court offences,** and **non-divorce family matters**
* They tend to deal with criminal matters, but not the more important criminal matters (i.e. murder trials etc. will be in SCJ)

**(iv) Appeals**

* The OCJ is a court of first instance
* While the *CJA* is silent on the issue of appeals routes from the OCJ, they are **likely governed by the relevant provincial statute** (e.g. see s. 69 of the *Child and Family Services Act*)

**(v) Limits on Remedies**

* Fewer remedies available in the OCJ than SCJ (**cannot grant equitable remedies)**
  + While the courts shall concurrently administer the rules of common law and equity [all courts must under ***CJA* s. 96(1)**], OCJ has **no power to grant equitable remedies** (i.e. injunctions, orders for specific performance, equitable setoff, etc.) (**s. 96(3)** 🡪 Only the CA and SCJ (exclusive of the Small Claims Court) may grant equitable remedies)
* Also, the court has **no power to grant declarations** (**CJA** **s. 97**) 🡪 only the CA and the SCJ (excluding Small Claims Court) shall grant declarations
  + **“Declaration”** = to declare someone incompetent (i.e. if someone can’t make a decision for him/herself)
* **Reasons for fettering OCJ’s remedial power:** academic literature says that allowing for such remedies would blur distinction between OCJ and SCJ, and the OCJ is an inferior court (why have two courts if they aren’t different?)
  + Equitable orders are seen as the hallmarks of superior courts — can’t be given to court of provincially-appointed judges
  + Only the federal government can appoint s. 96 judges to s. 96 courts

(3) Court of Appeal

**(i) Jurisdiction**

* ***CJA* s. 2(2):** “The Court of Appeal has the jurisdiction **conferred on it by this or any other Act**, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario.”
  + While the CA can draw on its **history** in exercising its power, it remains a court of **statutory jurisdiction**
  + Must point to section that shows why CA has ability to hear your case
  + The CA is *not* a common law court (like the SCJ is). Even though we think the CA > SCJ, the SCJ actually has more powers and has more jurisdictions than the CA. So the CA can overrule what a SCJ did, but it can’t do a lot of the other stuff.
* The CA may also answer **reference questions** from the Ontario Legislature by an order-in-council (***CJA*, s.8(1)**)
  + CA is a superior **court of record** = required to produce and store all records and files that supports its decision. Under CL, any jurisdiction with the authority to impose fines and sentences of imprisonment is a court of record
  + Can hear cases by **video** (usually criminal cases) but rare

**(ii) Composition**

* The CA is composed of a Chief Justice, an Associate Chief Justice, and 14 other judges (16 judges) **[CJA 3(1)]** 🡪 however under **3(2) & 3(3)** the number of judges may be increased if needed by regulation
* **Proceeding are heard by a panel of at least 3 judges** and always by an **uneven number of judges [CJA 7(1)]** (sometimes up to 5 if important issue. However, there are exceptions/special rules for motions and appeal wrt costs under **6(1)(c)** that allow for these matters to be heard by one judge **[CJA 7(2)]** 
  + can appeal an assessment of costs

**(iii) Appeal Routes**

***CJA* s. 6(1):** an appeal lies to the Court of Appeal from:

**(a)** an order of the **Divisional Court**, NOT on a question of fact alone, with **leave** of the CA (no automatic right of appeal)

* + If question of fact alone (i.e. whether a fax was received by the end of a business day), does not fall under **s. 6(1)(a)**

**(b)** a **final order of a SCJ judge**, exceptan order referred to in **s. 19(1)(a)** **OR** an order from which an appeal lies to the Divisional Court under another Act

* + If a SCJ judge makes a final order, that appeal goes to the CA
  + **s. 19(1)(a)** indicates when it should be appealed to Divisional Court instead of CA

**(c)** a **certificate of assessment of costs** issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the Rules

**(d)** an Order made under **s. 137.1** 🡪 deals with matter of public interest and debate

* e.g. gag proceeding (a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition)
* As **s. 6(1)(b)** indicates, the appeal route may be changed by “**another Act.**”
  + E.g. Ontario *Business Corporations Act*, s. 255: “An appeal lies to the **Divisional Court** from any order made by the court under this Act.” 🡪 Changes the normal appeal route for cases under the *OBCA* to go to Divisional Court rather than CA.

**NOTE:** The CA is not the only appellate court in Ontario—the Divisional Court (below) is another one and, in rare instances, the SCJ too

**[See Charts on Page PC-28 and PC-29]**

(4) Divisional Court (DC - s.96)

**(i) Composition**

* The DC is a **branch of the SCJ [CJA 18(1)]** and every judge of the SCJ is also a judge of the DC **(same member ship) [CJA 18(3)] 🡪** Thus the DC is a s.96 court
  + A sort of quasi-*appeal* court which is comprised of SCJ judges, so it’s kind of higher than the SCJ but not as high as CA
* Court generally sits in panels of **3 judges** but with enumerated statutory **exceptions** **[CJA s. 21(1)(2)].**
* Appeals happen in region where proceedings took place [**s. 20(1)**]—it is a “**moving” court**.
  + Moves around to different jurisdictions (e.g. comes a few times a year to London, ON. They move around and come to us instead of us coming to them

**(ii) Appellate Jurisdiction**

* CA won’t waste its time with appeals of less than $50k, so you go to the Divisional Court instead
  + They hear appeals which are not large enough to go to the CA (generally lower amounts) 🡪 less than 50k
  + **Must be considered together with** **s. 6(1) (right of appeal for CA)** – appeal goes to CA, except for this stuff
* ***CJA* s. 19** sets out the jurisdiction of the Div. Ct. (statutory jurisdiction)[even though it’s a s.96 court, doesn’t have inherent jurisdiction]. Under s. 19(1), an appeal lies to the Divisional Court from:

**(a)** a **final order of a judge from the SCJ:**

* + 1. for a single payment of not more than $50,000, exclusive of costs (limited costs)
       - E.g. P sues for $100,000 and wins, but the trial judge only awards damages of $20,000 🡪 handled by Div. Ct. under s. 19(1)(1.2)(a)(i) **(*McGrath,* 2001)**
       - “**costs**” - lawyer’s fees and disbursements
    2. for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order.
    3. dismissing a claim for an amount that is not more than the amount set out in (i) or (ii)
    4. dismissing a claim for an amount that is more than the amount set out in (i) or (ii) and in respect of which the judge or jury indicates that if the claim was allowed the amount would have been not more than that in (i) or (ii).
       - E.g. P sues for $100,000 and loses, but trial judge says that had he awarded for P, would have awarded $20,000 in damages—handled by Div. Ct. under s. 19(1)(a)(iv)
    - **\*NOTE: read s. 19(1)(a) in tandem with s. 6(1)(b) (re: right of appeal for CA)**
      * Final orders of SCJ judges that would otherwise go to the CA under s. 6(1)(b) are carved out and go to the Div. Ct. if they fall under **s. 19(1)(a)** (i.e. claims involving amounts less than $50,000, exclusive of costs).

**(b)** an **interlocutory order of the SCJ, with leave as provided in the rules of court**

* + - Interlocutory order: e.g. There’s a dispute in the middle of the litigation that the D has to show the insurance policy that exists (Rule 30), so they go to a SCJ for an interlocutory order. If you want to appeal one of those decisions, you have to get leave. If you get this permission, then you get to go to the Divisional Court

**(c)** a **final order of a master.**

Note: **Pre-judgment interest** counts in the $50,000 limit, but costs do not

* + Principle comes from ***Medis Health and Pharmaceutical Services Inc. v Belrose (1994)***

**Summary of Appeals** [confirm that these are correct]

* Final order of SCJ → CA (**carve out:** if fall within s.19(1)(a) i.e. less than 50k 🡪 DC)
* Interlocutory order of the SCJ → DC (with leave)
* Final order of a master → DC
* Interlocutory order of a master → SCJ
* Interlocutory order of OCJ → SCJ (CJA, s.19(4))
* Interlocutory order of a master 🡪 SCJ (CJA s. 17)
* Certificate of assessment of costs 🡪 SCJ (CJA s. 17)
* **E.g. 1**: X sues for $100,000. The Judge dismisses the case and in dismissing the claim, states that had the claim been successful, he only would have awarded $45,000.00
  + Handled by Div. Ct. under **s. 19(1)(a)(iv)**
* **E.g. 2**: X sues for $100,000. The judge finds in favour of the plaintiff but only awards $30,000.00 in damages
  + Handled by Div. Ct. under **s. 19(1)(1.2)(a)(i)** (*McGrath,* 2001)
* **E.g. 3**: X is successful in recovering $50,000.00, but also receives a pre-judgment interest award of $7,000.00
  + Handled by CA (*Medis Health*) 🡪 prejudgment interest is included in the 50K, but not costs

(5) SCC

**(i) General:** Created in 1875, and has its own federal statute (the ***Supreme Court Act*** *(SCA)*).

* Under s.101 of the *Constitution Act,* *1867* allowing federal government to create an appeal court for all of Canada.

**(ii) Composition:** ***SCA* ss. 4 and 6**: SCC is composed of 9 judges—3 must be from Quebec, under statute, and the rest are divided as a matter of convention.

**(iii) Jurisdiction:** Statutory jurisdiction—SCC derives its power from the *SCA*.

* ***SCA* s. 35:** “the Court shall have and exercise an **appellate, civil** and **criminal jurisdiction** within and throughout Canada.”
* The SCC does not have inherent jurisdiction – it’s limited by what powers the *SCA* gives it
  + Doesn’t hear witnesses, evidence, etc.

**(iv) Appeals and References:** **Leave** for appeal is required for all **civil cases** [***SCA* s. 40(1)**].

* The SCC only hears matters of national importance (leave difficult to obtain) 🡪 There’s no ability to get to the SCC on a civil matter without leave first, but it’s extremely challenging to get this
* ***SCA* s. 53:** provides for **references** from the federal government

(6) Federal Court of Canada (FCC)

**(i) General**

* Created under **s. 101** of the ***Constitution Act, 1867***, which provides for “the establishment of any additional courts for the better administration of the laws of Canada.” 🡪 Recognized in **s. 3 of the *Federal Court Act****.* 
  + Tend to see things that are **federally based (i.e. IP, tax law, immigration)**
* ***FCA* ss. 3 and 4:** Federal Court of Canada is divided into **two branches:**

(1) Trial division (the “**Federal Court**”)

(2) Appeal division (the “**Federal Court of Appeal**”)

* Court is based in Ottawa (though it does move around somewhat)

**(ii) Composition:** ***FCA* s. 5:** the **FC** has 37 judges (including the Chief Justice), and the **FCA** has 13 judges (including the Chief Justice), appointed by the federal government.

**(iii) Jurisdiction:**

* The Federal Court is a court of **statutory jurisdiction** (ability to get a case into FCA or FC must slot into a provision of the statute)
* Also, a **constitutional limit** on the court’s jurisdiction (***s. 101 of CA*, 1867**): court must be for the “better administration of the laws of Canada.” **->** can only deal with laws of Canada
* **Concurrent instead of exclusive jurisdiction**. If covers both provincial and federal, go to federal 🡪 federal > provincial

**Arguments for and Against the Federal Court:**

* (a) Arguments against Federal Court:
  + Hogg thinks the jurisdiction of the Federal Court is confusing and unnecessary, because the matters it deals with can be effectively handled by the provincial superior courts. The federal government appoints the judges of the Federal Court and provincial superior courts as it is, so there will still be federally-appointed judges hearing the matters. Additionally, the SCC is an overarching federal court that may handle concerns about the law developing differently within different provinces. He is also concerned about the US example, where vast amounts of time and money are wasted trying to figure out which court to send matters to.
* (b) Arguments in Favour of Federal Court:
  + Expertise of Federal Court judges in relation to specific types of cases (tax, patent and admiralty cases, etc.)

(7) Small Claims Court

**(i) General**

* ***CJA* s. 22(1):** the Small Claims Court is a **branch of the SCJ**
* **SC NOT a s. 96 court** 🡪 provincially-appointed judges and limited power (no equitable remedies)
  + While it is a branch of the SCJ, it is stripped of additional powers (e.g. no equitable remedies, declarations)
* ***CJA* s. 22(3):** all judges of the SCJ are automatically, by virtue of their office, judges of the Small Claims Court.
  + However, these judges **do not sit** on the court—under the *CJA*, the province designates full or part time **Small Claims Court judges** and **deputy judges** (provincially-appointed).

**(ii) Rationale for Small Claims Court**

* Concerns about delays, cost of litigation, and access to justice for ordinary citizens (too expensive to hire lawyers for such matters).
* Judge plays a more **active role** in directing the proceedings (because litigants often bring matters themselves, acting in person) – “Judge Judy court”
* Easy, **informal procedure** – relaxed rules: *Rules of Small Claims Court*
* **Disadvantages**: no right to examination of discovery, not the same documentary disclosure required, significant cost consequences, less predictable, judges may not have same level of expertise

**(iii) Jurisdiction and Remedial Authority**

* Jurisdiction is **(a) statutory, (b) civil (no criminal matters),** and **(c) first instance [CJA 23(1)]**
* SC has jurisdiction over actions involving
  + The payment of money less than $25,000; or **[CJA 23(1)(a)]**
  + The recovery of possession of personal property valued at $25,000 or less **[CJA 23(1)(b)]**
* ***CJA* s. 23(2):** provided the statutory jurisdiction of s. 23(1) is satisfied, **an action in the SCJ maybe transferred to the Small Claims Court** if all the parties consent.
* No equitable remedies **[CJA 96],** no declarations **[CJA 97]**
  + Thus while the SC is a “branch” of the SC, it is stripped of any powers of a s 96 court - no inherent jurisdiction, provincially appointed judges, limit on remedies, etc.
  + While court must administer equity and CL concurrently [all courts must do so under *CJA* s. 96(1)], its **remedial authority** is strictly curtailed.
  + But see: ***Hodgins v. Grover*, 2011 ONCA 72:** “court has jurisdiction to grant equitable relief when the order involves the return of personal property or a monetary payment within the limits of the small claims court.”

(8) Family Court

* Family Court is a **branch** of the SCJ (***CJA* s. 21.1**).
* **R. 1.02(1).2:** carves out specific rules for Family Court (i.e. own set of rules)
* **Judges appointed jointly by the federal government** (under s. 96 of the *Constitution Act, 1867*)**AND by the provincial government.**
  + **Rationale:** Due to division of powers, divorce and division of property are matters of exclusive federal jurisdiction (and can only be handled by federal judges). On the other hand, youth court and child welfare issues are matters of exclusive provincial jurisdiction (and can only be handled by provincially-appointed judges). Finally, custody, support, and access to children may be handled by both.
* **Joint appointment** allows the judges to hear all types of matters (rather than making parties sever the litigation and bring actions in different courts).
* **Appeals** from the Family Court are heard by the Divisional Court.
* Scope is seen in Schedule [CJA 21.8]

(9) Masters

* **A subcategory of SCJ judges** (***CJA* s. 87**)– they are not judges and have limited powers
* Masters typically preside **minor motions** in the SCJ (preliminary motions, procedural/administrative matters, etc.)—they free up judges to hear trials
  + These things aren’t necessarily unimportant, but SCJ can’t afford to spend a lot of time on these things so they’re passed on to Masters to save resources. Masters are heavily used in Toronto for motions court.
* Certain types of motions can only be heard by masters, and other types can only be heard before a judge (and some may be brought before either — “the court”).
  + In a notice of motion, you need to know who’s going to hear it – if you say “the court”, it can be either a Master or a judge
* The *CJA* does not provide for the appointment of any new masters.
  + Once all the masters retire, the matters will be left to the SCJ judges once again

# ACCESS TO ONTARIO COURTS

Language: CJA, s.125

* **Language:** The official language of the ON courts are English and French, the default is English (unless provided that will occur in French) 🡪 **hearings and evidence, including documents will be in English 🡪** if in another language they will be translated into English accompanied by a certified affidavit by a translator **[CJA 125]** 
  + ***Trumble v Kapuskasing:*** Where a respondent to an application delivered two affidavits written in French the court rules that the costs of the translation should be borne by the court
  + You do have a right to have documents in French: each area/jurisdiction of the court will make sure that they have at least one staff member in each position that speaks French in order to accommodate this right

***Bilingual Proceedings Act*:** sets out further rules for language

* If a party speaks French, the party has the right to require a **bilingual proceeding** 🡪 Judge must speak French and English, in certain geographic regions the jury must be bilingual in a bilingual hearing, evidence received in the language given, in certain regions documents (including pleadings) may be in French **[CJA 126]**
  + See Schedule for regions of Bilingual Juries (1), Bilingual Documents (2)
* Judge and jury must be bilingual, but prosecutor does not have to be
* Middlesex was added as an area in which you can have bilingual proceedings

Public Access: CJA, s.135-137

**General rule:**

* **CJA, s.135(1):** All court hearings open to the public
  + This is a general presumption and rule. There is a powerful presumption in favour of the public having the right to know what is happening inside the courtroom.
  + The court interprets this section to say that there is a **strong public policy of openness** in court proceedings
  + There are very limited exceptions to this rule

**Exceptions:**

* **CJA, s.135(2):** Court may exclude public if possibility of “**serious harm or injustice to any person**”
  + It is very difficult to achieve the test to exclude the public 🡪 ban must be consistent with *Charter* **(*M.E.H. v Williams*)**
* **CJA, s.135(3):** If public is excluded under s.135(2), court can make an order prohibiting the disclosure of information relating to closed proceeding (enforced by contempt)
  + There are some circumstances where the name of the individual or the individual themselves will have a publication ban (e.g. proceedings with sexual abuse allegations, youth charged with criminal offences)
  + In a civil proceeding, enforcement of contempt can come with criminal consequences

Prohibition against Photography: CJA, s.136

**General rule in civil court:** “Put the smartphone away”

* **CJA, s.136(1):** No photographs, video or audio recordings at a court hearing, of any person entering or leaving hearing room, of any person in the court building 🡪 No publishing, broadcasting, reproducing. Not entitled to be a party to the proceedings; only allowed to be there to observe. Can watch but cannot interfere with the case.

**Exceptions:**

* **CJA, s. 136(2):** 
  + Notetaking and sketching (unobtrusive) is okay
  + Lawyers, parties acting in person and journalists may record with the judge’s approval – as long as it is to supplement your written notes
* **CJA, s. 136(3):** Judge may authorize photos, videos, or audio recording for limited purposes (educational or instructional, etc.)

Filing of Documents and the Open Court Principle: CJA, s.137

**General Rule: Documents are public**

* **CJA s. 137(1):** All documents filed in civil proceedings can be viewed or photocopied by any member of the public **for a fee**, unless Act or order of the court provides otherwise
  + Must advise clients that anything they file is a public record (e.g. important in a defamation case)
* **CJA s. 137(3):** Any member of the public can seek a list of all the judgments that have been entered against the D (for a background or credit check)
* **S. 137(4):** On payment of the fee, a person is entitled to ***copies***of any documents they are allowed to see

**Exception: Sealing Order**

* **CJA s. 137(2):** Court can make an order to seal *part* of the court record as confidential (i.e. to be not part of the public record)
  + Confidentiality may be necessary to protect the position of the party, sensitive information, confidential business data, etc.
    - Usually for sensitive personal and private information (e.g. in one case, court said no one had any interest in the party’s estate planning)
    - Can also bring sealing orders for proprietary information (don’t want confidential information getting out)
  + Not easily granted – balancing of interests (public access vs. party’s desire for privacy)
    - Exceptions to public access are very limited. Must demonstrate that it’s extremely prejudicial for something to be in the public record and the balance is in favour of sealing it.
    - See ***B.(A.) v Stubbs***: embarrassment is not good enough, need irreparable harm
      * Moving party underwent cosmetic “enlargement” procedure and intended an action for damages for negligence and battery, but only permitted to be anonymous. Moved for order banning his name/identity from publication, injunction prohibiting publication saying that the “sensational” subject matter would be acutely embarrassing. Court: **potential for embarrassment not irreparable harm; unavoidable consequence of open justice system 🡪 action dismissed**
* Note: Confidentiality orders will become more of a concern as we file more documents electronically

These cases deal with striking a balance between openness principle and a *bona fide* right to protect confidential and sensitive information:

* ***BASF Canada Inc. v. Max Auto Supply* *(1986) Inc*:** “the making of a protective order is designed to strike a balance between the disclosure necessary for the conduct of an action and a party’s *bona fide* right to protection of confidential and sensitive information”
* ***Publow* (1994**): “If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, an order for *in camera* proceedings or otherwise. Widespread granting of such sealing orders could tend to diminish public confidence in the administration of justice. These considerations suggest that such orders should be **available only in exceptional cases**.” (Language indicates that this will be rare/unusual in a civil case)
* ***Sierra Club of Canada v. Canada, [2002] SCC:*** “A confidentiality order… should only be granted when:

**1)** such an order is necessary in order to prevent a **serious risk to an important interest**, including a ***commercial interest***, in the context of litigation because reasonably alternative measures will not prevent the risk; and

* + - The risk to an “important interest” has to be well-grounded in the evidence
    - The “interest” in question cannot be merely specific to the party requesting the order—there must be a broader **public interes**t in the confidentiality that the party is seeking (although a general commercial interest can qualify)

**2)** the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, **outweigh its deleterious effects**, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.”

* + - Court also indicated that confidentiality orders should be made to the most minimal extent necessary to diffuse risk

NOTE: This case is under federal court rules for making confidentiality orders in civil and commercial litigation (similar to provincial rules).

**Anonymity**

* **R. 14.06(1):** As part of the general rule of the open court principle, litigants are required to identify themselves—generally, there is no anonymity in civil litigation
* In some cases, however, plaintiffs have advanced the claim that they should be able to sue anonymously (i.e. criminal cases involving sexual abuse)

Parties & Representation

**Who can sue and be sued?**

* **Rule 7:** Parties Under Disability
* **Rule 8:** Partnerships and Sole Proprietorships
* **Rule 9**: Estates and Trusts

### Basic Considerations in whether a Party can Sue

**Individuals:**

* Must be age of majority (18+)
* Must be mentally capable
* Cannot be an undischarged bankrupt

**Corporations:**

* Must be properly incorporated
* Retaining of legal counsel must be properly authorized by the board of directors
* **Exception:** if litigation is in the ordinary course of the corporation’s business, then it does not require a special authorizing resolution of the board of directors—it is sufficient that the matter is handled by an officer of the corporation **(*Melgold Construction, 1988)***

### Rule 7: Parties under Disability

* If representing someone, you must be able to get instructions from them
  + If party is deemed not to be able to give instructions, must have a **litigation guardian**
* **R.1.03: “party under disability”** where used in respect of a person, means that the person is,

**(a) a minor =** Under 18 years; does not look at the capacity or competency of the child (only age here)

**(b) mentally incompetent** within the meaning of **s. 6 or 45** of the ***Substitute Decisions Act, 1992*** in respect of an issue in the proceeding, whether the person has a guardian or not, or

* + - **Re property:** not able to understand information relevant to making a decision in management of his or her property or not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision
      * There are people who have mental disabilities but do not fall under the first test (re: property)
    - **Re personal care:** not able to understand information relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety or not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision
    - Mental competence: can you appreciate or understand the current and future situation?

**(c)** an **absentee** within the meaning of the ***Absentees Act*** (s.1)

* + - Defined by *Absentees Act*, s. 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” [not common]
    - Absentees: they’re not there to defend themselves

**Litigation Guardian**

* **R. 7.01**: Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian
* **R. 7.01(1):** Parties under a disability (either P or D) are required to use a “litigation guardian” for litigation
  + The litigation guardian does not become the party to the proceedings— rather, it is an officer of the court who manages the litigation on behalf (i.e. in place) of the disabled party
* **“Litigation Guardian”** – person responsible within the litigation for the party under disability
  + Person who is taking care of the party under disability’s interests
    - Not necessarily a parent or spouse; theoretically, it could be anyone, but tends to be someone familiar with the individual
    - Litigation guardian must be prepared to personally pay costs awarded against the party under disability
  + The general rule is that a person under disability must *start, continue and end* a lawsuit through a litigation guardian
    - “Continue”: can have someone who suffers a breakdown and becomes mentally competent halfway through the lawsuit or disappears, at which point a litigation guardian is needed
  + **Conflict:** this person cannot be in conflict with the party under disability (cannot have an interest in the proceedings adverse to the party’s) – if they are, they will be removed and replaced by public guardian in trustee
    - ***Callahan* (2015)**:party moved to remove the public guardian in trustee [litigation guardian?]. There is a high onus – must have clear evidence of misconduct.
    - Must protect minors from people who may take advantage because of their own self-interest

**Rules for Plaintiffs or Applicants**

* **R.7.02(1):** Any person who is *not* under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1)
  + - * Mentally incapable 🡪 litigation guardian
      * Mental incapable with no litigation guardian 🡪 power of attorney
      * Absentee 🡪 committee of estate
* **R.7.02(2) Affidavit:** No person except the Child’s Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person: consents to act as LG, written authority to lawyer, nature and extent of disability, for minor states DOB, whether the LG and person under disability are resident in ON, relationship to person under disability, and no adverse interest in the proceeding, aware of costs liability
  + Do not need a court order for a litigation guardian; just have to meet criteria above in affidavit
  + Guardian is really just making a declaration that they have no adverse interests in the proceedings, and must also state that they’re aware of the costs liability

**Rules for Defendants or Respondents: [R.7.03]**

* **(1):** No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the court, except as provided in subrule (2), (2.1) or (3).
  + Litigation guardian must swear an **affidavit** undertaking to pay costs
  + Note: rule does NOT explicitly say that the litigation guardian for D cannot be under a disability
* **Exceptions:** 
  + When the D is a minor re. interest in estate or trust, Office of Children’s Lawyer shall be LG **(2)**
  + When D is a mentally incapable person with guardian, guardian shall be LG; Same for attorney under POA **(2.1)**
  + When D is absentee with a committee, committee shall be LG **(2.1)**
  + A LG for a plaintiff may defend a counterclaim without being appointed by a court **(3)**

**Default or “Last Resort” Litigation Guardians: [R.7.04]**

* **R. 7.04:** There are default/last resort rules if a party does not have a litigation guardian
  + **(a)** The Children’s Lawyer is default/last resort litigation guardian for party that is a minor (children) (***CJA s. 89(3)***), and
    - They very rarely take on the role of a child plaintiff, but will more commonly get involved in defence. This agency has limited funding so it tends not to get involved unless it can cause serious damage.
  + **(b)** The Public Guardian and Trustee is default/last resort for mentally disabled people (***Public Guardian and Trustee Act, R.S.O. 1990***)
  + Can be either of these if party is **both** a minor and incapable
  + There does not appear to be a separate rule for absentees

**Powers and Duties of Litigation Guardian**

* Can do anything a party must or can do; Diligently attend to the interests of the party under disability; Must have and instruct a lawyer (except the CL or PGT) **[R 7.05]** 
  + Litigation guardian must take every step available under the Act to protect the interests of the party

**Removal or Substitution of a Litigation Guardian: [R 7.06]**

* **R. 7.06(1):** party or litigation guardian may apply for removal or substitution of litigation guardian where: (a) child reaches age of majority (18); or (b) person under disability ceases to be under a disability
* **7.06(2):** court may substitute litigation guardian where it appears that the litigation guardian is not acting in the party’s best interests

**Special Rules if Party is Under a Disability and is Represented by a LG**

* Special rules are included to ensure that the best interests of the party are looked after
* **R. 7.07(1):** a party under disability may be noted in default (for failing to enter a defence, to file a document in the proceedings, etc.) ONLY with leave of a judge — cannot be done unilaterally
* **R. 7.07.1:** if a party is under a disability, the action may only be discontinued (by or against the party) with leave of a judge.

**Approval of Settlement: [R 7.08]**

**(1)** No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. 🡪 “Settlement” broadly defined includes consent judgments, in-court settlements, out-of-court settlements, and settlements where litigation has not even started yet

* + If before the court, bring an application for settlement approval
  + If no litigation started, bring motion to have the court approve the settlement

**R.7.08(4):** **Materials Required for Approval**

On a motion or application for the approval of a judge under this rule [approval of settlement], there shall be served and filed with the notice of motion or notice of application,

**(a)** an affidavit of the LG setting out the material facts and the reasons supporting the proposed settlement and the position of the LG in respect of the settlement;

**(b)** an affidavit of the lawyer acting for the litigation guardian setting out the lawyer’s position in respect of the proposed settlement;

**(c)** where the person under disability is a minor who is over the age of 16 years, the minor’s consent in writing, unless the judge orders otherwise; and

**(d)** a copy of proposed minutes of settlement.

**R.7.08(5):** Judge may refer to Children's Lawyer or PGT

* + The judge may refer the material supporting the settlement to the CL or PGT and may have such individuals make a report setting out their opinions and recs to determine any concerns with the proposed settlement

**R.7.09:** Any money payable to a person with a disability under an order or a settlement shall be **paid to into the court**, unless the judge orders otherwise.

* + Goal: ensure the money goes to the party, not to a family member or someone who might be trying to take advantage
* Must also justify fees: since personal injury lawyers operate on contingency, they must justify their fees to the court
  + Justify that fees are appropriate and not contrary to the *Solicitors Act*
  + There are cases where the judge thinks fees are too high and reduces them
  + The contingency agreement is signed by the litigation guardian and the lawyer

### Rule 8: Partnerships & Sole Proprietorships

**Partnerships: R.8.01-8.06**

Suing in the Partnership Name:

* **R.8.01(1)** a proceeding *by or against* 2 or more persons as partners *may* be commenced using the **firm name** of the partnership
  + Note: R. 8.01 is designed to deal with situations which are not between the partnership and one of the partners
  + Under “old rules”, all persons sued as partners in a firm name had to enter individual appearances (e.g. if suing a law firm, name all 52 partners. Now, can sue the firm name and the defence is in the name of the firm)
* **R. 8.01(2):** States that subrule (1) extends to a proceeding between partnerships having one or more partners in common
  + Thus, partnerships can sue each in their firm names if they have a partner in common
  + BUT, an individual partner cannot sue the partnership in the partnership name

Defence under Partnerships vs. Individual Defense:

* **R.8.02:** Where proceeding is commenced against a partnership using the firm name, the partnership’s defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with **leave** of the court. 🡪 An individual partner can defend separately with leave from the court

Others:

* **R.8.03:** providing notice to individuals of the partnership
* **R.8.05:** disclosure of partners
* **R.8.06:** enforcement of orders

**Sole Proprietorships: R.8.07**

**R.8.07(1):** Where a person carries on business in a business name other than his or her own name, a proceeding may be commenced by or against the person using the business name.

* This is a strange rule – it says you can proceed against the sole proprietorship in the business name (which is unusual because you should probably know who the individual is). What do you do with a judgment? A judgment in the name of “Jane’s Tutoring” isn’t that helpful – you want it in the name of the individual so you can enforce it (i.e. garnish wages, take bank account, etc.). Most people hold assets in their name, not the business name – so you want to commence the action against the individual.

### Rule 9: Estates & Trusts

* The non-living can sue or be sued through an **executor** (manages estate under will) or a **court-appointed administrator** (if no will).
* This is another way you can fall under a disability. We know a party has died, but can they still be sued? YES
  + You can sue, but you can’t dig down further than what would be known to the public (i.e. like with a business)
  + You don’t have to name the beneficiaries; you only name the name of the estate. This makes it simpler and more recognizable
  + Exception: where you’re suing on an issue regarding the estate itself (e.g. if X inappropriately dealt with things in the estate. Then you would have to name X)

**R.9.01(1) General rule**: A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries *without* joining the beneficiaries as parties

* + Must look at this whenever you have an estate matter – if you’re going after an estate, name the estate trustee (not the beneficiaries)
  + **Exceptions:** validity and interpretation of a will, against an executor (you name the individual then) **[R 9.01(2)]**
  + Problem: you know that “Bill Jones” owes you money, but don’t know who the individual is – so you name the estate and then go back and fix it **(see R.9.03)**

**R.9.02(1) Exceptions to general rule**: Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a **litigation administrator** to represent the estate for the purposes of the proceeding

* + This can occur in the middle or end of a proceeding. If this occurs, you have to continue the proceeding without them (continuity despite the status of the litigant). To do this, you have to appoint a litigation administrator.
  + Litigation guardian = person under disability
  + Litigation administrator = estate/trusts

**Remedial Provisions (R.9.03):**

* If a proceeding is commenced by or against the estate of a deceased person by naming “the estate of A.B., deceased” or the wrong personal representative is named, it is not a nullity
  + The rules allow you to fix it – the court will allow a change of the style of cause
  + Can also use this if you’re suing “Bill Jones”, but didn’t realize he died – once you realize, can correct it and put it in the name of the estate trustee
  + The remedial provisions are drafted such that you have to act reasonably (can’t sit on it) – the court can decide to dismiss your action (which is not likely, but you still must act expeditiously)
* **If you have a situation where someone is under a disability and they start a proceeding incorrectly, the rules of civ pro will allow you to correct this under R.9.03**
  + The purpose is to ensure that everyone’s interests are protected (whether a plaintiff or defendant)
* The court may order that it continue against the proper representative and the title may be amended

# COMMENCEMENT OF PROCEEDINGS

* Formal steps taken to begin litigation (action or application)
* **Originating process**: statements of claim [SOC], notice of action [NOA], and notice of application, application for the certificate of appointment of a state trustee, third party claim
* Title of proceedings will always refer to a plaintiff and defendant
* An application will refer to the applicant and respondent
* *Proceedings Against the Crown Act* & *Crown Liability Proceedings Act* provide direction on how the government is to be named in the proceedings
* Important to note the difference between things that must be served in person (e.g. statement of claim?) and things that may have notice given by mail (e.g. motion?)

Time: R.3

* Before we start a lawsuit, must make sure you’re within the timeframe to start it
* Limitation period = Often a 2-year limitation period
* Now looking at how lawsuit actually proceeds
* E.g. 20 days between getting served and filing statement of defence: We don’t include the day in which it was served (Jan 1), start counting on Jan 2, and then Jan 21 would be deadline
* E.g. If the period is >7 days, then it doesn’t matter whether Christmas falls in there (go to **R.1** to see what = holidays)

**R.3.01: Computation of Time**

* In the computation of time under the Rules or an order, except where a contrary intention appears,

(a) where there is a reference to a number of days between 2 events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words “at least” are used;

(b) where a period of 7 days or less is prescribed, holidays shall not be counted;

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday.

* **R.1.03** lists and defines holidays (note: Saturdays and Sundays are considered holidays)

**R.3.02(1): Extension or Abridgement of Time**

* **General powers of the court - R.3.02(1):** Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
* **When you can bring a motion to extend time - R.3.02(2):** A motion for an order extending time may be made before or after the expiration of the time prescribed.
  + - Based on “*nunc pro tunc*” concept: now for later
      * You get it when you’re already out of time and you ask the court to approve something
    - Considerations are “asking permission” vs. “begging forgiveness” – both are allowed under the rules
      * Asking permission – if you know you’re not going to get it done in time, then you can ask for permission beforehand
* Example - Motion: if defence had to be filed by Dec. 15 but it wasn’t done on time, you can go before the court and ask permission to file it later (after Dec. 15). Must give a good reason to persuade them (e.g. other side knew it was coming, no one was prejudiced by it, etc.)

Issuing & Filing of Documents: R.4

**Issue** – initiating a process; open a court file (initiating process = SOC or application)

* + “issue a statement of claim”
  + “issue an application”
    - A document may be issued on personal attendance in the court office by the party seeking to issue it or by someone on the party’s behalf unless these rules provide otherwise **[R 4.05(1)]**

**File** – add to a process/file (not starting a new process i.e. it’s already issued); put something in a court file

* + “file a statement of defence”
  + “file a motion”
    - The following requirements govern **the place of filing of documents in proceedings**, unless the documents are filed in the course of a hearing or these rules provide otherwise:

1. All documents required to be filed shall be **filed in the court office in which the proceeding was commenced**, subject to 2,3, and 4
2. If proceeding is **transferred**, file in new county
3. An affidavit, transcript, record or factum for a hearing shall be filed in the court office in the county **where the hearing is to be held**
4. Documents re transfer motion filed in “new” county **[R 4.05(2)]**

* Any document, other than one that is to be issued, may be filed by leaving it in the proper court office or mailing [or faxing] it to the proper court office, accompanied by the prescribed fee **[R 4.05(4)]**
  + Even though you can mail it in, people usually just bring to the court because mailing wastes time

Issue vs File Example: You don’t issue a statement of defense, you file a statement of defense because the action has already been initiated, you’re just adding to it. Issuing is initiating a process, whereas filing is adding to it.

Originating Process: R.14

Two types of civil proceedings:

* 1. Actions
  2. Applications
* Most of the time, you’re dealing with actions 🡪 90% of the exam questions will be in the context of actions. Applications are rarer and are generally dealing with one-off things that just need one thing done and then they’re over.

**“Originating Process”:** means a document whose issuing commences a proceeding under the rules and includes **(a)** a statement of claim **(b)** a notice of action **(c)** a notice of application **(d)** an application for a certificate of appointment if an estate trustee **(e)** a counter claim against a person who is not already party to the main action, and **(f)** a third or subsequent party claim, but does not include a counterclaim that is only against persons who are parties to the main actions, a cross claim or a notice of motion **[R 1.03]**

**“Action”:** a proceeding that is not an application and includes a proceeding commenced by (a) statement of claim, (b) notice of action,(c) counterclaim,(d) cross-claim, or (e) third or subsequent party claim **[R 1.03]**

**ACTIONS:** Usual method for commencing an action is to *issue* a statement of claim (**R.14.03(1)**). If short on time, may *issue* a notice of action (**R.14.03(2)**). This gives 30 extra days in which a statement of claim must be *filed*.

* **R.14.08(2):** If proceeded with notice of action (NOA) + statement of claim (SOC), must *serve* SOC within 6 months from date notice of action was issued
  + When NOA issued, then you satisfied that deadline but now you have a new one. You have 6 months to serve SOC.
* If you don’t think you can serve them on time (i.e. they are gone or hard to find), can ask the court to serve another way or to ask for more time (under **R.3**)

**APPLICATIONS:** Application is commenced by *issuing* a notice of application (**R.14.05(1)**)

* Default is to commence an action (R 14.02), but plaintiff may commence an application in some circumstances
  + See **R 14.05(3)** 🡪 very specific example of when you can deal with issues by order of application
* Statement of claim and notice of application are both similar (i.e. they both are originating processes, they both start lawsuits, they both have to filed at the courthouse)
* Can also commence by an application for a **certificate of appointment of an estate trustee**

### Actions: R.14.02

**General Rule: Proceedings are by Action unless a statute or the Rules provide otherwise (R.14.02).**

* **R.14.05(3)** lists when to proceed by Application

**R. 14.06: Title of Proceeding** (process for how a title of proceeding is put together)

**(1)** Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

* + E.g. If one of the parties is a minor, list the litigation guardian

**(2)** In an **action**, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant.

* + Proceeding = John Smith (plaintiff) v Jan Doe (defendant).
  + Used to be called the style of cause, but it’s the same thing as title of proceeding.

**(3)** In an **application**, the title shall name the party commencing as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which it is made.

**R.14.07: How Originating Process Issued**

**(1)** Issued by the registrar’s act of dating, signing and sealing with the seal of the court and assigning to it a court file number.

**(2)** Copy of the originating process shall be filed in the court file when it is issued.

**R.14.08: Time for Service**

**(1)** SOC: Statement of claim shall be served within 6 months after issued

**(2)** NOA: Notice of action and the SOC shall be served together within 6 months after notice of action is issued

### Applications: R.38

**R. 38.01: Application of the Rule**

**(1)** Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under **R.14.05**, subject to subrules (2) and (3).

**(2)** Rules 38.02 and 38.09 do not apply to applications to the Divisional Court [exceptions for Divisional Court applications]

**(3)** Rules 38.02 and 38.12 apply to an application made under subsection 140(3) of the *CJA* **[vexatious proceedings]**, unless otherwise provided in rule 38.13 and subject to any modifications set out in that rule.

**R.38.02: To Whom Made** – Applications shall be made to a **judge.**

* Applications made to a judge because they’re a one-time thing, so it may be the only time it’s heard by the judge
* Exception: some statutes allow for applications to be made to masters

**R.38.03: Place and Date of Hearing**

**(1)** The applicant shall, in the notice of application, name the place of commencement in accordance with R. 13.1.01.

**(2)** At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications [but see exception for lengthy hearings].

* See **(1.1)** to **(4)** for other considerations

**R. 38.04: Content of Notice** - Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state:

**(a)** the precise relief sought; (i.e. I want him to tear down his fence)

**(b)** the grounds to be argued, including statutory provision or Rule relied on; and (i.e. because it’s blocking my view)

**(c)** the documentary evidence to be used at the hearing. (i.e. here are my affidavits, etc.)

* Notice of application is key to setting out the party’s case because there are no pleadings
* **Example:** (a) Respondent cannot change pricing during contracted period (b) terms of the contract and 14.05(3) (c) the affidavit from client setting out their side of story and the contract
* Why would you bring forth an application?
  + It makes considerable sense in the proper case from a commercial point of view, and also, in these days of protracted and expensive litigation, for a court to determine in a summary proceeding, if possible, an issue that might be determinative of the overall dispute, thus saving the parties the time, effort, and significant expense of what could be a lengthy trial. The line of cases that stood for the proposition that the court should not act in half-measures or in a bifurcated fashion should not be followed. These cases pre-dated the revisions to the Rules of Practice and must be read with caution and in light of the rule changes and the exigencies of modern-day litigation. Fragmentation of the trial and lack of finality were not evils in themselves in the context of an application, if the end result is to enable the parties to process their dispute more expeditiously and efficiently, and provided there are no material facts that require a trial for their disposition in relation to the fragmented issue and provided there is some reasonable prospect that the resolution of that issue may resolve the lis between the parties. Rule 38.10(1) of the Rules of Civil Procedure authorizes this approach, and it was appropriate to use it for the immediate case **(*EJ Hannafin Enterprises Ltd and Esso Petro Canada)***

**R.38.05: Issuing of Notice -** A notice of application shall be issued as per **R.14.07** before it is served.

**R.38.06: Service of Notice of Application**

**(1):** Notice of application must be served on all parties

* + Since notice of application is an originating process, service governed by **R. 16 and R. 17**

**(3):** The notice of application must be served at least 10 days before the hearing date (if notice served within Ontario)

* + If served outside, must be done within at least 20 days before the hearing date

**(4):** The notice of application must be filed with proof of service at least 7 days before hearing date

* + Time periods are usually much longer in reality

**R. 38.09: Material for Use on Application**

**(1)** The applicant shall,

**(a)** *serve* an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least 7 days before the hearing, on every respondent who has served a notice of appearance; and

* **“Factum”:** Statement of facts and the law and how the law applies to the facts 🡪 very important, 80% of cases are decided on the factum

**(b)** *file* the application record and factum, with proof of service, at least 7 days before the hearing, in the court office where the application is to be heard.

**R.38.09(2): Required Materials**

The applicant’s application record shall contain:

**(a)** Table of contents

**(b)** Notice of application

**(c)** All affidavits and other material served for use on application

**(d)** List of relevant transcripts of evidence in chronological order (not necessarily the transcripts)

**(e)** Copy of any other material in court file that is necessary for the hearing of the application

**R.38.09.1: Is Everyone Ready? – Confirmation of Application**

**(1)(a)** Applicant must confer or attempt to confer with other party and, **(b)** not later than 2 p.m. 3 days before the hearing date, fax or deliver confirmation to the registrar that the application is proceeding (Form 38B), and **(c)** send a copy of the confirmation of application to the other party by fax or e-mail

**(2)** If no confirmation is given, the application shall not be heard, except by order of the court.

**R.38.10: Disposition of Application**

**(1)** On the hearing of an application the presiding judge may,

**(a)** grant the relief sought or dismiss or adjourn, in whole or in part and with or without terms; OR

**(b)** order that the whole application or any issue proceed to **trial** and give directions as are just.

**(2)** Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial.

Limitation Periods

**Underlying Reasons for Limitation Periods:**

* We can advance at least four reasons why it is wise to have a rule of limitation:

1. Need for some degree of **certainty and finality** in planning of affairs.
   * The D is entitled to “peace and repose”—freedom from worry.
2. Concerns about the ability of participants to **recall** events that happened.
   * From a practical perspective, more difficult to litigate if more time passes (the state and quality of the evidence gets worse over time).
   * A “best before date” concept of litigation.
3. The idea of “**diligence**”—Ps should not sleep on their rights.
   * A reasonable degree of diligence is expected on the part of the P to assert their rights by getting the litigation started.
4. Concerns about **shifting judicial attitudes and standards** between the time of the event and the litigation.
   * Fears that decisions will be tainted by hindsight.

* **\*Missing limitation periods is probably the #1 source for litigator negligence in Ontario.**
* But note that this is not always the lawyer’s fault—the Ontario limitations regime had been criticized for being **poorly structured** and **difficult to navigate**. In response, a new one has been instituted since Jan. 1, 2004 (*Limitations Act, 2002*)—however, it is not free from difficulties (associate Chief Justice in *Grenier* said that law continues to be unclear).

**Limitation is a Defence:**

* Limitation is a **DEFENCE**, which means it must be **affirmatively pleaded as such**.
* It is up to the D in litigation to affirmatively plead in the **statement of defence** that the claim is being brought outside of the relevant limitation period.
* NOT up to the court to monitor.

### (a) Basic Principle: S. 4 = 2 years

* **Section 4** sets out the **basic limitation period of 2 years** 🡪 threshold issue
  + “Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered” (*Limitations Act, 2002*)
  + The P must sue within 2 years from the time that the claim is “**discovered**” (see section below).
* Under old regime there were different periods for different types of claims.
  + Under **s. 25** the *Limitations Act* sweeps away many (but not all) of the limitation periods in **other statutes**—there used to be different litigation periods for different regulated professions (doctors, firemen, nurses, etc.).
  + Nevertheless, under **s. 19 and the accompanying Schedule** to the *Act*, many limitation periods in various statutes remain **preserved**.
    - For example, s. 38(3) of the *Trustee* *Act* provides a different limitation period—expressly applies notwithstanding the *Limitations Act* under s. 19 and Schedule*.*

### (b) “Discoverability” of Claims: S. 5(1)

* **S. 5(1): Discoverability Principle**
  + Explains what constitutes “**discovery**” of claims—it builds off of **s. 4** (above).
  + Under s. 5(1), a claim is discovered **on the earlier of**:

**(a)** the day when the P **became aware** of the **material facts** (subjective); OR

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission

(iii) that the act or omission was that of the person against whom the claim is made, and

* + - * + Offending party’s identity 🡪 who P will sue

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

* + - * + This was not in the old statute, and effectively adds the ratio from *Pexeiro*, where litigation would not have been an appropriate course of action to the P because the injuries immediately sustained were too low to bring an action.
        + Note: ***Pexeiro***is the case that established the common law test of discoverability principle. It has since been codified.

**(b)** the day in which the P **ought to have been aware of the material facts** (objective)

* + - * The day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
  + The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). While the respondents knew of some injury, they did not know prior to June 1993 that the damage MP sustained as a result of the first accident was a herniated disc, and it cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was started within two years of the time when they first learned that they had a cause of action, it is not statute-barred **(*Peixerio v Haberman)***
* **S. 5(2):** **Presumption**
  + Imposes a presumption of the P’s awareness of the material facts under s. 5(1)(a) as of the date the act or omission occurred. Thus, the onus is on P to show that he/she did *not* know the “material facts” at time of event (injury, offending party, and litigation as an appropriate remedy).
    - “A person with a claim shall be presumed to have known of the matters referred to in section 5(1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 🡪 Therefore if the person is bringing the action outside of the limitation period you need to convince the court that a **reasonable person would not have discovered the claim until more than 2 years**
* **S.5(3):** **Imposes** **Demand Obligations**
  + “For every demand obligations created on or after January 1, 2004, the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made”.
    - This means that if someone fails to do something, say pay you money, the injury, loss, or damage is said to have occurred the day that payment was due

### Minors and “Incapable Persons”: s. 6 and 7

**Summary:** Under **s. 6** (**minors**) **and s. 7** (“**incapable persons**”), time (limitation period established by s. 4) does not run against them while they are not represented by a **litigation** **guardian**.

* **S.7(2):** A person is **presumed** to be capable unless proved to the contrary.

**Section 8** states that oncea litigation guardian is procured,time starts running as if the minor or incapable person is a regular plaintiff.

Under **s. 9(2),** a potential D can apply to have a litigation guardian **appointed** to a potential P (in order to get the litigation clock to start running against the P).

### Cannot Contract out of Limitation Provisions: S.22(1)

* **S. 22(1)** Parties **cannot contract out** of the statue’s limitation provisions.
  + The old statute allowed for this (“tolling agreements” to suspend or extend limitation period when negotiations in process), and the ON legislature has stated that they will amend this section to allow for it once again (by way of the *Access to Justice Act*).
  + New **s. 22(3)** allows litigants to suspend limitation period, but cannot shorten or exclude it
  + New **s. 22(5)** for non-consumer transactions, the parties can extend, shorten, extend or exclude the period

### Other Limitation periods, etc.

#### Acknowledgements and Impact on Limitation

**Section 13(1)**: “If a person acknowledges liability in respect of a claim for a payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property**,** the act or omission on which the claim is based shall be *deemed* to have taken place on the day on which the acknowledgement was made.”

#### Ultimate Limitation Period: [s. 15]

**15(1):** “Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by section 15(2).”

**15(2):** “Ultimate limitation period is **15th anniversary** of the day on which the act or omission on which the claim is based took place.”

* S.15(2) contains a “**long stop**” provision—even if the P did not, or ought not (using reasonable diligence), to have discovered the claim, he/she cannot bring a claim after 15 years from the time of the act or omission**.**
* But **exceptions (s. 15(4) below)** for minors, incapable persons, and situations where the D has willfully concealed the true state of affairs from the P 🡪 D cannot rely on long stop in these circumstances.

#### Periods that 2 years do not run: [s.15(4)]

“The limitation period established by subsection (2) does *not* run during any time in which,

(a) the person with the claim,

(i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and

(ii) is not represented by a LG in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

(c) the person against whom the claim is made,

(i) willfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or

(ii) willfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

* **Burden:** Theburden of proving that s.15 (4) applies is on the person with the claim **[s. 15(5)]**

#### Day of Occurrence: [s. 15(6)]

The day an act or omission on which a claim is based takes place is,

**(a)** in the case of a continuous act or omission, the day on which the act or omission ceases

**(b)** in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs

**(c)** in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

#### No Limitation Period: [s.16, s.17]

**S. 16:** There is no limitation period in respect of

**(a)** a proceeding for a declaration if **no consequential relief is sought**;

**(b)** a **proceeding to enforce an order of a court**, or any other order that may be enforced in the same way as an order of a court

**(c)** a proceeding to **obtain support under the *FLA*** or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of that Act;

**(d)** Revoked

**(e)** a proceeding under section 8 or 11.2 of the *Civil Remedies Act*, 2001

**(f)** a proceeding by a **debtor in possession of collateral** to redeem it;

**(g)** a proceeding by a **creditor in possession of collateral** to realize on it;

**(h)** a proceeding based on a **sexual assault**

**(h.1)** a proceeding based on any other **misconduct of a sexual nature** if, at the time of the misconduct, the person with the claim was a minor or any of the following applied with respect to the relationship between the person with the claim and the person who committed the misconduct:

(i) the other person had charge of the person with the claim

(ii) the other person was in a position of trust or authority in relation to the person with the claim

(iii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person

**(h.2)** a proceeding based on an **assault** if, at the time of the assault, the person with the claim was a minor or any of the following applied with respect to the relationship between the person with the claim and the person who committed the assault:

(i) they had an intimate relationship

(ii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person

**(i)** a proceeding to recover **money owing to the Crown** in respect of

(i) fines, taxes and penalties, or

(ii) interest that may be added to a tax or penalty under an Act

**(j)** a proceeding described in subsection (2) that is brought by,

(i) the Crown, or

(ii) a delivery agent under the Ontario Disability Support Program Act, 1997 or the Ontario Works Act, 1997.

**(k)** a proceeding to **recover money owing in respect of student loans, medical resident loans, awards or grants** made under the *Ministry of Training, Colleges and Universities Act, the Canada Student Financial Assistance Act or the Canada Student Loans Act*.

**S.17: Undiscovered Environmental Claims**

There is no limitation period in respect of an environmental claim that has not been discovered.

#### Contribution and Indemnity: S.18(1)

* For the purposes of s.5(2) and s.15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the *first* alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer’s claim is based took place.

#### Adding Parties – Limitation Period: S.21(1)

* If a limitation period in respect of a claim against a person has expired, the claim shall *not* be pursued by adding the person as a party to any existing proceeding.

#### Agreements to Extend Limitation Period – s. 22

**Limitation periods apply despite agreements**

**S. 22(1)** A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6), schedule D s.2.

**Exceptions**

**(2)** A limitation period under this Act may be varied or excluded by an agreement made *before* January 1, 2004.

**(3)** A limitation period under this Act, other than one established by **s. 15** may be suspended or extended by an agreement made on or after October 19, 2006.

**(4)** A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered.

**(5)** The following exceptions apply only in respect of business agreements (“business agreement” does not include an agreement with a consumer as defined by *Consumer Protection Act*)

1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.

2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4).

**Definitions**

**(6)** In this section,

* “business agreement” means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act*
* “vary” includes extend, shorten and suspend.

#### Rules re Transition: [s. 24]

Section 24 governs the transition from the old limitation regime to the new regime 🡪 intended to deal with cases that straddle the changeover date (i.e. cause of action before Jan 1, 2004, with litigation taking place after), and provide protection to Ps where the limitation period has suddenly been made shorter.

**(1) “former limitation period”** means the limitation period that applied in respect of the claim before **January 1, 2004**.

**(3)** **Former limitation period expired:** If the former limitation period expired before January 1, 2004, no proceeding shall be commenced in respect of the claim.

***Former limitation period unexpired***

**(4)** If the former limitation period did not expire before January 1, 2004 and if no limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, there is no limitation period.

**(5)** If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
2. If the claim was discovered before January 1, 2004, the former limitation period applies.

***No former limitation period***

**(6)** If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after January 1, 2004, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
2. If the claim was discovered before January 1, 2004, there is no limitation period.

### Other Acts – S.19

**Other Acts, etc**

**(1)** A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

**(a)** the provision establishing it is listed in the Schedule to this Act; or

**(b)** the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act

Pleadings (R. 25)

**Note:** There are no pleadings in an application—pleadings are only in an action and serve to define the issues between the parties in the litigation (it is the first document anyone will read in a piece of litigation).

* Pleadings in an action are documents that (*Rodaro v Royal Bank*)
  + - define the issues,
    - make clear the case being advanced by each party,
    - outline the essential facts that the parties are relying upon,
    - show what is common or agreed upon by the parties,
    - serve a notice function, and
    - arguably serve as a legal filtering method.

### What are Pleadings?

**R.25.01(1): Action Commenced by Statement of Claim (SOC) or Notice of Action (NOA)**

In an action commenced by statement of claim or notice of action, pleadings shall consist of

* 1. **Statement of claim** (Form 14A, 14B or 14D)
     + Consist of a general heading
     + Tells D that a legal proceeding has been commenced against them and how to find a defence or intent to defend 🡪D has 20 days if served in Canada
     + Tells the defendant that if they do not defend there may be judgment against them
     + Sets out the precise relief claimed and then set out the precise events giving rise to claim
  2. **Statement of defence** (Form 18A) and
     + Consists of general heading
     + The defendant admits X
     + The defendant has no knowledge of Y
     + Set out material facts in defense
  3. **Reply** (Form 25A), if any.
     + Not much different if we are speaking about a counter claim, cost claim or third party claim
     + The plaintiff admits X
     + The plaintiff denies Y
     + The plaintiff has no knowledge of W
     + Set out material relied on to reply to statement of defense
     + **Where a reply is necessary (rare, allowed only in (1) or (2))**

**(1)** **Different Version of Facts:** A party who intends to prove a version of the facts different from that pleaded in the opposite party’s defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim **[R 25.08(1)]**

**(2)** **Affirmative Reply:** A party who intends to reply in response to a defense on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issued that has not been raised by the previous pleading *shall* deliver a reply setting out that matter, subject to sub-rule 25.06 (inconsistent claims or new claims) **[R 25.08(2)]**

**(3)** A party shall not deliver a reply except where required to do so by subrule (1) or (2)

### Time for Delivery of Pleadings: [R 25.04]

Sets out rules regarding timing for each stage of pleadings:

**(1)** **Statement of Claim (SOC) 🡪** 6 months after the SOC is issued **[R 14.08(1)],** If action is commenced by a notice of action, both NOA and SOC must be served together within 6 months after NOA issued **[R 14.08(2)]**

**(2)** **Statement of Defence (SOD):** within 20 days after service of statement of claim if served in ON **[R 18.01(a)]**, if served in Canada or USA 40 days **[R 18.01(b)]**, if served elsewhere 60 days **[R 18.01(c)]**

**(3)** **Reply:** A reply, if any. If a normal SOD 🡪 reply delivered within 10 days of service of SOD. If D counterclaims 🡪 reply and defence to counterclaim to be delivered within 20 days of service of SOD.

(4) In a **counterclaim**, the time for delivery of pleadings in a counterclaim is prescribed by **R. 27**

* P has 20 days to deliver reply and defence to counterclaim

(5) In a **crossclaim**, the time for delivery of pleadings is prescribed **R. 28**

(6) In a **third party claim**, the time for delivery of pleadings is prescribed by **R. 29**

### Role of Pleadings:

The role of pleadings depends on the judicial system that they are a part of

* In UK there is very little pre-trial discovery and therefore pleadings are very important
* In the USA the pleadings do not necessarily tell as much because of pre-trial discovery
* In Canada more mixture

Pleadings are the first thing that the judge will read and you want to create a favourable impression of the case and want to be persuasive (however do not over state case)

* Need to be concise, in settlement disputes you want to have an idea what you will settle for
* May help you succeed and ‘scare’ someone into settling, do not be hostile

Role in setting parameter of case 🡪 Trial judges are not entitled to find liability on basis not pleaded by the plaintiff 🡪 **Fundamental to litigation process that lawsuits be decided within *boundaries* of pleadings, a party cannot win on the basis of something that has *not* been pleaded (*Rodaro v Royal Bank of Canada)***

* *Rodaro v. Royal Bank (2002 C.A.)*: As part of loan agreement (RBC) P allowed to pursue repayment after loan defaulted. Went to trial. P lost on all grounds except one. CA - you hadn't plead that one issue you won on, and overturned decision. Law has to be decided within the boundaries of what's pleaded. But this doesn't mean can never amend or always have to amend whenever something new comes up. What's important is other side knows the basis of your claim and they have notice. Here, P had notice for many years what other side was suggesting were the facts.
* For this reason you want to cover all the basis in the pleadings just in case 🡪 Example: In a claim involving a car crash, say that the D was drunk, high, speeding, putting on makeup, etc. to cover all possible bases. If don’t plead,

Critical Purpose of Pleadings:

* The pleadings make clear what claims are being advanced by each of the parties (key facts that are alleged)
  + Allow parties to evaluate the extent to which they agree/disagree
* Pleadings also serve a **notice function** in respect of the case being advanced against a party (procedural fairness), as well as an **efficiency function** (show parties what claims are going to be made so that they can be prepared to respond)
* Pleadings also provide a kind of “**legal filtering**”
  + They are not written in the same way the client explained the story to the lawyer, but the lawyer “recasts” that story in different language, order, and form. However, some concerns about things being lost in translation

Strategic Issues with Pleadings:

* The pleadings must be **persuasive**
  + The first documents that a person will read about the litigation are the pleadings – critical to make a strong first impression
  + Document should tell a compelling story that leaves the reader w/ favourable first impression of your client
  + Pleadings are an advocacy document so they must convey the merits and the justice of case
  + It should be presented in a clear, organized, and direct style (headings, etc.).
* Defendants have many tools at disposal to delay proceedings by attacking the sufficiency of pleadings
* Pleadings play a vital role in the **settlement** of litigation
  + A well-drafted pleading shows competence on the part of the preparing lawyer
  + Poorly drafted pleadings are open to attack and may cost a party its case
  + Because of the role in settlement, the tone of pleadings is very important—should be written in a cool, measured style (no inflammatory language, etc.).
* Pleadings **set the parameters/scope** for gathering evidence pre-trial and what evidence is tendered at trial
  + Party will *not* be able to admit at trial evidence that is irrelevant/inconsistent with pleadings
    - E.g. in personal injury, a Plaintiff lawyer will often say in all statements of claim that other driver was drunk, high, eating, talking etc. on the cell. Strategically, would have to write in such a way or wouldn't be allowed to ask on evidence if not alleged during pleadings 🡪 need to think outside the box.
* A judge cannot resolve a case on the basis of a “novel theory” [***Rodaro v Royal Bank***].
  + I.e. A party cannot win on the basis of something that has not been pleaded

### Rules of Pleadings: [R 25.06]

[Applicable to all pleadings]

**25.06(1) Fact disclosure**

Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but *not the evidence* by which those facts are to be proved.

* Material fact vs Evidence: Elvis left the building at midnight (material fact) vs the manager noticed E left the building at midnight (evidence) 🡪 The court struck out a defence that contained both evidence and argument (*Jacobson v Skurka*)
* **Material facts fall into 4 categories** - Elements of a pleading
  1. Explain who the parties are
  2. Identify event giving rise to claim 🡪 car crash? Slip?
  3. Identify why each party is being sued (details) 🡪 what have they done or failed to do: driver crashed car? City didn’t remove snow?
  4. Provide details of damages suffered and the ensuing losses 🡪 list of injuries (impairments? Missed work?)
* Similar Fact Evidence: This is evidence that establishes the conditions under which factual evidence of past misconduct of accused can be admitted at trial for the purposes of inferring that the accused committed the misconduct at issue 🡪 **Similar fact evidence is properly pleaded** so as long as the added complexity does not outweigh the potential probative value (*Garwood Financial Ltd v Wallace)***🡪** party did something in the past, so likely to do it again
* Minimal Level of Material Fact: **R 25.06(1)** **requires a minimum level of material fact** if level is not reached, the **remedy is a motion to strike** out the pleading rather than a motion for particulars *(Copland v Commodore Business Machines Ltd)***🡪** in this case court found in favour of D, holding P’s pleading didn’t disclose a sufficient level of material fact
  + The pleadings need to contain sufficient detail so opposite party and court can understand the case to be tried and the opposite party can respond, knowing the case that has to be met 🡪 keep the purpose of the pleading in mind
  + If pleadings too complex/dense vs too sparse, can be challenged.
  + Shouldn't be pleading anything that you cannot prove. When in doubt, use broader language 🡪 don't be so specific that you can't prove it E.g. right hand vs hand vs grabbed the Plaintiff

**R.25.06 (2) Pleading law**

**“**A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.”

* + Statutory provisions that may take a party by surprise should be pleaded (*H.E.P.C. Ont v St Catharines*)
  + E.g. party cannot say “I want a $1M because D breached the standard of care”—they have not pleaded any material facts
  + Think: what do I have to show a court in order to win a claim in contract, tort, etc., then include material facts to support the elements of the offence (i.e. material facts support legal pleadings).

**R. 25.06(4): Inconsistent Pleading/Pleading in the Alternative**

“A party *may make inconsistent allegations* in a pleading where the pleading makes it clear that they are being pleaded in the alternative.”

* + A party is entitled to plead in the alternative, provided they do so expressly (because pleadings are filed at a time when parties are not aware of all the facts). Sometimes, the lawsuit itself will be the vehicle to determine what happened, because the party will not be able to find out on their own (medical negligence claims, etc.).

**Example: Alternative Pleadings**

1. The Defendant specifically denies that the Plaintiff has suffered the injuries and damages as alleged. In the alternative, if the Plaintiff did sustain damages, same are excessive, exaggerated and too remote to be recoverable at law. Also in the alternative, the Defendant pleads that the complaints of the Plaintiff are referable to a pre-existing condition, or a condition which has no causal connection with such injury, or to traumatic complaints relating to circumstances other than as a result of the collision pleaded.

2. The Defendant state that if the Plaintiff has suffered injuries that constitute a permanent serious impairment of an important physical, mental or psychological function, as defined in Regulation 381/03, which is not admitted but specifically denied, the Defendant pleads that he entitled to be credited to the extent of all collateral benefits received by or available to the Plaintiff...

**R. 25.06(5): Inconsistent Pleading in the Reply**

“An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall *not* be made in a subsequent pleading but by way of amendment to the previous pleading.” 🡪 amend previous pleading instead

* + *Ottawa Triple “A” Management Ltd. v. Ottawa (City), [1998]:* Reply has to be last document so if it raised new allegations, opposing party wouldn’t have opportunity to respond 🡪 that’s why Instead, raise it through an amendment to the previous pleading
  + Speculative Pleadings Example: The Plaintiffs plead that the collision and resulting damages were caused as a result of the negligence of the Defendant, particulars of which are as follows: (a) Being an incompetent driver on the occasion in question, lacking in reasonable skill and self-command and who ought not to have attempted to operate a motor vehicle; (b) Driving without maintaining a proper or any lookout; (c) Failing to have the motor vehicle he was operating under proper control; (d) Driving at a high rate of speed, having regard to the road, weather and traffic conditions; (e) Driving a motor vehicle with defective brakes, windshield, headlights and steering equipment; (f) Failing to apply his brakes in time to avoid a collision; and, (g) Applying his brakes improperly
    - You can do this because at the beginning of the case you don’t know which argument will be successful

**R.25.06(7): Pleadings Documents or Conversations**

“The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material” 🡪 **can paraphrase,** but quoting exact language in pleading can be effective as well

* + E.g. Pleadings are just to set out the parameters, so it’s sufficient to say there was a contract without its exact words stated
  + A SOC is deemed to include documents incorporated in it by reference and which form an integral part of the plaintiff’s claim *(Montreal Trust Co)*

**R.25.06(8): Nature of Act or Condition of Mind**

“Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.”🡪 **Don’t have to plead *why* a party knows something**

* Where a party alleges fraud**,** particulars of the specific facts that in law are required to constitute fraud must be pleaded. Fraud should not be alleged for tactical purposes (*Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc (1997)*)
* There was a concern here that parties would begin pleading fraud as a boiler plate 🡪 this provision says if you are alleging that an act was fraudulent you need to specify what is fraudulent a

**R.25.06(9): Claim for Relief**

Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

**(a)** the amount claimed for each claimant in respect of each claim shall be stated; and

**(b)** the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than 10 days before trial.

* + **General Damages =** Not capable of precise monetary quantification (e.g. pain, suffering) 🡪 judge/jury decide
  + **Special Damages** = Precise, pecuniary amounts, need to be specifically proven 🡪 ex. Cost of wheelchair
  + Egregious Damages = Punitive Damages
    - As such, it is best not to specify between special/general damages at all—instead plead what the P wants money in respect of (e.g. seeking $200,000 for pain and suffering, $100,000 for loss of future earnings, etc.)
  + If P does not know exact amounts at time of pleading, can estimate or leave it until trial.
  + P can also make claims for costs, prejudgment interest, and post-judgment interest, but this is not necessary as the P can be awarded them even if they are not claimed.
  + Boilerplate: End the damages requested section with “Anything else the plaintiff later requests and the deemed court views as just.”
  + The statement of claim (Form 14A) must begin with claim that the party is pleading (1st para.)
  + Party should particularize the different aspects of claim to the extent that it is possible—makes it clear how party arrived at overall damage claim.

### Defences to a Pleading (SOD)

**R.25.07: Rules of Pleading Applicable to Defences**

**(1)** **Admissions** – In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute.

**(2) Denials** – Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact.

* Form 18A (SOD) requires the same thing as 14A (statement of claim)—D must begin statement of defence with these admissions or denials 🡪 Example: D admits allegations contained in paras XX-XX. The D denies the allegations contained in paras XX-XX (i.e. usually para 1 where they ask for money or whatever). The D has no knowledge of the info contained in paras XX-XX.
* It is likely that you will be denying everything, **however a single word in a pleading can determine whether a D will deny or accept a claim** (Ex. “D hit P with car” vs. “D violently hit P with car”) 🡪 difference between admitting accident and admitting characterization, so be careful of the language/descriptors you use
* Since everything you don’t deny is assumed to be admission, lawyer will often draft pleading saying that except what is specifically admitted the D denies everything to protect themselves
* **R. 4** - tells you margin size, character size, use good quality white paper, etc.

**R.25.07(3): Different Version of Facts**

“Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party *shall* plead the party's own version of the facts in the defence.”

* + Can’t just deny what they say; must provide your version of the facts (i.e. must be pleaded affirmatively by D in SOD)
  + While it is permissible for the D to deny what the P has stated, the D cannot rely on his/her alleged version of the facts at trial unless it has been affirmatively pleaded in the SOD.

**R.25.07(4): Affirmative Defences**

“In a defence, a party *shall* plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.”

* + If D fails to plead an affirmative defence, cannot be relied on in trial.
  + **As affirmative defences are pleadings of law, they must be supported by material facts.**
    - E.g. If relying on statute of fraud, need to plead that. If there was lack of notice given, need to plead that. Contributory negligence, need to plead (example: “The P is in part responsible by not wearing the seatbelt.”)
    - If something comes up during course of proceeding, then can amend.

**R.25.07(5): Effect of Denial of Agreement**

“Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.”

* + When you deny an agreement in pleadings you are denying that the agreement [e.g. existence of contract] was made, not the legality of the agreement
  + If D denies an agreement, it is taken in law to mean that the D denies the existence of the contract or the making of the agreement (rather than a denial of the legality of that agreement). This is different than saying that the contract is invalid for any number of reasons (e.g. illegality), which would have to be specifically pleaded.

Applications: R. 38

Applications are different from pleadings. Whereas pleadings are used where it's a longer drawn-out litigation, applications are used for a **specific purpose**. It should be a persuasive document. Motions are similar to applications, but a motion is not an originating process. Motions are used within a litigation. Notice of application is a standalone proceeding.

**R. 38.04 Content of Notice:** Every notice of application shall state

(a) the precise relief sought;

(b) the grounds to be argued, including statutory provision or Rule relied on; and

(c) the documentary evidence to be used at the hearing

**R. 38.05 Issuing of Notice:** A notice of application shall be *issued* as provided by rule 14.07 *before* it is served.

**R. 38.06 Service of Notice 🡪** In ON – 10 days prior hearing date; Outside ON – 20 days prior hearing date.

**R. 38.07 Notice of Appearance:** A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A) 🡪 Must be filed “forthwith” (immediately)

**Material for Use on Application [R 38.09]**

**(1)** The applicant shall

**(a)** *serve* an application record, with a factum consisting of a concise argument stating the facts and law relied on, at least 7 days before the hearing, on every respondent who has served a notice of appearance; and

**(b)** *file* the application record and factum, with proof of its service, at least 7 days before the hearing, in the court office where the application is to be heard

* Can argue w/o a factum if judge consents to it, but rare.

**(2)** **Application Record -** The applicant’s application record shall contain:

**(a)** Table of contents

**(b)** Notice of application

**(c)** All affidavits and other material served for use on application

**(d)** List of relevant transcripts of evidence in chronological order (not necessarily the transcripts)

**(e)** Copy of any other material in court file necessary

**Confirmation of Application [R 38.09.1]**

**(1)** Applicant must confer or attempt to confer with other party, and not later than 2 pm 3 days before the hearing date, fax or deliver confirmation to the registrar that the application is proceeding.

**(2)** If no confirmation is given, the application shall not be heard, except by order of the court.

**Disposition [R. 38.10]**

**(1)** The presiding judge may,

(a) grant relief sought or dismiss or adjourn, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give directions as are just

**(2)** Where a trial of the whole application is directed the proceeding shall thereafter be treated as an action, subject to the directions in the order directing trial.

* The court refused to convert an application to an action notwithstanding that several trials of issues could be necessary. Fragmentation of trial may be permissible if the end result is to enable the parties to process their dispute more expeditiously and efficiently (*E.J Hannafin Enterprises Ltd v Esso Petroleum Canada (1994)*)
  + Usually, court doesn’t like fragmented processes, but there is that option.

Constitutional Questions: *CJA* s. 109

***CJA* s. 109**: Establishes formal system of notice to the AG (Form 4F) where there is a constitutional question.

**(1) Notice of Constitutional Questions:** Notice of a constitutional question shall be served on both the AG of Canada and the AG of Ontario where:

1. The constitutional validity or applicability of an *Act* of Parliament or Legislature of a regulation or by-law or a rule of common law is in question
2. A remedy is claimed under s.24(1) of the *Charter*

**(2) Failure to give notice** 🡪 then no finding of invalid or inapplicable or no remedy.

* Sanction for failure to give notice is nullification of proceedings—cancels remedy (no prejudice requirement) 🡪 if don’t give appropriate notice, there can’t be a valid finding.
* This is confirmed by ***Paluska v. Cava* (2002):** where the moving party failed to provide the Crown with the Notice of Constitutional Question as required by s. 109(2) the order made was declared invalid

**(2.2)** **Timing of Notice:** Served as soon as circumstances known and, in any event, at least 15 days before the day to be argued.

**(3)** Must notify AGs again at each level of appeal.

**Rationale for the rule**: concerns that constitutional questions would be resolved without input from government; parties may not be too interested in the constitutional question and not present full evidence to the court, or concede the point.

* Government doesn't want constitutional questions argued without input from government. They want notice of it, but AG doesn't usually care, just want to monitor.
* Generally in civil litigation, won't run into constitutional law questions too often.

# JOINDER

General Principles

The questions is asked what, if any, issues should be tried together 🡪 **consolidation:** it is usually the D that goes to consolidate, the court does not need to order that the trials are heard at the same time, they can be heard one after another (but usually at the same time)

**What is “joinder”?**

* “To join” – take separate things and put them together 🡪 In ON we have a liberal definition of what actions can be tried together within the same action (combining multiple parties, claims, issues into the same proceeding) 🡪 Why? Access to Justice 🡪 Joinders keep costs low and when we have 1 trial time is reduced as well (can also avoid vexatious proceedings as well)
* Joinder is important at the beginning of litigation (i.e. determining the acceptable range of P and D’s claims), but also at subsequent stages (e.g. amending proceedings by adding parties, etc.)

**CJA, s.138: Multiplicity of Proceedings**

General Rule: “As far as possible, multiplicity of legal proceedings shall be avoided.”

* + The courts prefer one proceeding over multiple proceedings
  + Reason: cheaper, more efficient, and avoidance of inconsistent findings of fact on the same incident (which brings the justice system into disrepute)

**CJA, s.139(2): Joint liability not affected by judgment or release**

**(2)** Where a person who has suffered damage brings two or more proceedings in respect of the damage, the person is not entitled to costs in any of the proceedings, except the first proceeding in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one proceeding.

* + You only get costs for first proceeding unless reasonable grounds for bringing more than one proceeding
  + Incentive to have joinder

Kinds of Joinder: R.5

1. Joinder of Claims: different claims but same parties
2. Joinder of Parties: different/multiple parties but same claims

**Joinder of Claims**

**R.5.01 (1)** A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

* + P may advance any claims against the D in the same proceeding 🡪 Claims do not have to have any factual connection whatsoever—e.g.: can sue D for battery, wrongful dismissal, and breach of contract in same action

**(2)** A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

* + E.g. can bring multiple claims against different parties in one action

**(3)** Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

* + E.g. can sue one D for breach of contract, another D for assault, and another for defamation—do not have to make same allegations against each D
  + *Richmond v North American Life Assurance Co (1998):* Plaintiff sued including claims of wrongful dismissal and also wanted to pursue claims of defamation. **Combination of two types of claims in one lawsuit permitted 🡪** “The prohibition against joining a claim for wrongful dismissal is not longer valid. Requiring separate trails would be unfair and would impose all unnecessary financial strains on litigants.”
    - Joinder of Claims is often seen in wrongful dismissal claims, again focus is on access to justice

**Joinder of Parties**

**R.5.02: Joinder of Multiple Plaintiffs or Applicants**

**(1)** Two or more persons who are represented by the **same lawyer of record** may join as plaintiffs or applicants in the same proceeding where,

**(a)** they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

**(b)** a common questions of law or fact may arise in the proceeding; or

**(c)** it appears that their joining in the same proceeding may promote the convenient administration of justice.

This was done in ***Bath v Birnstihl* (1975**), where over 100 plaintiffs fit into rule to sue a holiday vacation company—prior to class action legislation

* + **Facts:** Plaintiffs were customers of two tours. Defendants were tour promoters and travel agents who sold the tours. Action for breach of warranties and representations.
  + **Cause of Action:** Appeal from order of Master
  + **Held:** This was a proper joinder of plaintiffs and defendants as there were sufficient common and similar questions, and to split up the action would cause repetition, expense and great delay. There were common questions of law and fact and the claims arose out of the same series of transactions or occurrences.

**R.5.02: Joinder of Multiple Defendants or Respondents**

**(2)** Two or more persons may be joined as defendants or respondents where,

**(a)** there are asserted against them, whether jointly, severally or in the alternate, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

**(b)** a common question of law or fact may arise in the proceeding;

**(c)** there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

* E.g. where you contracted with someone who is signing under their name personally but also their corporation and you are not sure which one you are contracting with

**(d)** damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; **OR**

**(e)** it appears that their being joined in the same proceeding may promote the convenient administration of justice.

* Broader than joining plaintiffs: with Ps, need to have same solicitor of record, but **having same solicitor not needed for joining Ds**

**R.5.03: Joinder of Necessary Parties**

Apply by going through the test:

**(1)** Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding *shall be joined* as a party to the proceeding.

* + Court can do it of its own motion
  + **Note**: mandatory joinder is not used very often because it interferes with party choice/freedom

**(2)** A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.

**(3)** In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

**(a)** the assignment is absolute and not by way of charge only; and

**(b)** notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.

* “**Debt assignment**”: A legal transfer of a debt account from a creditor (assignor) to a third-party (**assignee**) that then becomes the rightful owner of the account for purposes of resolving the debt through collection from a debtor.

**(4)** The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party. (court adding party that should have joined or needed now)

**(5)** A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a *plaintiff or applicant* shall be made a *defendant or respondent*.

* + Rare to have mandatory joinder – prefer to have parties make the choice. See in **R. 5.04**
  + If person is supposed to be a P but refuses, and presence is needed in order to be bound, court can join that person as a D or respondent [under **R. 5.03(5)**] (This was above too)

**(6)** The court may by order relieve against the requirement of joinder under this rule.

* + Examples of mandatory joinder:
    - As a general rule, if a debtor has incurred a single obligation to a creditor (i.e. one borrowing of money), he or she should not be subject to multiple proceedings in respect of that debt obligation
      * Letting debtor to be sued more than once would be abusive
    - If D commits trespass to chattel that is jointly owned, all joint owners must be Ps for recovery
      * If one owner refuses, he or she will be joined as a D under mandatory joinder **[R. 5.03(5)]**

**R.5.04: Misjoinder, Non-Joinder and Parties Incorrectly Named**

**(1)** **Proceeding not to be Defeated** – No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

* + failing to get mandatory joinder required by R.5.03 does NOT defeat validity of proceeding 🡪 court will determine issues in dispute so far as they affect parties before it, as best it can

(2) **Adding, Deleing or Substituting Parties** – At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

(3) **Adding Plaintiff or Applicant** – No person shall be added as a plaintiff or applicant unless the person’s consent is filed.

**R.5.05: Relief against Joinder**

Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

**(a)** order separate hearings;

**(b)** require one or more of the claims to be asserted, if at all, in another proceeding;

**(c)** order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest

**(d)** stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

* + - Condition: must be bound by the findings of fact

**(e)** make such other order as is just.

**R.6.1.01: Separate Hearings**

With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

* + This is where you would bring a motion for a bi-frication, this motion would be done well in advance of trial
  + You would ask for this if you wanted judge to decide liability and jury to decide damages
  + The courts generally do not want to allow this. Not allowed if any party objects.
* See also **R 6.01 –** where order may be made for consolidation or hearing together

***Res Judicata* and Issue Estoppel**

* ***Res Judicata*** is a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.
* **Issue estoppel** is a species of *res judicata*. It applies where an **issue** in a cause of action was decided in a previous action. It must be a finding that is fundamental to the outcome of the decision, so fundamental that if a different conclusion had been reached on the **issue**, the outcome would have been different.
* *Res judicata* and issue estoppel have at their core the aim of putting an end to litigation—they prevent an issue or claim from being re-litigated once a decision has been made (essentially can't re-litigate a matter that has been ended by court)
* Doctrines also cover issues that should have been raised by the P in the prior proceeding (e.g. P cannot sue D for an intentional tort, lose, and then sue for negligence - doctrine will say should have sued for that in original proceeding because it arises out of the same factual matrix).
  + Litigants are supposed to raise all the claims that they have in the one proceeding.
  + While joinder is permissive, the effect of *res judicata* and issue estoppel is to drive Ps and their lawyers to bring together all possible claims arising out of a factual matrix in one proceeding
  + In practice, it is a further basis for broad joinder. If Ps do not join their claims, could be prejudiced later due to *res judicata*.
* *Republic of India v. India Steamship Co. Ltd. (No. 2), [1998]:* **Facts:** In June 1987, a ship carrying munitions to the Indian Government had a fire. The Indian Government sued in India, the case went to trial, judgment was issued in favour of the Indian Government, the judgment was appealed. Before the appeal had been heard, the Indian Government sued in England. **Held:** HL considered whether the action in England could proceed for several reasons, two of which were types of estoppel:
  + Estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption:
  + Estoppel by acquiescence: the question is ". . . whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title to the property, to take steps to make that claim known..."

# SERVICE: R. 16 & 17

The Role of Service

1. **Notice\* -** Process by which to give noticeof the lawsuit to the parties **(R.16, R.17)** 🡪 how can you be sued if not given notice, can’t defend
2. **Jurisdiction** – establish the right of the court in that area to impact the parties

Different documents (originating process vs. others) require different service:

**Rules of Manner of Service [R.16.01]**

**(1) Originating Process:** An originating process shall be served personally as provided in rule 16.02 or, by an alternative to personal service as provided in rule 16.03.

* + Originating process – commences a proceeding under the *Rules of Civil Procedure*
    - 1. A statement of claim
      2. Notice of action
      3. Notice of application
      4. Application for a certificate of appointment of an estate trustee
      5. Counterclaim against a person who is not already a party to the main action
      6. Third or subsequent party claim, but not a counterclaim that is only against persons who are parties to the main action
      7. A crossclaim or a notice of motion
    - Any time that a person is notified that there’s an action against them (in all above forms), must be given notice in person
    - Notice of action: starting an action before you have all the facts

**(4) All Other Documents:** Any document that is not required to be served personally or by an alternative to personal service,

**(a)** ***shall*** be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in rule 16.05; 🡪 as soon as someone has a lawyer must serve their lawyer

**(b)** may be served on a party acting in person or on a person who is not a party,

**(i)** by mailing a copy of the document to the last address for service provided by the party or person or, if no such address has been provided, to the party’s or person’s last known address, or

**(ii)** by personal service or by an alternative to person service.

**(iii)** electronic document exchange

**(iv)** email if parties consent

Personal Service

**R. 16.02(1): Personal Service –** where a doc is to be served personally, the service shall be made

**(a)** **Individual** – on an individual other than a person under disability, by leaving a copy of the document with the individual.

* + Requires physical transfer of document into possession of individual (i.e. cannot leave in mail slot, etc.)— **case law**
  + There is also CL “tag” rule that suggests that if you can at least touch person with document, may be sufficient to constitute service (even if document falls to ground after)

**(c)** **Corporation** – on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

Also see provisions re: Municipality, Board or Commission, Person outside Ontario Carrying on Business in Ontario, etc. on pp. 491-2

Alternatives to Personal Service

**R. 16.03 (2)** **Acceptance of Service by lawyer**

Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer’s office, but service under this subrule is **effective** only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.

* + Solicitor must indicate which party or parties he is accepting service on behalf of (as P may be suing multiple Ds).
  + There is a chance that a lawyer will claim that their client will not allow the lawyer to accept service
  + “Deemed” does not have a literal meaning in this case—open for a client to show absence of actual authority for solicitor to accept service, even in face of the lawyer’s endorsement of document [*Royal Trust v. Dunn* (1991)]

**R. 16.03 (4) Service by Mail to Last Known Address**

Service of document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16A) by mail to the last known address of the person to be served, but service by mail under this subrule is only effective as of the date the sender *receives* the card.

* + This is almost never done – no one would sign a receipt card

**R. 16.03 (5) Service at Place of Residence**

Where an attempt is made to effect personal service at a person’s place of residence and for any reason personal service cannot be effected, the document may be served by,

**(a)** leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; *AND*

**(b)** on the same day or the following day mailing another copy of the document to the person at the place of residence,

* **Timing note**: service in this manner is only effective on the 5th day after the document is mailed **[R 16.03]**. This is problematic if you’re trying to serve at the last minute.
* This is used very often
* **Trigger for this rule**—party can only use this method of service if party has attempted to serve personally but failed [*TD Bank v. Machado* (1998)]

**R. 16.03 (6)** **Service on a Corporation**

Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Consumer and Commercial Relations, service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address.

* + **Trigger for this rule**—service may be made by mail only where office cannot be found. You will do a corporate search, and if you go there and the office is not located there, then you’re entitled to mail the document to them.
  + **Problem:** if they aren’t at that location, they probably aren’t doing operating anymore and a judgment would be useless.

**R.16.06 Service by Mail**

**(1)** Where a document is to be served by mail under these rules, a copy of the document shall be served by regular lettermail or by registered mail.

**(2)** Service of a document by mail, except under R 16.03(4) [which service by mail to last known address, which requires acknowledgement of receipt card], is effective on the 5th day after the document is mailed, but the document may be filed with proof of service before the service becomes effective.

* + Exception is under **R.16.03(4)**, which requires acknowledgment of receipt card – alternative to personal service.

**\*R. 16.05(1): Service on Lawyer of Record** may be made by:

**(a) Mail**

**(b) Delivery** – leaving a copy with a solicitor or employee in their office

**(c) Document exchange service**

**(d) Fax** – Timing: if served between 4pm and 12am, will be deemed to have been served on the following day; When faxing anything over 16 pages, can only fax between 4pm and 8pm (however you can get permission for exception)

**(e) Courier**

**(f) Email –** Timing: like faxes (d) 🡪 since there is no confirmation that they have received it, you must email the lawyer to ask them to confirm receipt

* These mechanisms are effective because they provide greater control for P over timing as service can be effected unilaterally (D cannot slow the process down, etc.)
* Note: Used a lot – once someone retains counsel, all other service goes to that solicitor
* Note: Each of these methods has their own rules though (i.e. timing- see notes above)

Proof of Service

**R. 16.09: Affidavit of Service**

**(1)** Service of a document may be proved by an affidavit of the person who served it (Form 16B).

* + Affidavits are almost always completed by legal assistants
  + Proof of service does NOT mean *receipt*; it just means you followed the rules
  + Also sworn document by process server 🡪 I served X at 2 pm on 02/02/2018. I knew it was X because she made admission to identity

Variations in Service

[This is what happens if you cannot serve the way the rules tell you to]

1. Substituted Service or Dispensing with Service
2. Relief where Document did not Reach Party
3. Relief from Strict Adherence

### (a) Substituted Service or Dispensing with Service

[\*Note: These are order sought before service has been made.]

**R. 16.04: Substituted Service or Dispensing with Service**

**(1)** Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service [only apply to these docs] under these rules, the court may make an order for substituted service, or where necessary in the interest of justice, may dispense with service.

* + E.g. If someone is evading service – you can go to the court and bring a motion to have the court dispense of service or substitute service

**(2)** In an order for substituted service, the court shall specify when service in accordance with the order is effective.

**(3)** Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules

* + Dispensing of service is rare; substitute is reasonably common
    - Only applies to docs that must be served personally or by an alternative to personal service
    - P must provide evidence of impracticality in order for court to grant order
  + Court has a number of creative options for substitute service—the key consideration is assessing the likelihood that the document will come to other person’s attention using method court orders as a substitute
    - E.g. If P does not know where D is, court may order P to serve on a close relative, spouse, etc. If P knows where D is but cannot serve them properly (a recluse, etc.), court may allow service by mail, posting to door, etc. Courts have even allowed public advertising as a substituted means of service.

### (b) Relief Where Document does not Reach Person Served

[\*Note: relief sought after service has been made]

**R. 16.07: Where Document Does Not Reach Person Served**

Even though a person has been served with a document in accordance with these rules, the person may show on a motion to set aside the consequences of default, for an extension of time or in support of a request for an adjournment, that the document,

**(a)** did not come to the person’s notice; or

**(b)** came to the person’s notice only at some time later than when it was served or is deemed to have been served.

### (c) Relief from Strict Adherence to the Rules

**R. 16.08: Validating Service**

Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

**(a)** the document came to the notice of the person to be served; or

**(b)** the document was served in such a manner that it would have come to the notice of the person to be served, except for the person’s own attempts to evade service.

* **Court is concerned with actual service**: if you made a mistake or something, but it gets served – court can validate
* Contrast with **R. 16.04**, where order made before service
* Court takes functional rather than technical approach under **R. 16.08**: considers whether the person being served was effectively served (received proper notice, etc.) despite the fact that P did not follow the rules for personal or alternative service (*Teskey*)

Timing of Service

**(i) Actions**

**R. 14.08 (1): Time for Service in Actions -** Where an action is commenced by SOC, the SOC shall be served within 6 months after it is *issued*.

* Consequences for failing to comply— link back to limitation periods
* If six-month period expires, P can start litigation over or request an extension under **R. 3.02** with same presumption of prejudice in favour of D (**test is *Aliferis***)

**(ii) Applications**

**Service of Notice -** The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions [**R 38.06 (1)]**. In ON – 10 days before date of hearing of application; Outside ON – at least 20 days before hearing date **[R 38.06(3)]**

* + When bringing an application (as opposed to an action), all facts are put in an affidavit, and the lawyer will appear in court and argue the affidavit – can be a much quicker process than an action (e.g. 6 months vs. 6 years)
    - E.g. Useful if you need an interpretation of a contract clause, and not asking for damages
  + If there are critical facts in dispute (or other issues arise), the judge can convert it to an action – in application there are no witnesses to give evidence

Service outside Ontario: R 17

**Service Outside Ontario**

**R. 17.01** sets out special rules for serving an originating process ex juris (serving outside of Ontario)

* These rules take priority over the more general service rules dealt with in **R. 16**
* Provides a slightly different definition of “originating process”🡪 In **R 17.02 - 17.06**, “originating process” includes a counter-claim against only parties to the main action, and a crossclaim.
* Note: not limited to originating processes (**R. 17.05**), however, practically, once originating process served, party outside Ontario will take solicitor of record in Ontario and **R. 16** take over

**Types of Service outside Ontario**

1. Without Leave
2. With Leave

### Service without Leave

**R. 17.02: Service outside Ontario without Leave -** A part to a proceeding may, without a court order, be served outside ON with an originating process or notice of a reference where the proceeding against the party consists of claims or claims specified in the rule, such as in respect of real or personal property in Ontario, tort committed in Ontario, against a person ordinarily resident or carrying on business in ON;

* See List 🡪 If party can fit claim under one of these “heads” you do not need a court order/leave of court to serve a D or respondent outside of Ontario
* Initially up to P to decide whether claim fits into one or more of the heads (unilateral decision, with no judicial assessment), and can then serve D outside Ontario 🡪 Issue of service without leave only comes up in trial if D raises an objection to service
* If facts raise several claims, P must fit all claims within a head of **R 17.02** or else will be required to seek leave of the court
* Must plead the provisions of **R.17** (the head of service) you are relying on in the SOC

### Service with Leave

**R. 17.03 Service outside Ontario with Leave**

**(1)** In any case to which **R 17.02** does not apply, the court may grant leave to serve an originating process or notice of reference outside ON

**(2)** A motion for leave to serve a party outside ON may be made *without notice* [to the other side], and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made.

* + Bring ex-parte motion (i.e. without notice to other side) to judge to get them to permit you to serve outside of ON, you will need to convince them that ON is the proper place for dispute to take place
  + **Test** at this stage is not particularly rigorous: just consider balance to parties etc. – court knows that D will have opportunity to object, so pretty generous in granting leave to serve outside ON; this is not last word on jurisdiction

### Challenging Service outside Ontario

**R. 17.06: Motion to Set Aside Service outside Ontario**

**(1)** A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

**(a)** for an order setting aside the service and any order that authorized the service [i.e. that ON court lacks jurisdiction]; *OR*

**(b)** for an order staying the proceeding. 🡪 I.e. While ON court has jurisdiction, it should stay proceedings in favour of more convenient/appropriate forum

**(2)** The court *may* make an order under subrule (1) or such other order as is just where it is satisfied that,

**(a)** service outside Ontario is not authorized by these Rules;

**(b)** an order granting leave to serve outside Ontario should be set aside; or,

**(c)** Ontario is not convenient forum for the hearing of the proceeding.

See also subs **(3)** and **(4)**

**Note:** No detailed examination as to merits of the P’s claim at this stage in litigation—P must only demonstrate “a serious question to be tried” (e.g. essentially whether a tort was committed or whether there was a contract)

Jurisdiction Issues (Challenging Jurisdiction)

Two Types of Jurisdiction:

1. **Jurisdiction simpliciter** = the assertion of jurisdiction against an out-of-province D

Three grounds for it:

**(i)** presence-based jurisdiction (whether the D is physically present in the jurisdiction at the time of service of the originating process

**(ii)** consent based jurisdiction (where the D attorns either by agreement or responding to the P’s claim); or

**(iii)** assumed jurisdiction (where the court takes jurisdiction on the basis of a **real and substantial connection** between the subject matter of the claim and the forum in which the claim is brought)

1. **Forum non conveniens** = allows a court to dismiss a case where another court or forum is better suited to hear case

*Club Resorts Ltd v Van Breda (2012 SCC):* Two Ontario plaintiffs attempted to bring action against Cuban resort that was incorporated in Grand Cayman. The SCC set out the **real and substantial connection tests** in which the party arguing that the court should assume jurisdiction has the **burden** of identifying a presumptive connection factor that links the subject matter of the litigation to the forum. In the test the court focuses on:

1) How closely is the subject matter of the P’s claim tied to Ontario, and

2) How closely is the D tied to Ontario

### Real and Substantial Connection Test (Jurisdiction Simpliciter)

1. **Does the court have presumptive jurisdiction?**
   1. The party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connection factor that links the subject matter of the litigation to the forum.
   2. Look at non-exhaustive list of presumptive factors, if any exists 🡪 presumptive jurisdiction 🡪 i.e. D is domiciled or resident of province; the D carries in business in province; the tort was committed in the province; or a contract connected with the dispute was made in the province
2. **Can the court’s presumptive jurisdiction be rebutted?**
   * This could be accomplished by establishing facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.
3. **If the court has jurisdiction (1= yes, 2= no),** **should it decline to exercise its jurisdiction in favour of a clearly more appropriate forum** **(*forum non conveniens*)?**

# RESPONDING TO A CLAIM

A defendant can respond to a claim in 4 ways:

1. Dismiss action by paying back P fully
2. Negotiate a settlement to not pay back everything
3. Ignore the claim (P often ends up winning by default)
4. Respond to a claim by mounting a defence

D pays the Claim

**R. 14.10: Dismissal of Action where D Pays Claim**

**(1)** Where the plaintiff’s claim is for money only, a defendant, on paying within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff’s claim and the amount claimed for costs, may on motion have the court dismiss the action.

* + Can pay the plaintiff, and just pay the costs number (or just dispute over the costs number)
  + This never happens – it’s more likely that you receive the SOC, then ask the other party to negotiate a settlement rather than having to issue a statement of defence

Release Example 🡪 legal instrument that acts to terminate any legal liability between the releaser and the release, signed by the releaser

FINAL RELEASE IN CONSIDERATION of the payment of the sum of amount of settlement (in words) DOLLARS ($amount of settlement), inclusive of all claims, interest and costs, which is directed by the undersigned to be paid to payee, In trust, THE UNDERSIGNED do hereby for themselves, their heirs, executors, administrators, successors and assigns release and forever discharge names of defendant(s) from any and all action, causes of action, claims and demands for upon or by reason of any damages, loss or injury, to person and property which heretofore has been or hereafter may be sustained in consequence of a motor vehicle accident which occurred on location of accident/incident on or about date of accident, and which is the subject of Ontario Superior Court of Justice Action No. court file # commenced at place where action started. AND FOR THE SAID CONSIDERATION it is further agreed not to make claim or take proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise. IT IS UNDERSTOOD AND AGREED that the said payment is not deemed to be an admission of liability on the part of the said names of defendants. AND it is hereby declared that the terms of this settlement are fully understood; that the amount stated herein is the sole consideration of this release and that the said sum is accepted voluntarily for the purpose of making a full and final compromise, adjustment and settlement of all claims for injuries, losses and damages suffered by the undersigned, resulting or to result from the said accident. WITNESS my/our hands and seals this day of month, 2018.

Delivery of Statement of Defence

**R. 18.01: Time for Delivery of Statement of Defence**

Except as provided in R 18.02 or R 19.01(5) (late delivery of defence) or 27.04(2) (counterclaim against plaintiff and non-party), a statement of defence (Form 18A) shall be **delivered,**

**(a)** Within 20 days after service of the SOC, where the D is served in ON.

**(b)** Within 40 days after service of the SOC, where the D is served elsewhere in Canada or US; or

**(c)** Within 60 days after service of the SOC, where the D is served anywhere else.

* “**deliver”** 🡪 service and file with proof of service **[R 1.03]**

**R. 18.02: Notice of Intent to Defend (10-day extension)**

**(1)** A D who is served with a SOC and intends to defend the action may deliver a notice of intent to defend (Form 18B) within the time prescribed for delivery of a SOD.

**(2)** A D who delivers a notice of intent to defend within the prescribed time is entitled to 10 days, in addition to the time prescribed by R 18.01, within which to deliver a SOD.

* + By delivering notice of intent within time period set in R.18.01 (above), D receives 10 additional days to deliver the SOD
  + Kind of like a notice of action: counts as originating process and as a claim before the main claim

(3)Subrules (1) and (2) apply, with necessary modifications to

(a)a D to a counterclaim who is not already a party to the main action and who has been served with a SOD and counterclaim; and

(b)a third party who has been served with a third party claim.

**See also:**

**R. 19: Default Proceedings**

* + Not good to file to early. For example, if you note someone in default too quickly but then work something out with the insurer (who is actually paying), they will want the default undone (which is a big hassle)

**R. 19.01(5): Late Delivery of Defence** – A D may deliver a SOD at any time before being noted in default under this rule.

* + D will commonly deliver a notice of intend to defend with a letter to P’s lawyer requesting additional time to prepare SOD and requesting that the P not note the D in default
    - If P agrees not to note D in default, the D may take extra time to deliver SOD
    - However, it is equally typical for the P to deny the D’s request (seeking to move the case through ASAP)
    - Very few cases (only the simplest ones) will move through in 30 days (20 days + 10 days)
* The parties’ lawyers may formally agree to some deadline other than those provided within the Rules (acceptable because Rules do not stipulate the consequences of going over time for delivering SOD)

Request for Particulars

“**Particulars**” = a detailed, formal written document by the P elaborating on the pleadings and adding factual detail upon the D’s formal request (so that the D may properly respond to SOC)

* If a SOC makes a non-specific allegation, D can ask for a further explanation/details so you can properly plead the appropriate defence
* Particulars must be requested early in the litigation; often happens when the proceedings are very complex

**R. 25.10: Request for Particulars**

Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within 7 days, the court may order particulars to be delivered within a specified time.

* + R. 25.06(1) requires a minimum level of material fact disclosure—if this level is not reached, the remedy is a motion to strike out the pleading rather than a motion for particulars (*Copland*) 🡪 In *Copland*, there were so many defects that the motion was struck out.
  + If SOC is generally decent, a request for particulars may help

Considerations

* **Tactical Considerations:** Request for particulars may assist the P streamlining the claim, making it more persuasive. D may want to leave it unclear so P has difficult time making their case.
  + Asking for particulars is appropriate where facts are complicated and there is technical info
  + Courts may err on side of P where parties later argue as to meaning of a vague allegation—that D should have asked for particulars; D will be stuck with pleading as written.
* **Jurisdictional considerations**: concerns regarding attornment if jurisdiction is to be challenged
* **Timing considerations:** Request for particulars also stops the clock on time for issuing SOD, so can buy more time to prepare defence

**R. 2.02: Attacking Irregularity** 🡪What happens when you want particulars but don’t say anything/wait too long?

A motion shall *not* be made, except with leave of the court

**(a)** after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or

**(b)** if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity

* + *Six Nations of the Grand River Band v Canada (AG):* On the issue of timing of particulars, these may be cases where the complexity of the litigation requires that particulars be ordered during the discovery process in order to enable a party to prepare for trial. Such particulars were ordered in this case 🡪 Court accepted the case management judge’s use of discretion because he was intimately familiar with case and the case was very complex
  + *Physicians Services Inc v Cass:* **TEST --** Particulars for the purposes of pleadings will be ordered only if: **(1)** they are not within the knowledge of the party demanding them and **(2)** they are necessary to enable that party to plead
  + *Spiers v Zurich Insurance Co*

Requirement of a Defence

**R. 25.07 Rules of Pleadings – Applicable to Defences**

**(1):** **Admissions –** Admit every allegation of fact in the opposite party’s pleading that the party does not dispute.

**(2):** **Denials –** Subject to subrule (6), all allegations of fact that are not denied in a party’s defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of that fact.

**R. 23.07(3)** **Different Version of Facts** – Where a party intends to prove a version of facts different from the pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party’s own version of the facts in the defence.

* + Tell your separate version of the facts in the statement of defence
* See also subs **(5)** and **(6)**
* Must go through the SOC and indicate whether you admit, deny, or have no knowledge of each allegation of fact

Counterclaim

* D can also counter with other kinds of claims – each is a separate claim/cause of action
* There are clear reasons for allowing D to bring claims rather than starting new litigation as a P: concerns re: courts’ resources, time, inconsistent findings of fact, etc.
  + Court favors combination of claims into single proceeding
* A counterclaim may be either against one or more of the Ps **[R. 27.01(1)]**, or one or more of the Ps and a new party/parties who is a necessary or proper party to the counterclaim **[R. 27.01(2)]**

**R. 25.01: Pleadings Required or Permitted**

**(2)** In a counterclaim, pleadings shall consist of the counterclaim (Form 27A or 27B), defence to counterclaim (Form 27C) and reply to defence to counter claim (Form 27D), if any.

* The D is also permitted a reply to the P’s defence of counterclaim

**Note:** the SOD and counterclaim are one document (include counterclaim in SOD) **(R. 27.02)**

**R. 27.01: Where Available**

**(1) Against the Plaintiff:** A defendant may assert, by way of counterclaim in the main action, any right or claim against the plaintiff including a claim for contribution or indemnity under the *Negligence Act* in respect of another party’s claim against the defendant.

* + **Note**: this is NOT an originating process because not adding new party to litigation- counterclaim is a claim against a party *already in litigation*

**(2) Against the Plaintiff and another Person:** A D who counterclaims against a P may join as a defendant to the counterclaim of any other person, whether a party to the main action or not, who is a necessary or proper party to the counterclaim.

* This is saying that a D can counterclaim against the P for basically anything and that when they do, they may add people they are suing in addition to the P to the claim
* This is very rarely done; lawyers often issue the SOD and then commence separate actions against other parties, which must be joined in the future (expensive)
* If D’s counterclaim is against P and a new party, the new party is known as the **defendant by counterclaim**
  + As a new party is added, a pleading under **R.27.01(2)** is an **originating process** under R.14.03(1)(c)
* **R. 27.03(a)** Where person not already party to main action is made D to counterclaim, SOD and counterclaim, shall be issued **(i)** within the time prescribed by **R. 18.01** or any time before the D is noted in default, or **(ii)** subsequently with leave of the court [see full rule] **(b)** shall contain a second title of proceeding showing who is the P by counterclaim and who are the D’s to the counterclaim
* **R.27.02:** A counterclaim (Form 27A or 27B) shall be included in the same document as the SOD and the document shall be entitled a **statement of defence and counterclaim** (both part of same document)

**Note**: A counterclaim must involve at least one of the Ps - cannot be against new parties only

**P issues and serves SOC** 🡪 **D delivers SOD and counter claim** 🡪 **P deliver reply (to SOD) and defence to counterclaim** 🡪 **D delivers reply to defence to counterclaim**

Crossclaims

A cross-claim is a claim by one party against a co-party *(e.g., a D claiming against another D, or a plaintiff claiming against another plaintiff, arising out of the original complaint)*.It may be asserted in the responsive pleading.

**R. 25.01(3): Pleadings Required or Permitted**

In a crossclaim, pleadings shall consist of the crossclaim (Form 28A); defence to crossclaim (Form 28B); and reply to defence to crossclaim (Form 28C), if any.

**R. 28.01: Crossclaim – Where Available**

**(1)** A defendant may crossclaim against a co-defendant who,

**(a)** is or may be liable to the defendant for all or part of the plaintiff’s claim;

**(b)** is or may be liable to the defendant for an independent claim for damages or other relief arising out of,

**(i)** a transaction or occurrence or series of transactions or occurrences involved in the main action, or,

**(ii)** a related transaction or occurrence or series of transactions or occurrences.

**(c)** Should be bound by the determination of an issue arising between the plaintiff and the defendant.

**(2)** A defendant who claims contribution from a co-defendant under the *Negligence Act* shall do so by way of a crossclaim.

* + ***Negligence Act***: Ds jointly and severally liable: can seek indemnity from one D
    - Ds have opportunity to claim indemnity/contribution from one another on a number of bases in order to have court assess liability as between them 🡪 Apportioning liability

**R. 28.02**: A crossclaim (Form 28A) shall be included in the same document as the SOD and the document shall be entitled a **statement of defence and crossclaim**

* Does not involve adding new parties (it is against an existing D). Therefore, not an originating process under definition in R.1.03
* E.g. Line of cars in a car accident where they all rear-ended each other; all the people in the line end up blaming each other

Crossclaim Example: The D X claim against the D Y in this action for the following

1. Contribution, indemnity and other relief for any amount these parties may be required to pay to the
2. Their costs in a substantial indemnity basis of the P’s action and this cross claim
3. Interest pursuant to the previsions of the Courts of Justice Act
4. Such further and other relief as this Honourable Court deems just

### DefenCe to Crossclaim

**R. 28.05: Timing for Delivery of Defence to Crossclaim** [see p. 744] 🡪 within 20 days after service of SOD and crossclaim

**Contents of Defence to Crossclaim**

**R. 28.06: May Defend against Crossclaim and Against P’s Claim against Co-Defendant**

**(1)** In a defence to crossclaim, the defendant may,

**(a)** defend against the crossclaim; and

**(b)** where appropriate, defend against the P’s claim against the crossclaiming D, in which case the D may raise any defence open to the crossclaiming D. 🡪 E.g. This governs what the defendant named in the cross claim may do, they may defend themselves and they may defend the original defendant (the one who brought the cross claim)

Third Party Claims

A third-party complaint is a claim asserted by a defendant against a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff’s claim against the defendant.

**R. 29.01: Where Third Party Claim Available**

A defendant may commence a third party claim against any person who is not a party to the action and who,

**(a)** is or may be liable to the defendant for all or part of the plaintiff’s claim;

**(b)** is or may be liable to the defendant for an independent claim for damages or other relief arising out of

**(i)** a transaction or occurrence or series of transactions or occurrences involved in the main action; or

**(ii)** a related transaction or occurrence or series of transactions or occurrences.

**(c)** should be bound by the determination of an issue arising between the plaintiff and the defendant.

R. 29.09**:** the court has overall power of control if the proceedings become too complex—may separate into different hearings or carve action out into more than one proceeding

* Third party claims are separate document from SOD (unlike counterclaim and crossclaim)
  + Third party claims are an **originating process** because they bring in a new party
  + **NOTE**: the third party claim is “parasitic”—it relies on D being found liable under P’s claim
    - If D is not found liable, 3rd party claim dissolves
* E.g. Homeowner sues contractor for deficiencies, and the contractor is not counterclaiming but wants to point the blame at someone else – brings an action against a third party (saying “I don’t owe the P money, but if it’s found that I do, this other party should have to pay it”)
  + If the D owes money, wants to get indemnified by this other party
  + If D is not found responsible, then the third party cannot be held responsible – the P can’t go after them (if the P wants to go after the third party, they should add them as a D to their claim)

Close of Pleadings

**R. 25.05: Close of Pleadings**

Pleadings in an action are closed when:

**(a)** Plaintiff has delivered a reply to every defence or the time for reply has expired; and

**(b)** every Defendant who is in default in delivering a defence has been noted in default.

* The close of pleadings is set up as a threshold condition for some of the rules later on in the litigation process.
* “**Noted in default**” means that a party cannot file a defence anymore (e.g. 20-day period to file defence expires)
  + The party cannot then file a defence unless they speak to the P and the P consents to it
  + Often when a company is noted in default, it means that they aren’t operating anymore and a judgment won’t be useful anyway

Transfer to another County

**R. 13.1.01(2): Choice of Place** - Absent legislation to the contrary, plaintiff can choose where in Ontario proceedings will take place.

* + General rule: PLAINTIFF chooses
  + Will generally consider convenience for parties, witnesses, lawyers, etc. (*forum non conveniens*)

**R. 13.1.02: Motion to transfer to another county** - Sets out framework under which a D can challenge plaintiff’s choice of venue **(1)**, and identifies a series of factors to be considered by the court in the event that a defendant raises a challenge **(2) 🡪 see list (p. 460)**

# ALTERATIONS

Intervention

**“Intervener”** is someone who’s not a party to the action but has some sort of interest in the proceeding that they want to come in too.

**Different types of intervention:** As an Added Party, as a friend of the Court, Leave to Intervene in Div Court or the CA

**R. 13.01(1): As Added Party**

A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

**(a)** an interest in the subject matter of the proceeding;

**(b)** that the person may be adversely affected by a judgment in the proceeding; or

**(c)** that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

* In *Ontario (AG) v. Ballard Estate* (1997), minority shareholders were added as party intervenors as they met all of the requirements in **R. 13.01**. Court dismissed P’s argument that the addition would cause undue delay.

**R. 13.02: As Friend of the Court**

Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

* You can make legal argument in favour of one position or another even if not a party named in the proceeding. Party comes forward because they have such an integral role in the subject matter that they could be helpful in the proceeding.
  + Friend of the court is called an ***amicus curiae***
  + Leave to intervene is more readily granted in constitutional cases (*Adler*, 1992).
  + Court has allowed person/group to intervene if the “issue transcended the dispute between the immediate parties to the litigation” (*Childs v. Desormeaux,* 2003).

**R. 13.03 Leave to Intervene in Div Court or the CA**

* To be added as a party or a friend of the court

Consolidation

* Consolidation is a process whereby two or more proceedings are reconstituted as one proceeding
  + The goal of this is to avoid multiplicity of proceedings (*CJA s. 138*)
  + E.g. 1: Passenger gets injured by drunk driver. Passenger sues driver, and separately sues bar who served driver—2 separate claims (as was case in *Pilon v. Janveaux*)
  + Eg. 2: Purchaser buys equipment from company—pays 50% up front and then decides equipment worthless. Sue to get first payment back. Company sues to get balance of price in separate action.
* Idea of consolidation relates closely to joinder 🡪 if, under the rules of joinder, proceeding could have been started as one action in the first place, a likely candidate for consolidation
* **It is necessary for the court to be able to join proceedings because the** **joinder rules are optional**

**R. 6.01: Joining Multiple Claims**

**(1)** Where two or more proceedings are pending in the court and it appears to the court that,

**(a)** they have a question of law or fact in common;

**(b)** the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

**(c)** for any other reason an order ought to be made under this rule,

The court may order that,

**(a)** the proceedings be consolidated, or heard at the same time or one immediately after the other; or

**(b)** any of the proceedings be,

**(i)** stayed until after the determination of any other of them, or

**(ii)** asserted by way of counterclaim in any other of them.

**In cases of consolidation, who will be the plaintiff?**

The court will consider various factors in determining who will be plaintiff: *Pilon v. Janveaux, [2000 OJ]*

1. Which claim was filed first?
   * The party that started proceedings first will typically carry proceedings as P
2. Which set of claims is more comprehensive?
   * Broader claim tends to be one advanced by P, and narrow claim to D by counterclaim.
3. Where majority of the burden of proof lies?
   * Whoever has the *bigger* evidential burden of proof should be the P

**Across Courts**

**CJA s. 107(1):** where 2 or more proceedings are pending in 2 or more different courts, and the proceedings:

**(a)** have a question of law or fact in common;

**(b)** claim relief arising out of the same transaction or occurrence (or series of transactions or occurrences); or

**(c)** for any other reason ought to be the subject of an order under this section,

An order may, on motion, be made:

**(a)** transferring any of the proceedings to another court and requiring proceedings to be consolidated or heard at the same time or one immediately after the other; or

**(b)** requiring any of the proceedings to be:

**(i)** stayed until after determination of any other of them; or

**(ii)** asserted by way of counterclaim in any other of them.

**Trial Together**

* A trial together is a fallback order the court may make where consolidation is not possible. 🡪 This is allowed through the discretion of the TJ who has an ultimate choice **[R 6.02 & CJA 107(7)]**
* Tried together vs. one immediately after other (sequential)
  + 1. If trying together, two actions are tried as one integrated whole 🡪 Each witness will give testimony once, and will be cross-examined at one time
    2. If sequential proceedings (back-to-back) 🡪 witnesses testify twice and get cross-examined twice; same judge sits for both trials so, at a minimum, can avoid inconsistent findings of fact
  + Either method avoids inconsistent findings of fact
  + \*\*However, the distinction between the two can be reduced to nothing if the trial judge is prepared to make an order that evidence from the first trial constitutes evidence for second trial

**R. 6.02 & CJA s. 107(7): Trial Judge has Ultimate Choice**

Where the court has made an order that proceedings be heard either at the same time or sequentially, the judge presiding at the hearing nevertheless has discretion to order otherwise (*Reichmann v. Toronto Life Publishing Co. [1988 OJ])*

Amendments to Pleadings

**Rule 26.01: General Power of the Court**

On motion at any stage of an action the 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.

* + A party may seek to amend his or her pleadings in a number of ways:
    1. Minor amendments
       - Eg: P determines that the value of his/her claim is more than he initially thought
    2. Amendments involving the adding of a new claim/allegation or party (more complicated)
       - This becomes more of an issue if limitation period has run out prior to P adding new claim (e.g. You forgot to add the bar on a claim for drunk driving)
  + Cost: party asking for amendment may have to pay some money to responding party to make up for the fact that calculations by expert might need to be changed, etc.
  + As long as costs + adjournment are met, court required to give it to you

**Rule 26.02: When Amendments May be Made**

A party may amend the party’s pleadings,

**(a)** without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a *party* to the action;

**(b)** on filing the consent of all parties and, where a person is to be added or substituted as a party, the person’s consent; or

**(c)** with leave of the court

**After Expiry of Limitation Period**

* Essentially: If you have pre-2004 claim, and the limitation period did not expire before, statute doesn't apply and you're OK to proceed. As long as limitation period did not expire before 2004, and the claim was discovered before then *Limitations Act* s. 24 applies and claim meets special circumstances.
* **General rule:** a party cannot amend its pleadings to add a party or claim after the expiration of the limitation period (*Limitations Act s. 21*)
  + **Rationale:** amendments should not be permissible when they prejudice the rights of the opposite party – i.e. the ability to rely on a limitations defence..
  + **Exception:** Subject, however, to the **doctrine of “special circumstances”** 🡪 Generally, if you want to sue someone and limitation expired, then too bad. But, under this CL doctrine, if you’ve already started an action and it’s determined that there’s another party that needs to be added but wasn’t, and the limitation period has expired, courts have held on to power to allow an exception and allow a party to be added if court is satisfied that special circumstances exist i.e. if party couldn’t find out if another party should be added until discovery
    - The doctrine is now dead – CL special circumstances does not survive Limitations Act (*Wonderland)*, BUT CL “special circumstances” DO still apply where s.24 *Limitations Act* applies (*Meady v Greyhound)*

Transmission of Interest: R 11

* This is the procedure where a transfer of interest or liability occurs through death, assignment, or bankruptcy.
* An interest may be transferred voluntarily or involuntarily:
  + **Voluntary transfer**: E.g. assignment (assigning debt interest to someone else)
  + **Involuntary transfer**: E.g. bankruptcy, disability, death, etc.—interest is transferred involuntarily (to trustee in bankruptcy, litigation guardian, estate, etc.).
    - Bankruptcy means the action is automatically stayed unless the judge answers the order to continue if everything is in place, and one of those things is transfer to trustee in bankruptcy

**R. 11**: Sets out the procedure for continuation of proceedings where there is a transfer or transmission of the interest or liability of a party.

* Litigation is suspended until an “order to continue” the proceeding (Form 11A) has been obtained - need a motion before court with explanation of what’s going on and a plan of how it will be handled
* An “order to continue” proceedings can be obtained from registrar without notice and must be served on all parties [**R. 11.02(1)]**
* Rule 11 deals with this by saying that the action freezes and comes to a stop (stay of proceedings)

**R. 7.06(1)**: Allows for the removal or substitution of a litigation guardian.

* Involves situations where disability may cease (i.e. minor turns 18)
* Go back to rule 7 and have a litigation guardian appointed if necessary

# MOTIONS & APPLICATIONS

Motions: R.37

* Motions are the interlocutory part to a proceeding 🡪 Bring a motion any time you want relief in an action
* E.g. In discovery, client told not to answer but you want the answer. You can bring a motion – so it can be about something as simple as wanting the answer to one question.
* Party bringing the motion is called the “**moving party**”; party responding is called the “**responding party**”
* Motions share some characteristics with applications:
  + A motion is a smaller procedural step within a larger proceeding (it is not a proceeding itself)
  + Motions may be within applications, but it is far more common to have them in actions
  + **Motions occur pre-trial**, and can be on a wide range of subjects (to extend time for filing doc., to extend time for serving D, to consolidate, to challenge service outside jurisdiction, etc.)
  + Motions are resolved in the same way as applications
    - **Oral arguments before judge based on paper record** (affidavits, documents attached)
    - Judge will rule based on submissions and written record]

### Notice of Motion

A motion shall be made by a **notice of motion** (Form 37 A) unless the nature of the motion or the circumstances make notice of motion unnecessary **[R 37.01] 🡪** Where the rules refer to courts, the motion can go before a judge or a master

**Contents of notice of motion shall contain:**

1. State the precise relief sought
2. State the ground to be argued in support of the motion, including reference to any statutory provisions or rule to be relied on; and
   * Notice of motion, like a statement of claim, is an advocacy document—not solely about procedural issues (want to be persuasive)
3. List the documentary evidence that will be used to rely on at the hearing of the motion **[R 37.06]**
   * A lawyer cannot swear an affidavit in the motion, or they cannot argue the motion (so a law clerk will do it)
   * This is covered under **R. 39** (evidence on motions and applications), which discusses types of permissible evidence in a motion
   * \*Documentary evidence does NOT include pleadings—pleadings are not evidence

### Jurisdiction to Hear Motion

Important for certain cities (Ottawa, Windsor, Toronto – they have masters in these cities). In these cities, masters hear many motions and judges will hear those that masters cannot hear 🡪 When you read a rule and it says “judge” it means only a judge

**R. 37.02(1) Judge:** A judge has jurisdiction to hear any motion in a proceeding.

**CJA s. 87(2) Masters:** Masters can hear the same motions as judges, except those listed in **37.02(2),** including:

**(a)** where the power to grant the relief sought is conferred expressly on a judge by a statute or rule 🡪 Any rule that specifically confers the power to hear a motion on a judge can only be heard by a judge

**(b)** a motion to set aside, vary, or amend an order of a judge; or

**(c)** a motion in an appeal.

.: Masters are subject to exceptions. A judge can do anything a master can do, but not the other way around.

**CJA s. 101(1)**: interlocutory injunctions and mandatory orders can **only be made by judges.**

### Place of Hearing Motions

**R. 37.03(1): Place of Hearing of Motions**

All motions shall be brought and heard in the county where the proceeding was commenced or to which it has been transferred under R 13.1.02, unless the court orders otherwise.

### Service & Filing of Notice of Motion

**A. Motion with Notice (Inter Parte)**

**R. 37.07(1): Required as a General Rule**

The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

* + Everyone who will be affected by the motion must be given notice – if not, judge will force you to do so?

**R. 37.07(6):** the notice of motion must be ***served*** at least 7 days [business days] before the motion is to be heard.

**R. 37.08(1):** the notice of motion must be ***filed*** with proof of service at least 7 days before the hearing.

* + Proof of service = affidavit saying that you served the party
  + Practically, R.37.07(6) will probably be >30 days in order to satisfy R.37.08(1)

**Note:** You can ask for an order of the court to waive the two time requirements above.

**B. Motion without Notice (Ex Parte)**

**R. 37.07(2): Where Not Required**

The court may make an order without notice where the nature of the motion or circumstances render service of notice impracticable or unnecessary.

* + E.g. Need to seize assets of a business, so can’t give notice or they might remove them from property.
  + E.g. Person evading notice.
  + In circumstances like this, you can seek an order under 37.07(2).
  + In ex-parte motions you need to put all evidence before the court whether it helps or hurts you case (it will slash your credibility if you fail to do so because when the motion is made without the other side present, the judge is relying on the information you have given)

**R. 37.08(2):** Notice of Motion must be ***filed*** with the court at or before the hearing (no service required, obviously)

### Motion Material

* The above was just the notice of motion. But you also need to provide material to the court in advance so the judge knows what it’s about and there must be some evidence so the judge has some basis.
* You’re not allowed to give testimony on facts, so you have to bring the evidence to court in another way
* A motion record is needed 🡪 the contents are provided under **R.37.10(2)**
* It’s all paper – the parties don’t participate

**Motion Record, Affidavit Evidence, Factum: [R 37.10]**

**(1) Where Motion Record Required**

Where a motion is made on notice, the moving party must serve and file (with proof of service) a motion record at least 7 days before the hearing of the motion. 🡪 Motion record = record of notice + affidavits

**(2) Contents of the Motion Record**

The motion record shall contain:

**(a)** a table of contents describing each document;

**(b)** a copy of the notice of motion

**(c)** a copy of all affidavits and corresponding exhibits that the moving party is seeking to rely on;

* + - This is the most common way for evidence to get into the motions record
    - If you’re responding to a motion and have concerns about the evidence, you have a right to cross-examine the person who swore the affidavit on the issues raised in their affidavit

**(d)** a list of all relevant transcripts of evidence; and

**(e)** a copy of any other material in the court file that is necessary for the hearing of the motion

* + - Pleadings are not treated as evidence, although they are in theory already in the court file—it may be problematic to rely on pleadings, however
* **“Exhibit”:** document that you’re attaching to, for example, an affidavit. You are backing up, with evidence, that statement.

**(6) Factum**

A party *may* serve on every other party a factum consisting of a concise argument stating the facts and law relied on by the party.

* “The factum must be a tightly constructed document which in terse but cogent or pungent language draws the judge’s attentions to they facts in issues and the controlling legal principles…It is my firm view that, absent some highly exceptional circumstances the factum should never exceed about 25 pages (*Zuppinger v Erb*).
* *Bradshaw* *v* *Unity Marine Corporation, Inc* (SD Texas 2001) at 670-72: the factum should contain relevant legal authorities with pinpoint citations. Counsel should not be throwing long range darts. The factum should be a useful guidance for the judge.

### Motion Odds and ends – Other Provisions

**A. Consent, Unopposed or Without Notice**

**R. 37.12.1(1):** A motion may be heard in writing without the attendance of the parties where the motion is on consent, unopposed [i.e.I don’t really care what you do], or without notice under R.37.07(2), unless the court orders otherwise. 🡪 judge solely assesses paper record

* + Moving party should include with the above materials the consent or statement that it is i) unopposed; and a ii) draft order for court to endorse
  + Called a “**basket motion**”

**B. Opposed in Writing**

**R. 37.12.1(4):** The moving party may request that the motion be heard in writing, where the issues of fact and law are not complex.

* Rarely, if ever, happens

**C. Motions in Public**

* Motions, as a general rule, are to be heard in **open court** under **R. 37.11(2)**.

**CJA s. 135** Can request a protective order excluding the public in sensitive or difficult cases.

**R. 37.11(1):** Offers procedural exceptions to the open court rule.

* + If you think there’s a reason that it shouldn’t be done in open court, you can move under this rule for it to be heard in a closed courtroom

**D. Abuse**

**R. 37.16:** A party may seek a court order to put a stop to abusive motions.

* Quite common – but it has to be pretty clear that the party is being abusive (e.g. continuously bringing the same motion)

**E. Designated Judge**

**R. 37.15(1):** Allows litigants to have a judge designated to hear all motions in a complicated proceeding or in a series of proceedings that involve similar issues.

* Designated judge: not efficient to keep re-educating judges on the complicated facts on a particular case
* Referred to as a judge being “seized of a matter”

**F. Motions before Commencement of Proceedings**

**R. 37.17** in urgent cases, a motion may be made before the commencement of proceeding on the moving party’s *undertaking* to a commence proceeding forthwith.

* E.g. Happens frequently with injunctions – need an immediate injunction, but then agree to commence the lawsuit

**Setting Aside or Varying Orders**

**R. 37.14**: a party may move to set aside or vary an order that has been made on a motion (note: this is NOT an “appeal” of a motion). Must be a party who:

**(a)** is affected by an order obtained on motion *without notice*;

**(b)** fails to appear on motion through accident, mistake or insufficient notice; or

**(c)** is affected by an order of a registrar.

* Notice of motion under R. 37.14 must be served “forthwith.”

Applications: R. 38

* Dealing with more **narrow issues** – want to get to a solution more quickly and in a more controlled fashion. Requires fewer steps
  + E.g. Someone is blocking access to your business or driveway
* Parties: Applicant and Respondent
* Applications are brought in motions court as well – it is almost always a special appointment

**General Requirements**

**R. 38.02:** All applications must be made to a **judge** under the Rules.

* Note: however, some statutes allow for applications to be made to masters

**R. 38.03:** Place of commencement, date and length of hearing set out **in notice of application**.

* This rule is different from motion (the date and length of hearing is very different – in a motion, you don’t know when that’ll be. In an application, you know it’s short term so the originating process can identify the day for a hearing)

**R. 38.04 Contents:** Sets out the content of the notice of application

**(a)** the precise relief sought;

**(b)** the grounds to be argued; and 🡪 Must set out the rule(s) that you are relying upon

**(c)** the documentary evidence to be used.

* Notice of Application is similar in form with the Notice of Motion (3 sections)
* This is just bigger because not asking for an interlocutory order, but the **actual order**

### Service of Notice of Application

**R. 38.06(3):** The notice of application must be served at least **10 days** [calendar days] before the date of hearing

**R. 38.06(1):** Notice of application must be served on all parties [personally].

* Since notice of application is an originating process, service governed by **R. 16** and **R. 17**.

**R. 38.07(1):** After receiving the notice of application, the **respondent** is required to file a **notice of appearance** “forthwith.”

### Application Materials: [38.09]

**Application Record and Factum**

**(1) Applicant: (a)** applicant must serve an application record and factum **at least** **7 days** before the hearing date **(b)** these materials must be filed with **proof of service** at least 7 days before the hearing date.

* In reality, you will likely need to do it more than 7 days in advance, unless you can do it all in one day

**(3) Respondent Factum:** The respondent must serve a factum and may serve an application record (3.1) on every other party, **at least 4 days** before the hearing date **(3.2):** The respondent’s factum and application record, if any, must be filed with **proof of service** at least 4 days before the application is to be heard.

* Factum must be served at least 4 days before the hearing date, so respondents have 3 days to get respondent factum ready (since applicants must serve at least 7 days prior)

**Note:** Factum is mandatory for both parties in an application.

### Application odds and ends: Other Provisions

**A. Trial of an Issue**

**R. 38.10(1):** On the hearing of an application, the judge can order a **trial** of an issue or the whole dispute.

* + If the application gets started and the judge thinks this should be a motion and not an application, the judge can order that one or more issues (including the entire dispute) proceed by way of trial

**B. Setting Aside Judgment without Notice**

**R. 38.11:** Where a party is affected by a judgment on an application made without notice, the party can move to set aside or vary the judgment.

* + E.g. If you were sick when an application was made without notice, you can bring a motion to set it outside. This makes sense because it happened when you were gone so it’d be unfair to allow it to happen.
  + Whenever you don’t get notice of something, you’re entitled to put your case before the judge

Evidence on Motions & Applications

### Affidavit Evidence

**R. 39.01(1):** Evidence of a motion or an application may be given by affidavit unless a statute or the Rules provide otherwise.

**R. 39.01(2) Applicant’s Affidavits:** Where motion or application is made on notice, affidavits must be *served* with the notice of application or notice of motion and *filed* with proof of service at the court office at least 7 days prior to the hearing.

**R. 39.02(3) Responding Affidavits:** shall be served and filed at least 4 days prior to hearing.

**R. 4.06(2) Affidavit Contents:** An affidavit must be confined to the **statement of facts within the personal knowledge** of the deponent.

* + Can only swear an affidavit to the extent of which they know it to be true
  + Can’t swear an affidavit saying this is what the expert said – would have to have an affidavit from the person with the personal knowledge of it (i.e. Mary told me this, then Mary should give an affidavit)
* Extended by **R. 39.01(4)** and **(5)**, which allow deponents to swear based on their **information and belief**.
  + Must specify source of information in affidavit
  + For purposes of credibility, important to use deponents with first-hand knowledge of issue

### Cross-Examination on Affidavit

* Cross-examination occurs in a boardroom, very different from examination in discovery

**R. 39.02 On a Motion or Application**

**(1)** A party to a motion or application may cross-examine the deponent of **any affidavit** served by a party who is **adverse in interest** on the motion or application.

* Co-defendants are not adverse in interest as between each other (unless cross-claims)—thus, cannot cross-examine each other on that affidavit

**(2)** A party who has cross-examined on an affidavit delivered by an adverse party **cannot put in a further affidavit** after cross-examination **without consent** of other party or leave of the court

* Once you ask the other side a question, you cannot file any more affidavits
* Fairness consideration: cannot tailor your evidence to respond to other side’s.
* Under rule, court shall grant leave to enter another affidavit if there is an issue raised in cross-examination that requires response. Another example is where someone lied and you need to clarify the information.

**R. 39.02(3)** **To be Exercised with Reasonable Diligence:** The right to cross-examine on affidavit must be exercised with reasonable diligence.

* Court might order that application go ahead without cross-examination if no reasonable diligence

### Examination of a Witness

**R. 39.03(1):** **Before the Hearing**

Subject to **R. 39.02(2)**, a person (party or non-party) may be examined as a witness *before* the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

* Rule allows a party, pending an application or motion, to obtain evidence of any person.

**R. 39.03(3):** **To be Exercised with Reasonable Diligence:** The right to examine must be exercised with reasonable diligence once the motion or application has been started

* Scope of questioning of a person being examined pending an application/motion is limited to questions *relevant* to the motion (i.e. cannot ask entirely relevant and appropriate questions about dispute as a whole)

### Evidence from Examination for Discovery

**R. 39.04(1):** **Adverse Party’s Examination**

On the hearing of a motion, a party is permitted to use the evidence taken on discovery of an adverse party.

**R. 39.04(2): Party’s Examination**

In contrast, a party *may not use their own examination* for discovery (or of any persons examined in party’s stead or behalf) as evidence on the hearing of a motion *without the consent of the other party*.

* You can’t rely on your own transcript unless the other side consents to it; can only rely on the adverse side’s transcript
  + The purpose is for the other side to obtain evidence and cement your story so evidence cannot move from that at trial

Appeals of Decisions on Motions

### Final vs. Interlocutory Orders

Orders fall into 2 categories:

**Interlocutory order** – a **pre-trial decision** that has *not* resolved the dispute or the underlying substantive issue in the dispute; OR

* + E.g. Motion deciding one small issue, which aids in progress of the action, but doesn’t give final order (e.g. damages).

**Final order** – an order that resolves a substantive issue in a dispute.

* + E.g. Order dismissing the action (even if done by motion and not by way of trial).

**\*New approach**: courts have begun to consider whether a decision on a motion resolves a particular substantive issue which could have been dispositive of the litigation—if so, it is a final order. Basically, if decision on motion resolves particular aspect that could have resolved entire litigation, it is final.

### Appeal Route for Final Orders

Final orders governed by **R. 61** (Appeals to an Appellate Court).

* Appeals of final orders on motions treated like appeal of trial 🡪 If the decision was made as a result of a motion and was considered final, you will appeal to an appellant court (Div Ct or CA)

### Appeal Route for Interlocutory Orders

Summary

For Interlocutory orders, it depends on whether it is an order from **a master or a judge**

* + If it’s a **master** who decided on the motion 🡪 appeal to a judge (SCJ) [automatic right of appeal]
  + If it’s a **judge** who decided on the motion 🡪 ask for leave from another judge and then go to appeal in the Div Ct (**R.62** has a two-pronged test for this, see below)

**Interlocutory Order of a Master**

**R. 62.01(1)(a)** sets out procedural requirements.

**CJA s. 17(a)** an appeal lies to the **SCJ** from an interlocutory order of a master (as of right) 🡪 Automatic right to appeal (“as of right” means you don’t need leave)

**Interlocutory Order of a Judge**

**R. 62.02 (1)** a party may appeal an interlocutory order of a judge to the Divisional Court **with leave** (below) 🡪 not automatic, need leave

**(4)** **Leave:** Sets out the two-part test for leave to appeal to Divisional Court.

* Leave to appeal (of an interlocutory order) shall not be granted unless:

**(a)** there is a conflicting decision on the matter and it is desirable that leave to appeal be granted; **OR**

* + - “Conflicting decision” = must be as to law that had been applied by judge (i.e. actual legal conflict), and not exercise of judge’s discretion (*Comtrade Petroleum*).
    - “Desirable” = refers to the need for appellate court to provide certainty and a definitive appellate answer (*Lodge v. Regier*). Conflict between decisions is not enough on its own—the court must also believe there is a need to resolve this conflict.

**(b)** there appears to be good reason to doubt the correctness of the decision and the proposed appeal involves matters of such importance that leave should be granted.

* + - “Correctness” = it is open to serious debate whether decision is right or wrong 🡪 low threshold
    - “Importance” = an issue of broader significance or general application, beyond the parties, that makes it worth being heard by an appellate court (*Greslik*). I.e. Matters are relevant to development of law and administration of justice

**R. 61.03** sets out the process for obtaining leave to appeal to the Divisional Court. If leave not granted, CANNOT appeal it further.

**Further Appeals for Interlocutory Orders to the CA**

**CJA s. 6(1)(a)** **Court of Appeal Jurisdiction**

An appeal lies to the CA from an order of the Divisional Court on a question that is **not a question of fact alone**, with leave of the CA, as provided in the Rules.

**R. 61.03.1(1)** **Motion in Writing**

Where an appeal to the CA requires the leave of the CA, the *motion for leave* shall be heard in writing without attendance of the parties or counsel. 🡪 All done in writing; do not have to appear to the convince the court why the matter should be heard.

**RECAP:**

* **R.37** you can be granted leave to bring a motion before even having a NOC/SOC/SOD if the judge says it’s ok
* After that, may bring a motion at any time (can even have them during trials)
* \***Motions are always interlocutory but the order that arrives from the motion can be interlocutory or final**
  + Final order – i.e. summary judgment. Would appeal to the CA (depending on $ limits).
* Anything else will usually be interlocutory and would require seek leave to appeal to divisional court
* Application is a more simplified thing

# DISPOSITION WITHOUT TRIAL

Ways to avoid a trial:

1. Default proceedings
2. Discontinuance and abandonment
3. Motion to strike out
4. Determination of an issue before trial
5. Disposition available prior to trial
6. Vexatious proceedings and litigants
7. Dismissal for delay
8. Summary judgment

(1) Default Proceedings: R.19

The P may take default proceedings upon the defendant’s failure to deliver a SOD or where the defence has been struck out. When this occurs the P may require the registrar to note the D is default.

* If you don’t note them in default, they can still file a defence at any time – as soon as you note them, they cannot file defence.

**R.19.01: Noting Default where no Defense Delivered**

**(1)** Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01(2), require the registrar to note the defendant in default.

**(5)** A defendant may deliver a statement of defence at any time before being noted in default under this rule.

* + The time in which a D can file a SOD is **20 days** if within Ontario. If they fail to do that, the door isn’t shut to them to file a SOD until you’ve filed a notice of default. So P should note them in default as soon as it can be don

**R.19.02: Consequences of Noting Default**

**(1)** A defendant who has been noted in default,

**(a)** is deemed to admit the truth of all allegations of fact made in the statement of claim; and

**(b)** shall not deliver a SOD or take any other step in the action, other than a **motion** to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.

* You can avoid a trial if you note them in default (helpful for the P but to the detriment of the D)
* If you fail to file a SOD, you can go to the court and beg permission to join the action (**R19.02**) – this puts you back in the shoes that you were in when you were served with the SOC so you can file the SOD

**R.19.03: Setting Aside the Noting of Default**

**(1)** The noting of default may be set aside by the court on such terms as are just (look at ***MTCC v Bardmore***)

**(2)** Where a D delivers a SOD with the consent of the P under clause 19.02(1)(b), the noting of default against the D shall be deemed to have been set aside.

Noting in Default Test

*Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd. [1991 ONCA], p. 483*

* **\*Meaning of “such terms are just” under R.19.03(1)**

**Held:** The test for setting aside a noting in default should not be the same as that for setting aside a default judgment. In either case the court has a broad discretion which should take into account the behaviour of the plaintiff and defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and value of the claim involved. Only in extreme situations should the trial judge's discretion be exercised to require an affidavit as to the merits of the defence on a motion to set aside a noting in default.

* + - If there has **(i)** not been undue delay by D, and **(ii)** D has manifested a *bona fide* intention to defend, courts are generally more willing to allow D to defend
    - D need not show that a good defence on the merits is available
    - Generally an easy hurdle for D to meet, but if D waits too long to get out from default, then tougher to argue there was a bona fide intent to defend
  + **Note:** NOT same test as for setting aside default judgments. This is NOTING IN DEFAULT test.
    - Talks about a noting in default vs. default judgment:
      * Noting in default – door closed to filing SOD
      * Default judgment – a binding judgment in favor of either party based on some failure to take action by the other party. Most often, it is a judgment in favor of a plaintiff when the defendant has not responded to a summons **or** has failed to appear before a court of law.
    - Shouldn’t be quite the same test – noting in default test needs to be slightly less onerous but the court still needs a broad discretion (court doesn’t have to overturn it)
    - Everyone has the right to file and defend – shouldn’t take this away.

Default Judgment Test

* The court set aside default judgment without any inquiry as to the merits of the defence where the plaintiff’s counsel knew defence counsel was actively engaged but nevertheless noted default and obtained judgment without notice *(Male v Business Solutions Group)*
* Where there has been no undue delay and there has been an intention to defend throughout, a default should be set aside without the necessity of establishing a defence on the merits [low threshold] *(Axton v Kent)*
* **The requirements for setting aside a *default judgment* are as follows: [not setting aside noting in default]** *Lenskis v. Roncaioli [1996 ONCA]*
  + - 1. The motion to set aside a default judgment should be made as soon as possible after the applicant becomes aware of the judgment;
         * Did the D act as quickly as he could? (i.e. if you were on vacation and missed the default notice). You have to take action as soon as reasonably possible.
      2. The moving party must give a plausible (reasonable) explanation for the default;
      3. The parties in default must set forth facts that support at least an arguable defence on the merits.
         * The court will look to see if there’s at least an arguable defense. If they’re going to overturn the judgment, they’re going to see if there’s at least a reasonable opportunity. The court has gone through hassle too. Won’t want to overturn it if the court thinks the D will never succeed.
         * This is a very low threshold. It just needs to be an arguable defence.
    - *Chitel v. Rothbart [1988 ONCA]* The 3-part test is not to be applied rigidly. It may be sufficient to establish only two of the elements, for example. Chitel: motion to set aside was promptly brought and good defence on merits established. CA held that failure to satisfactorily explain delay was not fatal and set aside large default judgment, but on terms.
    - Court also more receptive to setting aside a judgment obtained in default if the delay was the fault of lawyer rather than D.

**R.19.04(1): By Signing Default Judgement – Where Available**

Where a D has been noted in default, the P may require the registrar to sign judgment against the D in respect of a claim for,

**(a)** a debt or liquidated demand in money, including interest if claimed in the SOC (Form 19A);

* An amount may be a debt or liquidated money demand if it is evidence in the pleading that it can be readily quantified by arithmetical or other determinate calculations and not if the method is uncertain or contentious *(Englefield v Wolf)*

**(b)** the recovery of possession of land (Form 19B);

**(c)** the recovery of possession of personal property (Form 19C); or

**(d)** foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K and 64M)

🡪 Requisition filed with the registrar that says please file judgment against the D; must be one of these 4 categories.

**R.19.04(3.1): Default Judgement – Motion to Judge**

If the registrar declines to sign default judgment the plaintiff may,

**(a)** move before a judge for judgment under rule 19.05; OR

**(b)** in the case of a claim referred to in subrule (1), make a motion to the court for default judgment.

* If registrar doesn’t sign default judgment, or if it doesn’t fit into one of the four categories, you can bring a motion to a judge

**R.19.05: Default Judgment by Motion for Judgment**

**(1)** Where a D has been noted in default, the P may move before a judge for judgment against the D on the SOC in respect of any claim for which default judgment has not been signed.

**(2)** A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages.

* Where a defendant has been noted in default, the motions judge should not engage in an inquiry about the defendant’s liability during an assessment of damages hearing *(Umlauf v Umlauf)*
* If a default judgment is not granted under R. 19.04, P may make a motion for judgment under R. 19.05
* More complicated, motion made to a judge only, etc.
* This is wiggle room. The courts are entitled to assess on numerous factors what you are entitled to get
* This is something not easy for registrar to figure out, need judgment call from a judge

**R.19.08: Setting Aside Default Judgment**

**(1)** A judgment against a D who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just. 🡪 the court will look at how D can compensate the P for putting in all that time in getting their default judgment

**(2)**  A judgment against a D who has been noted in default that is obtained on a motion for judgment on the SOC under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as just. 🡪 Covers default judgments (R. 19.04) and judgments (R. 19.05) and judgments after trial

* + On motion to set aside a default judgement, there is a broad obligation to look at all the circumstances of the case and to be satisfied that no injustice is done to the plaintiff if the judgement is set aside. Motion should be made ASAP, the circumstance must give plausible information for default, must provide evidence that there is an arguable case *(Tweed Farm)*

(2) Discontinuance & Abandonment

**Abandon vs. Discontinue**

* Difference: You abandon an application and you discontinue an action
* When you commence an application/action and then reconsider pursuing it

**(i) DISCONTINUANCE (ACTION)**

**R.23.01: Discontinuance by Plaintiff**

**(1)** A P may discontinue all or part of an action against any D,

**(a)** before the close of pleadings, by serving on all parties who have been served with the SOC a notice of discontinuance (Form 23A) and filing the notice with proof of service; 🡪 done unilaterally

* + - R. 25.05: “**closed pleadings”** = (a) reply has been filed to all Ds or time has lapsed for reply, and (b) all Ds in default have been noted in default

**(b)** after the close of pleadings, with leave of the court; or

**(c)** at any time, by filing the consent of all parties. 🡪 most common

**(2)** If a party to an action is under disability, the action may be discontinued by or against the party only with leave of a judge obtained on motion under rule 7.07.1 🡪 Must have permission from the judge, consent from the other side isn’t enough.

**(ii) ABANDONMENT (APPLICATION)**

**R.38.08: Abandoned Applications**

**(1)** The applicant may abandon an application by delivering a notice of abandonment.

**(2)** An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise.

**(4)** Where a party to an application is under disability, the application may be abandoned by or against that party only with leave of a judge, on notice to,

**(a)** the Children's Lawyer, unless,

**(i)** the PGT is litigation guardian of the party, or

**(ii)** a judge orders otherwise; and

**(b)** where the party under disability is a respondent, the LG.

**Costs of Discontinuance or Abandonment**

R.23.05(1) **Action:** If all or part of an action is discontinued, *any party to the action* may, within 30 days after the action is discontinued, make a motion respecting the costs of the action.

R.38.08(3) **Application:** Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise.

* It does not provide for how you will get costs. You’re entitled to them, but you still have to prove to the court what amount you should get in costs. If you don’t, there will never be an actual amount assigned.

(3) Motion to Strike Pleadings

Either P or D can bring a motion to strike pleadings:

* + Plaintiff: There’s no reasonable defence. What they’ve put in their SOD cannot reasonably succeed in law. A judge can allow this and strike this out.
  + Defendant: Can look at a SOC and say there’s no reasonable cause of action, you have no way to sue me

**R.21.01: Determination of an Issue before Trial**

**(1)** A party may move before a judge,

**(b)** to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly

* Rationale: does not make sense to force D to proceed along through trial if P has no reasonable claim

Setting out the **plain and obvious test:**

Hunt v. Carey Canada Inc., [1990] 2 SCR 959 (SCC)

* + Before a statement of claim is struck out for disclosing no reasonable cause of action under R.21.01(1)(b), it must be plain and obvious that it discloses no cause of action. The test is rooted in the need for courts to ensure that their process is not abused.
  + **Test = plain and obvious that the SOC has no cause of action**
  + We’re not going to strike novel claims (i.e. new tort) or those that *might succeed*

Ballard v. Stavro, [1997] O.J. No. 3577 (Gen. Div.)

* + Court will be reluctant to strike out a claim in an area of law that is not well-established (negligence, law of fiduciaries, etc.)
  + The threshold is quite low – very low test for the P, but this is not frequently met. Part of this is because anyone can sue.

(4) Determination of Point of Law

If relying upon legal argument, you can move for a judge to determine just that question of law.

**R.21.01: Disposition Prior to Trial on a Question of Law**

**(1)** A party may move before a judge,

**(a)** for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

* + - The plain and obvious test applies to R 21.01(a) as well 🡪 it should not be used when: material facts are in dispute, facts are assumed or hypothetical, question depends on contract, law is not fully settled *(MacDonald v Hydro Ontario)*
    - Not as frequently brought in motions, although they are still fairly common
    - You can take one issue of the lawsuit, or the entire lawsuit, and you say this is all based on one thing. There is no point in going through multiple weeks of evidence, so the entire case may be over much faster.
    - These motions can be quite powerful and cost-saving
    - But these have to be questions of LAW, not questions of FACT 🡪 The court cannot make a determination of questions of fact because it is just looking at if we take the pleadings, can this case ever succeed? If there’s disputes about credibility or facts that could go to trial, it won’t be dismissed.

(5) Disposition Available Prior to Trial

* What can you do to deal with some, or all, of the lawsuit before getting to the trial? Other than striking pleadings or determine based on issues on law, you can stay the action and it hangs there indefinitely or dismiss it entirely for several different reasons:

**R.21.01(3): Dispositions Prior to Trial Available to a Defendant**

A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**(a)** **Jurisdiction** — the court has no jurisdiction over the subject-matter of the actions

**(b) Capacity** — the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued; 🡪 P or D is without legal capacity (i.e. a minor without a litigation guardian, Martian not a person)

**(c)** **Another Proceeding Pending** — another proceeding is pending in ON or another jurisdiction between the same parties in respect of the same subject matter; OR 🡪used fairly often when there is already a lawsuit and the person brings another suit (on the same matter).

**(d)** **Action Frivolous, Vexatious or Abuse of Process**

and the judge may make an order or grant judgment accordingly.

**R.25.11: Striking Out a Pleading or Other Document**

The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

**(a)** may prejudice or delay the fair trial of the action;

**(b)** is scandalous, frivolous or vexatious; or

* + “**Frivolous or vexatious**” = (1) complete absence material facts; (2) utterly hopeless (ie. no chance of success).
    - Unfortunately, these words are often used “compendiously, without any individual definition”
  + “**Scandalous**” = it must be indecent, abusive, offensive, an inflammatory character attack unbecoming for court to hear, etc. AND not relevant
    - a pleading cannot be scandalous if it is relevant, but it is not necessarily scandalous if it is irrelevant

**(c)** is an abuse of the process of the court

* + “**Abuse of process**” = an untenable plea; attempt to re-litigate issues already resolved in another case; or a claim barred by release (includes issue estoppel and res judicata)
  + *Ballard v Stavro*: The D already sued on allegations by Public Trustee by P (and proceeding was settled). P tried to bring those allegations in pleadings, and D argued abuse of process. Court ultimately allowed allegations, but had to weigh to what extent P could plead conduct that really involved other parties who already sued on it. Issue was barred by release-related argument under abuse of process.

Motion to Strike Pleading: Summary

* The court must take the facts alleged in the challenged pleading as true unless they are patently ridiculous or incapable of proof.
* The court should read the pleading generously, making allowances for drafting deficiencies: ***Hunt***
* The court should not dispose of matters of law that are not settled in the jurisprudence. Where the law in a particular area can be described as "muddy", the court will not strike that part of the pleading, nor hold that the claim or defence must fail.

(6) Vexatious Proceedings & Vexatious Litigants

**R.21.01(3): Disposition Prior to Trial Available to Defendant**

A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**(d)** Action Frivolous, Vexatious or Abuse of Process — the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

…and the judge may make an order or grant judgment accordingly.

**CJA, s.140: Vexatious Proceedings**

[D may move to have a party declared a “vexatious litigant,” instead of having to defend all different pieces of litigation (more radical circumstances) 🡪 E.g. where P is addicted to motions without merit]

**(1):** Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,

**(a)** instituted vexatious proceedings in any court; or

**(b)** conducted a proceeding in any court in a vexatious manner, the judge may order that,

**(c)** no further proceeding be instituted by the person in *any court*; OR

**(d)** a proceeding previously instituted by the person in any court not be continued,

…except by leave of a judge of the Superior Court of Justice.

**An Alternative Process to Application under s 140 CJA**: **R 2.1.01(1)** permits a hearing in writing to determine if an individual proceeding or a motion is a proceeding ought to be dismissed where it appears on its face to be frivolous, vexatious or an abuse of power

* Rule 2.1 is not for close calls. It is for a proceeding that is frivolous, vexatious or abusive on its face and where there is a basis in the pleading for resort to this rule *(Scaduto v LSUC)*
* Lower threshold to prove *this particular* lawsuit is vexatious
* **Vexatious Litigant 🡪 high threshold 🡪** Gao v Ontario WSIB, 2014 ONSC: “Experience teaches that vexatious litigant proceedings can be very expensive and often serve just to give a vexatious party yet another opportunity to inflict the very harms that the process is designed to end. To obtain a **vexatious litigant order**, an applicant must commence a separate proceeding and prove that the target has persistently and without reasonable grounds instituted vexatious proceedings or has conducted proceedings in a vexatious manner. The requirement to show persistence has meant that litigants must endure several vexatious proceedings prior to bringing a vexatious litigant proceeding… an application for a vexatious litigant declaration is a separate legal proceeding. This gives the vexatious litigant a platform from which to repeat all of her or his vexatious conduct. The respondent in a vexatious litigant proceeding has all of the rights of a respondent to a regular application – i.e. to file evidence, to cross-examine, to summon third party witnesses, to bring motions, and, especially exhausting and expensive, the right to or to seek leave to appeal at every step of the way.”
  + Court concerned about vexatious lawsuits and the people who start them as two separate concerns
  + They are expensive and harm the people who are involved in them (i.e. the person or institution’s reputation)
  + You must take an active step, spend money, put documents in front of the court explaining why this is a vexatious process
  + Some of these vexatious litigants will start multiple lawsuits. Some will repetitively sue over and over.
* **Common attributes of a vexatious litigant:**

(a) Bringing multiple proceedings to try to re-determine an issue that has already been determined by a court of competent jurisdiction;

(b) Rolling forward grounds and issues from prior proceedings to repeat and supplement them in later proceedings including bringing proceedings against counsel who have acted for or against them in earlier proceedings;

(c) Persistent pursuit of unsuccessful appeals;

(d) Failure to pay costs awards of prior proceedings;

(e) Bringing proceedings for a purpose other than the assertion of legitimate rights, including to harass or oppress others;

(f) Bringing proceedings where no reasonable person would expect to obtain the relief sought.

(7) Dismissal for Delay

**R.24.01: Dismissal of Action for Delay**

**(1)** A **defendant** who is *not in default* under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

**(a)** to serve the SOC on all the defendants within the prescribed time;

**(b)** to have noted in default any defendant who has failed to deliver a SOD, within 30 days after the default;

**(c)** to set the action down for trial within 6 months after the close of pleadings; or

**(e)** to move for leave to restore to a trial list an action that has been struck off the trial list, within 30 days after the action was struck off.

* The D has to take the motion to court and take steps

Case law indicates that the test for dismissal for delay is quite high (high threshold),

* Court is reluctant to distinguish litigant’s action based on delay—usually requires an unexplained passage of several years coupled with real evidence of prejudice (*Sussman v Ottawa Sun (The)* (1997 Ont. Gen. Div.))
* *E. George Kneider Architects v Anthony Gardynik Invts Ltd.* (1998 Ont. Div. Ct.):the court upheld the motion for dismissal of action for delay where P delayed for over 5 years and health of elderly key D failed
* Court will also factor in who is at fault for delay (i.e. lawyer or litigant)

Test for Dismissal for Delay:

*Faris v. Eftimovski, 2013 ONCA 360*

* + A **plaintiff bears the burden** of demonstrating that:
    1. There is an acceptable explanation for the delay in the litigation; **AND**
    2. If the action was allowed to proceed, the defendant would suffer no non-compensable prejudice
       - Whether the D will suffer prejudice that they can be compensated for – is there prejudice that D will suffer if the lawsuit is allowed to go forward?
       - Things that are non-compensable – key witness died, documents destroyed, and something that they cannot simply recover by money

**R.48.14: Dismissal for Delay**

**(1)** Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

* 1. The action has not been set down for trial or terminated by any means by the later of the 5th anniversary of the commencement of the action and January 1, 2017.
  2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the later of the 2nd anniversary of being struck off and January 1, 2017.

**NOTE: don’t worry about Jan. 1 date anymore (that is gone); it’s just the five-year anniversary**

* **Important rule** – automatic kicking out of your action, which can result in client suing the lawyer
* Restoring to trial list: you serve trial record, then schedule trial at assignment court – if you show up at assignment court and are not ready for trial, the judge will strike you off the list. So if you’re struck off the list, then don’t move for 2 years to put it back on (i.e. restore to trial list), then your action is gone.
* Here, the defendant doesn’t have to take any steps, the court can do it itself

(8) Summary Judgment: R 20

* Rationale of the summary judgment rule is that there should be some process short of going through a full blown trial to resolve **cases that are “clear”** (E.g. P suing under a promissory note)
  + R.20 allows parties to go beyond what has been pleaded to get into whether there is any evidential support for what has been pleaded. This can happen in both simple and complicated cases.
* A motion for summary judgment can be brought by any party regarding whole or part of a claim
  + Note the timing requirements for each
* These motions are brought to avoid trials (and their costs), but these motions are still expensive

**R.20.01: Summary Judgment – Where Available**

Plaintiff

**(1)** A plaintiff may, after the D has delivered a SOD or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the SOC.

**(2)** The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the SOC, and leave may be given where special urgency is shown, subject to such directions as are just.

Defendant

**(3)** A defendant may, after delivering a SOD, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the SOC.

R.20.02(1): **Evidence on Summary Judgment Motion**

**(1)** **An affidavit** for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

**(2)** In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party *may not* rest solely on the allegations or denials in the party’s pleading, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

* + Onus of establishing that there are no triable issue rests on the moving party. This rule places an obligation on the party responding to the motion to put forward evidence for allegations (or risk losing) – *1061590 Ontario Ltd. v Ontario Jockey Club* (1995 C.A.)
  + Generally, if there is issue of credibility which is material, trial will be required.

R.20.02(1): What can you bring as evidence on a motion for summary judgment

R. 20.02(2): The ultimate test is set in R.20.02(2) – if there is a genuine issue requiring a trial, the summary judgment motion fails

* + If not, the summary judgment motion will be granted
  + But a summary judgment motion is a double edged sword: if the court has decided all the facts are present and can be decided on affidavit material alone, the court might actually decide against the D, who brought the motion

R.20.04(2): **TEST “No genuine issue requiring a trial”**

**(2)** The court shall grant summary judgment if,

**(a)** the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;

**(b)** The parties agree to have all or part of the claim determined by summary judgement and the court is satisfied that it is appropriate to grant the summary judgement

The “Old” Cases (for R.20.04(2)(a)):

* *Aguonie v. Galion Solid Waste Material Inc.* and *Dawson v. Rexcraft Storage & Warehouse Inc.*
* These 2 cases spoke about how (approach) to deciding whether genuine issue existed and the proper role of a motions judge when undertaking this analysis. These cases had the effect of restricting the scope or utility of R.20 (it ended up really narrowing the scope of summary judgment, which went against the entire purpose of summary judgement). To try to overturn how restrictive these cases had made the rule, they took what these cases said and wrote it into the rule (explicitly – allowed to evaluate credibility, assess evidence, etc. in R.20) – this will be considered the “new rule” but it’s the current R.20 🡪 see below Powers of the Court

### Powers of the Court – Summary Judgment

R.20.04(2.1): **Powers of the Court**

In determining under **R 20.04 (2)(a)** whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

R.20.04(2.2): **Oral Evidence (Mini Trial)**

**“**A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.”

* + *Dr. Therese Thomas Dentistry Professional Corp v. Bank of Nova Scotia (2010 SCJ):* The court concluded that it could not resolve a fact in issue on the basis of conflicting affidavits & ordered a mini-trial to determine the fact in issue.

**Interpretation:** summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims (*Hryniak v Mauldin)***.** *Combine Air Case (SCC)*– summary judgment should be given where process has allowed a finding of fact and for the law to be applied to the facts

* + In determining whether there is a genuine issue, they’ve allowed the courts more powers to overcome this problem
  + These steps used to be only for trials – they did this because they wanted people to return to using summary judgment motions
    - Not using them was a real problem because it was bogging down the justice system
  + Trial usually requires credibility. **They explicitly allow motions judges to assess credibility now**
  + Can also draw reasonable inferences (3)
  + New rules came out in 2010

### Where a Trial is Necessay

**R.20.05: Where a Trial is Necessary**

**(1)** Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and order that the action proceed to trial expeditiously.

**(2)** If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

**(i)** that any oral examination of a witness at trial be subject to a time limit;

**(j)** that the evidence of a witness be given in whole or in part by affidavit;

**(k) (HOT TUBBING)** that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

**(i)** there is a reasonable prospect for agreement on some or all of the issues, OR

**(ii)** the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court.

* Hot tubbing = controversial issue. Judge may order that all the experts talk. Experts have traditionally been protected. They’re not allowed to be attacked until trial. This is an exception to try to progress judgment – order experts to sit in a room and talk to each other. It seems like it could be a good idea, but difficult practically – the louder person or person with a bigger opinion may overrule the other(s). The test of who wins should not be who has the louder voice. This might not be the same person who is correct based on expertise in the issue.
* First part of this motion encouraged by SCC says to try to encourage summary judgment, try using mini trial, try assessing credibility
* But if you can’t, **R.20.05** says where a trial is necessary
* This is to try to discourage judges from sending things to trial – how can this matter move more efficiently through the court system?
* R 20 gives extra powers to say how it will look in the future. I won’t grant summary judgment but will make the proceeding more effective

**R.20.06: Costs Sanctions for Improper Use of Rule 20**

The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

**(a)** the party acted unreasonably by making or responding to the motion; or,

**(b)** the party acted in bad faith for the purpose of delay

* Partial indemnity costs or substantial indemnity costs [see separate discussion of costs]

# DISCOVERY

Discovery: General Principles

* Discovery is a process of pre-trial disclosure of all relevant materials that are to be used at trial (including the smoking gun)
* This is done in part to encourage settlement and in part to avoid surprises (notice function).
* There are a number of reasons for discovery, mainly being ability to evaluate the case
  + Notice function
  + Eliminates surprise at trial
  + Encourages settlement
  + Shortens length of trial by requiring production of less evidence
  + Ties parties to their admissions in advance of trial – I.e. locks witness into testimony 🡪 While parties can change their testimony at trial, it will hurt their credibility
  + Narrows down the issues that need to be addressed in trial
* Evaluate the case: Discovery also gives the lawyers a chance to evaluate witnesses on cross-examination; the adversaries and their own. Road test the witnesses as to how they will perform on the stand
  + Oral discovery = trial run of how person will perform at trial (both own client and the opposing party)

**R. 1.03: Definition of the four forms of “Discovery”**

* 1. Discovery of documents
  2. Examination for discovery
  3. Physical or mental examination
  4. Inspection of property
* Discovery is usually the most expensive and the most time-consuming process

Admissibility

**R. 30.05: Disclosure or Production Not Admission of Relevance**

The disclosure or production of a document for inspection shall *not* be taken as an admission of its relevance or admissibility.

* + Relevant but inadmissible 🡪 still must be disclosed on discovery
* Documents must be disclosed if they are relevant (regardless of admissibility) – see discussion of privileged information

Discovery Plan: R.29.1.03

**R. 29.1.03(1): Requirement for Plan**

When a party intends to obtain evidence through discovery processes, then the parties shall agree to a discovery plan.

* + R.29.103(1) sets out rough parameters of discovery
  + Would include what the parties have agreed to for each type of discovery
  + How important these plans are depends on where you practice, counsel and client. Some judges have refused to settle disagreements between counsel about contents of discovery plan, others will.

**R. 29.1.03(2): Timing** [not a big deal]

The discovery plan should be prepared before the earlier of:

* + 60 days after closing of pleadings (or when agreed to by parties), or
  + Attempting to obtain evidence.

**R. 29.1.03(3): Contents**

Discovery plan shall be in writing and include:

1. Intended scope of documentary disclosure
2. Dates of service for Affidavit of Documents
   * Affidavit of Documents is a document of party swearing that they produced everything that is relevant (with documents attached; **Schedule A documents**)
   * You don’t serve privileged information (**Schedule B documents**) – e.g. Emails discussing lawsuit strategy, etc.
3. Production of the documents
4. Who will be produced for discovery
   * E.g. Who will be examined for a corporation? Is this an appropriate person for discovery? You want some broad language of who you want to rely on
5. Any other information intended to result in expeditious and cost-effective completion of discovery process
   * Duty to Update Plan: the parties must ensure that changes are updated in plan **[R 29.1.04]**
   * The amount of detail in a discovery plan will be driven by what type of litigation you’re involved in

**R. 29.1.03(4): Electronic Discovery**

Incorporates the Sedona Canada Principles Addressing Electronic Discovery [Sedona Principles is ~52 pages long]

* What is e-Discovery? Discovery of electronically stored information, including email, web pages, word processing files, computer databases, and virtually any information that is stored on a computer or electronic device.
* Metadata
* E-Discovery typically most important in commercial litigation or large complex litigation
* Niche market in the legal industry

R. 29.1.05: **Failure to Agree to Plan**

* On any motion relating to discovery, the court may refuse to grant relief or to award costs if the parties have failed to agree or to update a discovery plan.

Proportionality in Discovery

**R.29.2.03(1): Considerations**

In making a determination as to whether a party or other person *must* answer a question or produce a document, the court shall consider whether,

**(a)** the time required for the party or other person to answer the question or produce the document would be unreasonable;

**(b)** the expense associated with answering the question or producing the document would be unjustified;

**(c)** requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

**(d)** requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

**(e)** the information or the document is readily available to the party requesting it from another source.

* Can argue this rule when the other party asks you to complete very labourious undertakings or produce a vast amount of documents (can try to cease behaviour when party is trying to cause litigation fatigue)
* In small cases, ordinary discovery can be downsized from that ordinarily provided by the Rules. However, a large case’s discovery cannot be expanded to something outside of what is allowed by the Rules (I.e. can’t say I have a really large case so the proportionality should be increased). Proportionality is about keeping the production manageable and cost-productive
* It’s about trying to save costs at the production stage – court wants parties to limit the amount of documents that are being produced, but everything needs to be disclosed. What is produced can vary though according to the proportionality rule
  + Attempt by Rules Committee to rein in some of the costs of litigation.
* In a 2010 case (unsure of the name), the Court refused to allow defendant to examine two FLA claimants when had already examined the plaintiff and another FLA claimant. Court determined that the defendant had the best evidence from the best sources, and time, expense and prejudice of proposed examinations were out of proportion to the issues in the litigation.

# DISCOVERY OF DOCUMENTS

**General Principles**

Discovery has two parts:

* **Physical part** – documentary discovery
  + This is where you get a better sense of what the case will be about and what the other side has
* **Oral part** – oral discovery

**R. 30.01: Definition of Document**

**(a)** “document” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and

* + Electronic form includes meta-data – this includes information on the usage of the data (e.g. when accessed, who accessed, etc.)
  + Electronic form contains information that would not be available in a hard-copy (e.g. hidden highlights, comments, changes, etc.)

**(b)** a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

Disclosure of Documents

**R. 30.02: Scope of Documentary Discovery – Disclosure\*\* (note: NOT producing)**

**(1)** Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action *shall* be disclosed [does not mean have to produce it] as provided in R 30.03 - 30.10, whether or not **privilege** is claimed in respect of the document. 🡪 have to disclose ALL relevant doc, but not necessarily produce it

* **NOTE**: R. 30.02(2) deals with producing document(s)
* Most important rule when it comes to documentary disclosure – sets out what you have to disclose
  + The scope of documentary discovery in Canada is very broad
  + Unlike the U.S. where parties must specify in writing the documents they are seeking, the onus is on the party providing the documents in Canada to disclose them. It starts with the presumption that you have to disclose all relevant documents.
  + This rule also takes into account documents that were within your possession but no longer are
* “**Relating to any matter in issue”**: you don’t have to disclose documents not related to matters in issue; confined to actions – discovery not applicable for applications.
* “**Possession, control, or power”**: includes documents that **were** in the possession, control, or power of the party (i.e. now and in the past)
* “**Power”**: R. 30.01(1) in a person’s party if that party is entitled to obtain the original document or a copy of it and the party seeking it is not.
* **“Privilege”**: privileged documents must be disclosed, but there is a difference between disclosing that documents exist and actually producing the documents [Existence vs. producing]

R. 30.02(3): **Insurance Policy**

A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

**(a)** to satisfy all or part of a judgment in the action; or

**(b)** to indemnify or reimburse a party for the money paid in satisfaction of all or part of the judgment, but no info concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

**R. 30.02(4): Subsidiary and Affiliated Corporations and Corporations Controlled by Party**

The court may order the disclosure of documents held by a subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by a non-corporate party. 🡪 significant piercing of corporate veil 🡪 allows you to get an order to get documents that aren’t officially within the power of one corporate entity but are within the power and capacity of a related corporate entity

* + You can request that the court rely on this rule to grant disclosure of a document when the other party, for example, says a document is not in their possession, control or power (perhaps because it is with a subsidiary and they cannot request it)
  + Control not defined in the Rules, but case law has suggested it is “control” as defined in *Ontario Business Corporations Act*

Affidavit of Documents

**R. 30.03(1): Affidavit of Documents - Party to Serve Affidavit**

A party to an action shall, within 10 days after the close of pleadings, serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

* Must be served on the other party within 10 days from the close of pleadings.
* However, it is quite common for this deadline to be extended upon consent of the parties.
* Affidavit: each party required to do this within 10 days (although this doesn’t really happen within this time frame – most parties will agree to serve an *unsworn* affidavit). If there’s a strategic importance to the order in which you conduct discovery, (i.e. personal injury cases), the person who serves a sworn affidavit document first gets to pick the order of the discovery.

R. 30.03(2): **Contents**

The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,

**(a)** that are in the party's possession, control or power and that the party does not object to producing;

* + **Sch A**: list all documents that are **relevant** and you will produce to the other side

**(b)** that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

* + **Sch B**: list all documents that are relevant, but will not be produced (**privilege**) – make sure it is itemized
    - These items will be declared privileged. The other side cannot see them and determine whether or not they’re properly privileged. If they want to challenge the ‘privileged’ classification, they would need to bring a motion.

**(c)** that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

* + **Sch C**: **no longer in possession, power and control** – must indicate how you lost it – fairly uncommon
* Under this rule, the affidavit must identify each document by date, author, recipient, type of document, etc.
  + Sometimes, especially re: privileged documents, lawyers use “boiler plate texts.”
    - Improper boiler-plate: “Documents containing or reflecting confidential professional communications passing from the corporations’ solicitors to the corporations directly related to the seeking or receiving of legal advice or legal assistance in connection with the litigation herein and in preparation therefor.” (Schedule B language)
* Although boiler-plates are sometimes used for privileged documents, these are considered inappropriate as they do not allow the other party to assess and possibly challenge the privilege.
* The Courts have said that you have to include enough information for the other party to assess whether or not the document is indeed privileged.

Ethical Issues re Production - *Grossman v Toronto General Hospital*

* + “…it becomes quickly clear to anyone setting out to practice in the courts that "**production**" is open to serious abuse. The integrity of the system depends upon the willingness of lawyers to require full and fair discovery of their clients. The system is, in a sense, in the hands of the lawyers. The opportunity for stonewalling and improper concealment is there. Some solicitors grasp it. They will make only such production as can be forced from them. That is bad practice. It can work real injustice. It causes delay and expense while the other side struggles to see that which they had a right to see from the first. In such a contest the advantage is to the long purse. The worst consequence is that the strategy is sometimes successful, giving its perpetrators a disreputable advantage. The practice must be condemned. If it were widespread it would undermine the trial system.”
    - The court made several points re: ethical concerns:
      * Production process open to serious abuse
        + Clients suppress documents by not providing to lawyer
        + Clients may tell lawyer about documents but refuse to disclose
        + Lawyers might suppress documents, hiding them, or call irrelevant so not disclose
      * Documents should not be concealed
        + It can work real injustice and undermine the trial system
        + It causes delay and expense to the other side who has to fight to get access to info that it is entitled to. The party in a better position to afford these battles is at an advantage
        + If successful, it gives the party a disreputable advantage
      * Lawyers must take seriously their obligation to disclose documents and to impress same on clients- make sure clients go through documents diligently, and identify all documents]
      * It is unethical and unprofessional for a lawyer not to fully explain the important of discovery disclosure to the client or to allow the client to assess the relevance of documents.
        + There’s a difference between disclosure and production. As counsel, you should have a good understanding of your client’s documents. If you think that your client isn’t providing you with all relevant documents, you need to ensure that you get them
        + Lawyer’s reputation on the line, not the clients.

R. 30.03(4): **Affidavit of Documents - Lawyer's Certificate**

Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent (person being examined),

**(a)** the necessity of making full disclosure of all documents relating to any matter in issue in the action; and

**(b)** what kinds of documents are likely to be relevant to the allegations made in the pleadings.

* If a lawyer discovers that the client has sworn a false Affidavit of Documents, the lawyer should attempt to explain the perjury component of this action, and the lawyer has an ethical obligation get off the record.

Production of Documents

### Scope of Production

**R. 30.02(2) Scope of Documentary Discovery - Production for Inspection**

Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, **unless privilege is claimed** in respect of the document.

* + Only have to produce Schedule A documents
* The scope for production is similar to the disclosure of documents with two major exceptions:
  1. There is no requirement to produce documents that you do not have.
  2. There is no requirement to produce documents that are privileged.
* E.g. Facebook
  + The test refers to “relating to any matter in issue” so it’s very broad!
  + Allanah Simpson – recent Fanshawe grad who now resides in Red Deer. Plaintiff in a motor vehicle accident on September 4, 2013, complaining of severe back pain and depression which has negatively impacted her personal relationships. She describes herself as socially withdrawn and her relationship with her boyfriend has been negatively impacted. Defence counsel’s Affidavit of Documents contains numerous photos obtained through investigation, which included a review of Ms. Simpson’s Facebook profile. Case law has said that FB is a document. You must disclose it and sometimes produce it. In terms of your pics, it’s pretty much fair game. But you can try to change your privacy settings.
* **Important note:** the documents that have to be produced in advance of the examination for discovery are going to inform the questions the party is asked at the examination for discovery

### Methods of Production

**R. 30.04: Inspection of Documents**

**(1)** **Request to Inspect:** A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is *not privileged* and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

* + You can make the documents available for inspection under R. 30.04 (the other party can then request copies of documents they consider important), or under R. 30.04(7) they can be copied and given to the other side
  + It is far more common that the documents are copied and given to the other side, but for things that will be difficult to copy (e.g. construction plans), you can arrange for the party to come to your office and see the documents

**(7)** **Copying of Documents:** Where a document is produced for inspection, the *party inspecting the document* is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

* + The method that is most commonly used
  + Standard approach is for party to photocopy documents that it is producing, bind it with tabs, and send it to the other side
* Parties are responsible for bringing the produced documents to certain relevant proceedings.
* The Court has a role in resolving any disputes between the parties regarding the disclosure of documents.
* **Redaction:** if only part of a document is relevant or privileged, then the irrelevant or privileged parts of the document can be blacked out. 🡪 It is proper practice to note why the section has been deleted or blacked out.

Continuing Disclosure Obligation

* Parties have a continuing obligation to disclose documents under **R. 30.07** (unless doc. is privileged). Parties are obligated to produce any relevant documents as they arise or are found and to correct any errors or omissions to the original affidavit of documents.
* Strategically: a party will want to challenge other side on why documents did not come in original affidavit

**R. 30.07: Documents or Errors Subsequently Discovered**

Where a party, after serving an affidavit of documents,

**(a)** comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

**(b)** discovers that the affidavit is inaccurate or incomplete,

The party shall forthwith serve a **supplementary affidavit** specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

* + Continuing obligation to disclose relevant documents (Supplementary Affidavit of Documents). Practically, will just produce new documents without updating the Affidavit of Documents. May however require an updated AOD for motion purposes.

**R. 30.08: Effect of Failure to Disclose or Produce for Inspection**

**(1)** Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

**(a)** if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

* The court refuse to permit the defendant to use the plaintiff’s Facebook posts when cross-examining the plaintiff because the defendant has failed to disclose and produce them before trial *(****Nemchin v Green****)*

**(b)** if the document is not favourable to the party's case, the court may make such order as is just.

* The result of failure to disclose a document depends on its relevance:
  + If a document helps the party that failed to produce it, it will not be admissible in court without leave
  + If the document is not favourable, it is up to the court to decide whether or not it should be admitted. The court may also order an adjournment, further discovery, costs, etc.
  + These are serious consequences that could impact outcome of trial
* The Rules are designed to prevent surprises at trial – parties should know the full extent of the case against them before committing to a trial
  + If you don’t disclose a document, it can be quite negative for your case. The expectation is that you will have disclosed every document relevant to your case and that you intend to rely on at trial
  + Even the smoking gun must be disclosed: If opposing counsel thinks you’re in the practice of not disclosing documents, you’re looking at an LSUC case. Solicitor negligence also possible in some circumstances.

**R. 30.08 (2): Failure to Serve Affidavit or Produce Document:** Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may:

1. Revoke or suspend the party’s right, if any, to initiate or continue an examination for discovery
2. Dismiss the action if the party is a plaintiff, or strike out a SOD if the party is a defendant
3. Make other such order as is just

**R. 30.09: Privileged Document Not to Be Used Without Leave**

Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

* + This deals with where a party has claimed privilege over a document for the purposes of discovery, but wishes to rely on this document at trial. You may only use a document that was not produced during discovery due to privilege if the court grants leave, or to impeach the testimony of a witness.
  + Most times this rule is relevant when we are taking about surveillance

Documents Held by Non-Parties

**R. 30.10: Production from Non-Parties with Leave – Order for Inspection**

**(1)** The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that, [this is the test]

**(a)** the document is **relevant to a material issue** in the action; AND 🡪 has to be relevant to a material issue (higher standard) rather than just relevant overall

**(b)** it would be **unfair** to require the moving party to proceed to trial without having discovery of the document.

**Factors the court will consider regarding “fairness” (Ballard Estate)**

1. the importance of the documents;
2. whether pre-trial production is necessary to avoid unfairness;
3. whether discovery from the parties is adequate and, if not, whether responsibility for the inadequacy rests with a party;
4. whether the non-party resists production;
5. the availability of the documents or information from other sources; and,
6. the relationship between the non-party and the parties.

**Wagg Motion:**

* This motion is required when a third party is refusing to produce records that have been requested, or where the records have been heavily redacted (often due to privacy legislation). Generally for the production of **police or Crown documents**.
* Can go to court and ask judge for an order compelling a 3rd party to produce a report in their possession
  + E.g. MVA case with police records – a lot of info may be redacted due to privacy concerns. Then have to go to court to ask the police for the full records.
* Party can refuse to produce because require its own Release/authorization signed.
* You can seek costs against a 3rd party that is unnecessarily withholding or refusing to produce documents
* It may also be the case that a non-party refuses to give a document unless it is promised that the document will not be used against them (or another condition).
  + The party has the choice whether to accept the condition, or to bring a motion for the production of the documents.
  + The court then has to assess the two-part test and whether the conditions are unreasonable.
  + The court may then order the outright production of the documents, or the production of the documents but with the conditions attached.

Implied Undertaking

* Developed from **common law** – limitation on the use of documentation 🡪 becomes the **Deemed Undertaking Rule** (see below)
* Question: what can party do with the documents once they have received them from D or third party?
  + Especially, what can be done with them outside of the litigation? E.g., can documents obtained on discovery be used to found new cause of action (because someone is implicated within documents)? 🡪 no, can’t do this except for the matter it was discovered for, unless you obtain consent from the other party. Documents are produced only for the purpose of the litigation. If you want to use them for something else, then you need to go to the court to get permission to use them for another purpose or ask the other side

Implied Undertaking Rule:

Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.), p. 702

**Issue:** Addressed the questions of whether you use documents obtained through discovery for founding a claim of defamation.

**Held:** There was an implied undertaking not to use documents obtained through discovery except for the matter they were given for except with the consent of the other side or with permission of the court

* + Using a document for a purpose outside of the litigation can attract a contempt order, and would likely attract a LSUC complaint.

Deemed Undertaking

* This rule was developed by the Rules Committee in response to the Court of Appeal’s decision in ***Goodman v. Rossi***
* The rule is actually more broad than the rule in ***Goodman***
* The rule does *not just* *apply* to documents, but ALL evidence obtained in discovery

**R. 30.1.01(3): Deemed Undertaking**

All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

* + Can **only** use the information for that action
  + This does not apply if the other person consents (4)
  + Does not include evidence filed with court, evidence that is given in hearing
  + Does not refer to the ability to impeach witness

**R. 30.1.01(8): Order that Undertaking does not Apply**

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

* + If you can convince a court that this test is met, then you can use documents for a purpose other than that which it was produced

# EXAMINATION FOR DISCOVERY: R.31

Discovery has two parts:

* 1. **Physical part** – documentary discovery
     + This is where you really get a sense of what the case will be about and what the other side has
  2. **Oral part** – oral discovery

**R.31: Examination for Discovery**

* One of the most important steps in litigation (if not the most important step)
* Permitted by Rule 31 to examine opposing party under oath.
* **Provides an Opportunity to**: test strength and weakness of opposing party’s case, secure admissions, access credibility of a witness, commit evidence to a transcript; impeachment at trial
* Examination for discovery is a **compulsory, pre-trial disclosure** **made under oath** about each party’s knowledge and belief about facts of the litigation 🡪 Doesn’t happen in a courtroom—could be in the office of an examiner, the office of a court recording service, or at a lawyer’s office; Court recorder makes an official record of what goes on during the examination. They create a transcript of the examination
* General rule is that the parties answer the questions, not the lawyers
* Counsel needs to be attentive at all times – listen to question and making a snap decision on whether that question is proper and admissible or not 🡪 If it’s a question that shouldn’t be answered or isn’t proper, you must act quickly
* On examination for discovery, you’re on the record and it goes on the transcript
  + - If you want to take a break, you officially ask to go off the record so the recording stops

Procedure on Oral Examinations: R.34

* **R.31.02:** An examination for discovery may be **oral or by written questions or answers, but not both** except with leave.
* **Rule 35 Written Questions:** The procedure on examination for written questions is regulated by Rule 35; rare.
  + - Problem with written questions is you can’t go with the flow for follow up questions
* **Rule 34** **Oral Examinations:** Rule 34 governs the procedure on oral examinations including:
  1. Location (county where party being examined resides)
     + Only applicable if they are in Ontario; otherwise, there will be an argument between lawyers regarding where it will occur
     + Can be done in different cities (and the two parties don’t even have to see each other)
  2. Form of Notice (generally, a Notice of Examination – Form 34A)
  3. Use of an interpreter (R.34.09(1))

Issue #1: Who is entitled to be present at the examination for discovery?

* Party/parties being examined (parties rarely testify on the same day); lawyers for parties; no judges; court reporter/official reporter who makes a verbatim transcript of examination
* Optionally, any other parties to litigation (do not have to be there, but have right)
* Note: Can make orders excluding a party 🡪 E.g. Sexual assault cases (don’t want P and D in same room), issues of credibility (don’t want D to tailor his/her answers to match those given by first D), etc.

**R.31.03(1)** – A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8).

* + Doesn’t say who can be in the room, but just that can only examine once
    - But there can be undertakings that the lawyer will ask the person for, so you will always end an examination for discovery by saying “these are all my questions, subject to any questions that arise in relation to undertakings” – this is how you get around this rule
  + Factors to consider on who can be in the room
    1. Have to be fair but not prejudicial
       - E.g. You can make order from court to get the party not to be present at the discovery examination (for example in sexual assault cases)
    2. Are you going to get honest answers?
    3. Can you assess credibility better or worse?
    4. How will this have an impact on your case?

Examples where opposing party was permitted to be in the room:

* *Alexandridis v. Richard***:** MVA- multiple Ps, wanted both Ps to sit in (husband and wife); Concern that there would be tailored evidence
  + **Mere allegations of tailoring evidence not sufficient** to exclude party from attending examination of another party
  + Need persuasive evidentiary basis that process will be compromised
* *Besner v. Ontario****:*** malicious prosecution case –claimed credibility case so D should not be there
  + Court: **credibility not the 'crux' of the case** so permitted D police officers to be at each other’s examinations
* *Roe v. Leone*: HIV case - D had sex with many women and they contracted HIV. Court refused to grant the motion to exclude him from attending P’s examination for discovery as **no compelling evidence that P felt intimidation**
  + Evidence presented by P, being affidavit from her mother and from her lawyer, was insufficient to show that case was one of exceptional cases in which order to exclude D from attending her examination for discovery should be granted. While case arose out of sexual assault, Ds in this case were not perpetrators — There was no evidence of medical nature or from plaintiff herself as to any detrimental effect on her of their attendance — There was no evidence upon which it could be found that there had been intimidation by D in respect of plaintiff herself or that he had conducted himself in any way at discoveries he had attended that could result in disruption or intimidation of parties being examined.

But also consider:

* *The Atlas Corporation v. Andy Ingriselli****:***Case fails on credibility; Breach of non-compliance clause
  + Court: Credibility was part of claim so there was **real concern of tailoring evidence**
  + Moving party has onus to show potential for tailoring evidence
* *K. F. (Litigation Guardian of) v. White***:** Sexual assault case; court ordered exclusion on basis of **intimidation of witness**

Issue #2: Who is the “party” to be examined?

**R.31.03(2): Where a corporation may be examined for discovery,**

**(a)** **General Rule:** the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

* + **“May examine ANY officer”**… first choice goes to the examining party (i.e. the P’s lawyer), but if corporation doesn’t want to produce the CEO, can bring a motion and would have to bring an affidavit setting out the evidence saying that the CEO is not the most appropriate person, the discovery would have to be delayed, costs more, this person knows more etc. The opposing party would have to bring their own evidence on why they want the CEO and the court makes a fact-based decision

**(b)** the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court.

*Sawah v Strategy Insurance Ltd****:***Where the plaintiff chose to examine the president of the corporate defendant, the court refused to substitute a different witness. Court held the president has sufficient knowledge of matters at issue.

* + The following practice is becoming more prevalent: the corporation will offer up multiple people and the other party will choose who they want to examine.

Issue #3: What if the person you need to examine is not a party?

**R.31.10 (1): Discovery of Non-Parties with Leave**

The court may **grant leave**, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

* + Any person with info relevant to a material issue = higher threshold (i.e. not just any issue)
  + Except for an expert – they are protected because they give expert opinions – cannot examine them
* You can get leave from the court to get order to compel 3rd party to attend, but you can also ask the 3rd party directly to attend.

**R.31.10 (2): Test for Granting Leave**

An order under subrule **(1)** shall not be made unless the court is satisfied that,

**(a)** the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

**(b)** it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; AND

**(c)** the examination will not,

**(i)** unduly delay the commencement of the trial of the action,

**(ii)** entail unreasonable expense for other parties, or

**(iii)** result in unfairness to the person the moving party seeks to examine.

* ***Rothwell v. Raes*, [1986 Div. Ct.):** The requirements of **R. 31.10(2)** are cumulative and all of them must be satisfied – the rule-makers established a number of preconditions so that the remedy could not easily be subjected to abuse. The onus is on the applicant to show that the requirements of the rule have been satisfied. To satisfy the 2nd requirement it may be necessary to ask the person to be examined to supplement her initial response.
  + This is the test for when you can examine a non-party (remember experts are exempted)
  + Most common non-parties are lawyers and doctors that were not engaged as experts
  + Can’t be redundant – if the information they are likely to get is already readily available, then you likely wouldn’t get leave to examine them

Issue #4: What if party no longer resides in Ontario?

**R.34.07: Where Person to be Examined Resides outside Ontario**

**(1)** Where the person to be examined resides outside Ontario, the court may determine,

**(a)** whether the examination is to take place in or outside Ontario;

**(b)** the time and place of the examination;

**(c)** the minimum notice period;

**(d)** the person before whom the examination is to be conducted;

**(e)** the amount of attendance money to be paid to the person to be examined; and

**(f)** any other matter respecting the holding of the examination.

* Rule is open-ended; must go into court and convince the judge on where it should take place
* E.g. Sarah commences a claim for damages related to sexual assaults that occurred at a young age at the hands of her uncle. Her uncle moved to Vancouver Island (Tofino) many years ago. He enters a defence through a solicitor in Ontario and strenuously denies the allegations of abuse. Sarah’s lawyer contacts the uncle’s lawyer to arrange discoveries and is told that the defendant is unwilling to attend for a discovery in Ontario. The defendant lawyer suggests that Sarah’s lawyer fly out to Tofino to conduct the examination. Sarah tells her lawyer that she cannot afford to pay for her to fly to Tofino to examine the defendant.
  + 3 options:
    - (1) Fold entirely on the case (access to justice issue)
    - (2) Risk not doing a discovery and not knowing what they’re going to do
    - (3) S pays the cost herself
  + Could potentially use discovery by writing here, but concerns that this would be an emotionally charged situation so it may not be the best choice

Issue #5: What if the party’s lawyer is answering the questions instead?

**R.34.14: Improper Conduct of Examination – Adjournment to Seek Directions**

**(1)** An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

**(a)** the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;

**(b)** the examination if being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;

**(c)** many of the answers to the questions are evasive, unresponsive or unduly lengthy; or

**(d)** there has been a neglect or improper refusal to produce a relevant document on the examination.

* Can seek an adjournment of the examination for discovery to seek instructions
* Note that this rule applies to a lot more than lawyers answering questions for the party
  + These are all very common – (a) to (d) – but it’s not very common to seek directions
  + Lawyers will instead use the tactic of saying you have to stop this behaviour right now or we are walking out of the door (then behaviour ceases)
* You would utilize this rule where another party is abusing your client

**R.31.08 Effect of Lawyer Answering:** Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by his or her lawyer and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.

* + It’s ok for the lawyer to answer, but it’s also ok for the lawyer for the other side to object to this
  + If lawyers answer for client and no objection, it would be the client that is bound by it, as if it came from client's mouth unless they repudiate it

**Information Subsequently Obtained**

**R.31.09(1) Duty to Correct Answers:** Where a party has been examined for discovery or a person has been examined for discovery on behalf of or in place of, or in addition to the party, and the party subsequently discovers that the answer to the question on the examination,

**(a)** was incorrect or incomplete when made; or

**(b)** is no longer correct or complete,

the party shall forthwith provide the information in writing to every other party.

* + Tip: It is critical to have one’s party review the discovery transcripts prior to trial to make sure that testimony doesn’t conflict with what was said under oath in examination for discovery
  + This provision fixes the transcript, but doesn't mean other side can't examine again and ask: Did a lawyer coach you on how to correct this answer?
  + allow them to call them back on all the other undertakings

*Iroquois Falls Power Corp v. Jacobs Canada Inc* (2000, SCJ):While a lawyer can discuss evidence with client prior to examination, once it has begun the lawyers and client can not continue to discuss examination.

* When client is being examined, you cannot discuss the evidence with your client (from the moment the examination starts until it finishes). Cannot aid them. Lawyer and client went for lunch – client said they misunderstood a question. Lawyer disclosed that they had this discussion because client misunderstood, and they provided documents. Court said that if you are going to have these discussions with your client, you must tell the other side. The court did accept that the parties weren’t doing anything wrong; but still, you’re not allowed to speak about it until examination is over. Improper for counsel who called W to communicate with W without leave of court while W is under cross-examination for discovery.
  + If examination has already occurred but you need to fix something, you can still correct it – you are obliged to correct the answer. Write a letter for the other side saying that was incorrect and this is the correct answer.
  + They may not notice that an answer was incorrect until much later

Issue #6: What is a relevant question?

**R.31.06(1): Scope of Examination (Generally)**

A person examined for discovery shall answer, to the best of his or her knowledge, information or belief, any proper *question relevant* *to any matter in issue* in the action. 🡪“Any matter in issue” is interpreted as relative to the pleadings

* Courts have said that this is meant to provide some degree of restraint – an examination for discovery is **not a “fishing expedition**”
* This is the big challenge in discovery (not allowing opposing counsel to ask client irrelevant questions) – lawyer will advise client which questions not to answer because the lawyer believes they are not relevant

Kay v. Posluns [1989 ON HC]

* + Pleadings will be interpreted broadly by courts—a question must be answered during discoveries if it has a “**semblance of relevancy**” to any matter in issue in litigation. It’s a broader test than at trial (at trial has to be directly and on point, no tolerance nor time for going side ways)
  + recovery so we’re entitled to know If it was settled based on those injuries, then that was probably related to future care money and in tort law, you can’t get double
    - Judge here says no, just knowing a number isn’t going to give you that information
    - On that fact specific basis, it wasn’t relevant but maybe in another situation it could be
  + This is what is important with respect to every question asked – is it a relevant question or not?
  + This way if the disagreement continues as in ***Kay*** case, you can bring it to a judge
* Wide latitude is allowed on examination or discovery. Questions are permitted so long as they have a semblance of relevancy
* R 31.06(1)(b) merely removes cross-examination as a ground for objection. It does not authorize or encourage it. In Ontario, cross-examination in the true sense does not occur on examination for discovery *(Kay v Posluns)*

**R.34.12(1) Objections and Rulings During Examination:**

Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

**(2)** A question that is objected to may be answered with the objector’s consent and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing [R 34.12(2)]

* Advise client not to answer, then give reason of why the question is not relevant

Common reasons for objections:

1. The answer calls for disclosure of privileged information;
2. The question is irrelevant to the matters in issue;
3. The question is repetitive; or
4. The question is ambiguous. [can rephrase the question i.e. ask as 2 separate questions]

**R.34.15: Sanctions for Default or Misconduct by Person to be Examined**

**(1)** Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under **R.34.14**, the court may,

**(a)** Where an objection to a question is held to be improper, order or permit the person being examined to **re-attend at his or her own expense and answer the question**, in which case the person shall also answer any proper questions arising from the answer; [usually judge will order this]

**(b)** Where the person is a party or, on examination for discovery, a person examined on behalf or in place of a party, dismiss the party’s proceeding or strike out the party’s defence.

**(c)** Strike out all or part of the person’s evidence, including any affidavit made by the person; and [usually won’t strike out since taking away someone’s ability to defend themselves]

**(d)** Make such other order as is just.

**(2)** Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a **contempt order** against the person.

* *Anderson v. Cara Operations Limited* (2009, Ont. S.C.):After the court made 4 order under 34.14(1) (adjournment to seek directions), the court dismissed the action

### Discovery Plan re: Later Motions

**R.29.1.05 Failure to Agree to Discovery Plan:** On any motion under **Rules 30 to 35** relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.

* This is court saying you have to do a discovery plan. A lot of times lawyers don't want to do discovery plans since spending client's money into a plan.
* In reality, Prof has never seen this provision relied on. Both counsels can "forget" to do it, no one will rely on this rule since both sides are at fault.
* discovery plan – what broad issues will you examine each other on, what format (may be e-discover), etc.

Issue #7: What if the party and/or counsel are abusive/obstructionist?

Issue #7: What if the party who is being examined, and/or their counsel, conducts themselves in an abusive or obstructionist fashion?

* E.g. Ms. Civility, counsel for the plaintiff, commences her examination of the defendant physician in a wrongful dismissal action. She barely gets into her examination before she is being cut off and challenged by the defendant’s lawyer, Mr. Disagreeable. Early on in the course of the examination, Mr. Disagreeable tells Ms. Civility to put all of her questions on the record, although they will just refuse to answer them as being irrelevant. What is Ms. Civility to do?
* Goal is to obtain the other side’s story – so lawyer being abusive or obstructionist is very problematic
  + 2 different rules that can be used:
    - **34(14)** [Improper Conduct of Examination - Adjournment to Seek Directions] AND
    - **34(15)** [Sanctions for Default of Misconduct by Person to be Examined]
      * can either proceed and just deal with it later OR can stop things and get motion for directions
  + If person isn't answering questions, thinks best to go with 34(14) and get motion for directions.

*Ornstein v Starr [2011 ONSC]*

* Counsel keeps on saying don’t answer that [If counsel keeps on saying don't answer that, better to stop and get motion for directions 34(14)]
* **Held:** It is my view it is indeed enough. Enough to justify making the order sought with costs on a substantial indemnity basis, payable forthwith.
  + - Court ordered substantial indemnity costs
      * Substantial is the upper end – you won’t get full indemnity
    - You can refuse to answer questions on a proper basis, but if you just take the basis that you will not answer any questions, there will be consequences for that. This was a higher cost than usual for obstructing the process.

Issue #8: Does a party have to provide disclosure of their expert’s opinions?

Issue #8: Does a party that is being examined have to provide disclosure of their expert’s opinions?

**R. 31.06(3): Scope of Examination – Expert Opinions**

**(3)** A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert’s name and address, but the party being examined need not disclose the information or the name and address of the expert where,

**(a)** the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

I.e. Opinions, etc. have been prepared solely for purpose of litigation assessment 🡪 don’t have to disclose

**(b)** the party being examined undertakes not to call the expert as a witness at the trial.

* as long as you don't call expert at trial 🡪 don't have to disclose (E.g. Expert is just providing expertise to assist lawyer in developing questions to ask in discovery (due to very technical nature of issue), but expert will not be called at trial))
* if haven’t decided whether will rely on report, undertake to disclose the info
* These are the two situations where you do not have to disclose the opinions of their expert(s)
* Beyond an expert’s findings, opinions, and conclusions (I.e. the expert’s “final report”) this section broadly extends to include factual information and documents that went into forming expert’s report.
  + Includes underlying documentation, tests, raw data, etc. used in making the final report
  + Aim is wide disclosure of factual underpinnings of expert’s conclusions
* E.g. Yola is examining a defendant engineer. She asks that witness if he has obtained any findings, opinions and conclusions of any expert. The lawyer for the witness says that they have retained an expert but it is a preliminary retainer at this stage and they “have no other information to offer.” What should Yola do?
  + She asked the expert with the exact wording of the rule. If they hired the expert to provide opinions on findings, opinions, etc., the rule says they have to provide you with that information but they don’t have to provide you with any report or any information of the expert, so long as they were provided for the purposes of the litigation.
  + E.g. Send clients to medical specialists for assessment. Doctor might say there’s nothing wrong. You might not want to use this information. You don’t have to disclose this (r.25) if you’re not relying on it. If you’re not relying on it, you never have to serve it. But you have to say that you did speak to a doctor, except that I’m not going to give that information to you. This rule says you only have to disclose info if you’re going to rely on it

Issue #9: How can a discovery transcript be used at trial?

**Use of Examination at Trial**

**R. 31.11(1): Reading in Examination of Party**

**(1)** At the trial of an action, a party may read into evidence as part of the party’s own case against an adverse party any part of the evidence given on the examination for discovery of,

**(a)** the adverse party; or

**(b)** a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

If the evidence is otherwise admissible, whether the party or person has already given evidence or not.

* + “**Read into evidence”:** the attorney provides a schedule (of the answers he/she wants admitted) which court “reads in” as evidence.
    - However, leave of court is required if party being examined is under a disability **(5)**.
    - E.g. You would want to read in admissions by witness that they are unlikely to repeat (e.g. instructor’s case where witness admitted job offered was on lower level than previous job)
  + “**Of an adverse party**”: cannot use the evidence of your own client given in examination for discovery—that evidence must be provided through testimony on the stand. Can only put in information that procured from other side.
  + “**Otherwise admissible**”: since at trial, must now live up to general evidential rules of admissibility (e.g. hearsay admissible at discovery, but not at trial)

**R. 31.11(6): Unavailability of Deponent**

**(6)** Where a person examined for discovery,

**(a)** has died;

**(b)** is unable to testify because of infirmity or illness;

**(c)** for any other sufficient reason cannot be compelled to attend at the trial; or

**(d)**refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the trial judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in court.

**(7)** in deciding whether to grant this leave, the court will consider 3 factors plus a basket clause (d)

**(a)** the extent to which the person was cross-examined on examination for discovery;

**(b)** the importance of the evidence in the proceeding;

**(c)** the general principle that evidence should be presented orally in court; and

**(d)** any other relevant factor

* *TD Bank v. Leigh Instruments Ltd.*: the court permitted the use of examination for discovery, including answers to undertakings, of a **deceased witness** at trial – acceptable as appropriate substitute for live witness because it was thorough and detailed

**R. 31.11(2): Impeachment**

**(2)** The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

* + Impeachment not done to bolster your own case, but to attack the credibility of witness that is testifying. If a prior inconsistent statement is going to be used for purposes of impeachment, the statement must first be put to the witness and the witness must be afforded the opportunity to explain the inconsistency before statement can be put into evidence
  + Another way you can use this rule (other than impeachment) is by reading in the evidence given on examination for discovery. You can take the transcript of the other guy’s discovery and read it into evidence so that it becomes part of the official record at trial
  + You CANNOT read in your own transcript, but you can read in the opposing party’s transcript 🡪 permitted to read it in as part of your evidence for the record
  + If you want to read in your transcript, you have to put your witness on the stand

Rule in Brown and Dunn

**Evidence Act, R.S.O. 1990, c. E.23, s. 21**

“If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate that particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such a statement.”, see also s. 20

* + - You cannot destroy witness before you give them a chance to correct themselves. Have to place previous inconsistent statement before him to allow him to explain.
    - If you are going to challenge someone’s credibility (i.e. to impeach them on an inconsistency), you have to put that to them (giving them an opportunity to explain it). You can’t impeach someone without providing them an opportunity to look at the document with which you’re impeaching them. If you don’t give them the opportunity to defend it, the judge will strike that evidence. So this rule can win you the case, but it can also lose you the case – must know it well.
    - Another context: if you are challenging the witness’ credibility by presenting other witnesses to give evidence (e.g. by saying they stole company funds), you must ask the questions to the witness and put the evidence to them, rather than just calling all the witnesses to say they did it.

# DISCOVERY: PRIVILEGE

* Discovery of documents and disclosure of information can be protected by privilege.
* Another objection in examinations for discovery is privilege
* 4 types of privilege:

1. Solicitor-client (legal advice) privilege;
   * Must be *actual* legal advice. Privilege doesn’t attach to factual questions.
2. Litigation privilege;
   * E.g. Going out and seeking expert opinion – you don’t have to tell them you did that
3. Settlement privilege; and
   * If there have been discussions between parties about settlement, that cannot be introduced as evidenced by way of discovery – parties should be entitled to discuss settlement without it ever coming back to harm them
     + E.g. If you went to a mediation before discovery
4. Wigmore’s “confidential communications” privilege

**Note:** Goal of discovery is often to hear all of the evidence and report to your client. You can tell them whether it is a good or bad case.

(1) Solicitor-Client Privilege

* Recognized by the SCC as a “fundamental civil and legal right” – confidentiality is at the center of privilege (although not the same thing)
* **Test for when solicitor-client privilege attaches** is outlined in *Blank v. Canada (Minister of Justice)*, [2006 SCC]
  + First, **solicitor-client privilege** applies only to confidential communications between the client and his solicitor.  **Litigation privilege**, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature.
  + Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved.  Litigation privilege, on the other hand, applies only in the context of litigation itself.
  + Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.  This difference merits close attention.  The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice.  If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice. *(Blank v Canada (Minister of Justice)*
* Unlike other forms of privilege, there is no balancing of competing interests
* Limited number of exceptions to solicitor-client privilege

*Solosky v. The Queen [1980 SCC]*

* + A substantive rule of law and a permanent right
  + **Transcends other forms of privilege**
  + Privilege belongs to the client, not open to the solicitor or any other person to waive it.

Other Notes:

* Not always clear that every communication made with lawyer will be seen to be made with purpose of legal advice 🡪 but privilege is applied broadly
* *Maranda v Richer (2003):* if you have communications as part of valid client-lawyer relationship they are presumed to be privileged, it is up to the opposing party to show that purpose was not for seeking legal advice
  + *95%* of time court will uphold privilege
* Privilege lasts for life and death, estate steps into shoes of the client
* Privilege is “system-wide”🡪 client talks to lawyer about real estate matter, then Crown claims that this info is useful to their fraud case against the client, this does not matter the privilege applies to the real estate matter and the criminal case = system wide

(2) Litigation Privilege

* Similar to, and can overlap with, solicitor-client privilege
* Applies in situations of anticipated or pending litigation 🡪 Litigation privilege applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature.
* Document must have been prepared for the dominant purpose of litigation
  + Any time you know that you’re going to sue, or someone is going to sue you, and you prepare documents to prepare for that – remember that these documents are privileged
  + include notes clients made themselves, if it’s made in contemplation of litigation
* **Not a substantive right; subject to both legislative and judicial limitations.**
  + ***General Accident Assurance Co. v. Chrusz* (1999, C.A.)**

**Other Notes:**

Allows people to have zone of privacy so that when they are investigating the case and coming up with ways to defend themselves the other side cannot come in and get all their files.

**What is it not:** It is not legal advice 🡪 they both protected against similar kinds of interest but do so in very different ways

* Litigation privilege is not quite as important as legal advice privilege
* Example of legal advice privilege: client goes to lawyer to take about legal trouble they are facing and get advice
  + More narrow🡪 only protects communication between lawyer and client
* Example of litigation privilege: if client is being sued, lawyer need to be able to do the best they can to defend client
  + Say client is being charged with fraud, client and lawyer may hire an accountant to investigate
  + Accountant says there is fraud
  + Ordinarily this would be admissible 🡪 the question is, is it protected?
  + This is covered by litigation privilege

***Lizotte v Aviva Insurance (2016 SCC):*** litigation privilege ensures the efficacy of the adversarial process…[by] maintaining a “protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.”

* You do not need to be with a lawyer to institute litigation privilege 🡪 allows for much broader protection in relationships [lawyer meeting with experts, with investigators]

**Litigation privilege applies only where the material in question was prepared for the dominant purpose of real of apprehended litigation.**

* Discovery wants us to protect openness, however litigation privilege is saying that where you can show that you did something only to advance case in litigation, we will allow you to keep that private
* Example: Lawyer represents gas company and explosion takes place, the company/lawyer hires an expert to determine what went wrong. They do this so (1) they can improve safety (2) they know litigation is coming down the road. This expert is the first on the scene and obviously whoever is going to sue the company wants this info. The question is, can they have it?
  + This is something that is fought over often 🡪 difficult

(3) Settlement Privilege

* Documents that are created for the intended purpose of reconciling or settling litigation are protected by settlement privilege
  + A litigious dispute must be in existence or within contemplation;
  + The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed;
  + The purpose of the communication must be to attempt to effect a settlement.
  + Redact any mention of settlement out of letter so that courts are not aware

(4) Case-by-Case Privilege – Wigmore’s Criteria

**Wigmore’s 4 Criteria:**

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously (diligently) fostered
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct dispose of litigation.

# FURTHER DISCOVERY AND E-DISCOVERY

Inspection of Property: R. 32

* One party wishes to examine the property of the other to obtain evidence in the lawsuit 🡪 often done to prepare expert witness
  + Example: In a construction deficiency dispute, the builder may want to have an expert examine the owner’s building to assess the legitimacy of the owner’s construction deficiency complaints
  + E.g. slip and fall cases
* Often inspection is requested at the Examination for Discovery and if the party refuses to permit the inspection, the requesting party can bring a motion pursuant to Rule 32 to obtain an order granting the inspection
* Not uncommon to agree to terms of inspection, e.g. How invasive, who to be in attendance, potential damage to property etc.
* Pursuant to **Rule 32.01**, on a motion, the court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in the proceeding
* Note that the Rule does not limit that the property must be owned or in the possession of one of the parties to the litigation 🡪 can inspect ANY property, doesn’t have to belong to parties of litigation
* For the purpose of the inspection, the court may,

**(a)** authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;

**(b)** permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and

**(c)** permit the taking of samples, the making of observations or the conducting of tests or experiments.

* The order shall specify the **time, place and manner** of the inspection and may impose such other terms, including the payment of **compensation**, as are just.
* Must serve the person in possession of the property with the notice of the motion and order sought unless,

**(a)** service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party; OR

**(b)** the court dispenses with service of notice for any other sufficient reason.

Medical Examination: R. 33, CJA s.105

**Physical or Mental Examination: CJA s. 105**

* **Order.**provides that where the physical or mental condition of a party is in question in a litigation, the court may, on a motion, order that the party undergo a physical or mental examination by a health practitioner **(CJA s.105(2))**
  + Must be an issue in the litigation
  + Health practitioner: “A person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction” **(s. 105(1))**
  + However in *Ziebenhaus v. Bahlieda*, 2015 ONCA 471, Court of Appeal ruled that Court has inherent jurisdiction to order examination by a person that does *not* fall within definition of a “health practitioner”.
* Where the question of a party’s physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation **(section 105(3))**
* **Further examinations.** A party can bring a motion for further physical or mental examinations pursuant to **section 105 (4)**
* **Examiner may ask questions.** The examiner is entitled to ask the party being examined questions that are relevant to the examination and the answers are admissible as evidence **(section 105(5))**
  + put faith that medical examiner only asks relevant questions since lawyer not there to protect client

**Procedure: R. 33**

[Sets out the procedure for the motion seeking an order for a physical or mental examination]

**R.** **33.01 Motion for medical examination:** A motion by an **adverse party** for an order under **CJA s.105(3)** must be brought **on notice** to every other party [so have opportunity to object]

* *Wooley v. Industrial Alliance* 2016 ONSC 7617 – Court refused to order a neuropsychological examination where the Plaintiff had not put his cognitive function in issue
  + D just randomly wanted to know P’s cognitive function. But this was not an issue in the litigation. Even if it was, D still has to meet the 2nd part of the test in s.105(3) that there’s substance in the allegation.

**R. 33.02(1)** **Contents of Order:** An order under s.105 *CJA* **may** specify the time, place and purpose of the examination and **shall** name the health practitioner or practitioners conducting the examination.

**R. 33.02(2) Order for Further Examination:** The court ***may* order a second examination** or further examinations on such terms respecting costs and other matters as are just.

* *Gelea v. Firkser*, 2013 ONSC (SCJ) – In deciding whether to order a second defence examination, **trial fairness** is central issue. In this case, second examination ordered as D may be prejudiced if not given opportunity to respond to Plaintiff’s medical expert reports

**R.33.03 Dispute as to Scope of Examination:** The Court may determine any dispute relating to the scope of an examination

* *Davis v. McFarland* (1997 ON Master) – A defendant was not allowed a neuropsychological assessment of one plaintiff twin for use as a gauge in trying to assess the neuropsychological injuries of the other plaintiff twin
* *McKitty v. Hayani* (2017 SCJ) – In a dispute whether the plaintiff was brain dead, court refused to permit videotaping of the Plaintiff over 72 hours to monitor movement where no evidence that the results would assist the Court [no merit in doing this, not helpful to TJ to have this done]

**R 33.04 Provision of Info to Party Obtaining Order:** The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least 7 daysbefore the examination, a copy of,

**(a)** any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

**(b)** any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

**R 33.05 Who May Attend On Examination:** Unless the court orders otherwise, **no person** shall be in attendance at the examination other than the person being examined, the examining health practitioner and such assistants as the health practitioner requires for the examination

* *Barnes v. London Board of Education* (1994 Div. Ct) – Parents of disabled minor ordered to attend examination and provide information.

**R 33.06 Preparation and Service of Report**

**(1)** After conducting an examination, the examining health practitioner shallprepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order [regardless of what is said on report]

* In general, don’t have to produce expert reports unless want to rely on them. But under this rule, have to produce expert report if go through with the process.

**(2)** The party who obtained the order shall forthwith serve the report on every other party.

* *Colistro v.Tbay Tel*, 2013 ONSC (SCJ) – Court ordered **costs** against a defendant as report not served [D didn’t produce report] until Plaintiff brought a motion to compel production [P forced to bring motion]
* *Nasir v. Kochmanski*, 2013 ONSC (SCJ) – Court required doctor to produce report despite doctor’s desire to withdraw from case and her concern that report would be of poor quality and contain inaccurate or incomplete findings

**R 33.07 Failure to Comply**

* if a Plaintiff or Applicant fails to comply with an Order granting a medical assessment the proceeding may be dismissed
* if a defendant or respondent fails to comply with an Order under section 105 or Rule 33, the statement of defence or affidavit in response to the application may be struck out.

**R 33.08 Examination on Consent**

Rule 33.01 to 33.07 apply to a physical or mental examination conducted on the consent in writing of the parties, except to the extent that they are waived by the consent.

E-Discovery

**What is E-Discovery**

* The preservation, retrieval, exchange and production of documents from electronic sources in electronic form are together referred to as “e-discovery.”
* E-Discovery is widely used as part of the litigation process
* Lawyers need to be familiar with clients’ obligations to preserve and produce electronic documents, and with the technology available to retrieve, search and produce them in a cost-effective manner

**Sedona Canada**

* The Sedona Conference Working Group on E-Discovery Issues in Canada (“Sedona Canada” or “WG7”) was formed in 2006.
* The mission of Sedona Canada was “to create forward-looking principles and best practice recommendations for lawyers, courts, businesses, and others who regularly confront e-discovery issues in Canada.”
* The Sedona Canada Principles are focused on the discovery process and the issues related to the management [and preserving] of electronic records and other electronically stored information (ESI)
* The first edition of these *Sedona Canada Principles* was released in early 2008 (in both English and French) and was immediately recognized by federal and provincial courts as an authoritative source of guidance for Canadian practitioners. It was explicitly referenced in the Ontario *Rules of Civil Procedure* and practice directives that went into effect in January 2010
* The Second Edition was published in 2015 and was a collective effort of a large group of Canadian practitioners

**Some Objectives**

* The *Principles* provide an outline of best practices with respect to the management of ESI that are or may be relevant to every case.
* One goal is also to provide a framework to address how to conduct e-discovery, based on norms that the bench and bar can adopt and develop over time as a matter of practice
* Attempt to move the discovery process from the former paper-based age to the world of electronic information

**Impact on the Discovery Process**

* Since the publication of the original principles, provincial rules of civil procedure have been amended to accommodate e-discovery, a robust body of Canadian e-discovery case law has developed, the test for relevance has been narrowed in some jurisdictions to reflect a new, high volume, “e-reality,” and across the country, the concept of proportionality has become firmly entrenched in the new discovery process.

**Challenges with E-Discovery**

* Two significant challenges with E-Discovery are volume and complexity
* The two key Principles to address these challenges are **proportionality** (Principle #2) and **cooperation** between parties (Principle #4)

**Key Amendments to Rules in Ontario to Address Challenges of E-Discovery**

* **R 29.01.03 Discovery Plan [cooperation]**: requires the parties to agree to a discovery plan that takes into account “[the] relevance, costs and the importance and complexity of the issues in the particular action.”15 The discovery plan shall also include “any other information intended to result in the expeditious and cost-effective completion of the discovery process *in a manner that is proportionate to the importance and complexity of the action*.”16 Ontario Rule 29.1 also requires that, “[i]n preparing the discovery plan, the parties ***shall***consult and have regard to the document titled ‘The Sedona Canada Principles Addressing Electronic Discovery’ developed by and available from The Sedona Conference.”

**Amendments to Ontario Rules**

* **Rule 29.2 Proportionality** - Court to assess proportionality in determining whether party to answer a question or produce a document.
* Pursuant to **Rule 29.2.02**, the Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).

2. Rule 31 (Examination for Discovery).

3. Rule 34 (Procedure on Oral Examinations).

4. Rule 35 (Examination for Discovery by Written Questions).

**Rule 29.2 – Proportionality**

**(1)** Pursuant to Rule 29.2.03, in making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

**(2)** ***Overall Volume of Documents*:**In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an **excessive volume of documents** required to be produced by the party or other person.

**Sedona Principles**

* **Principle 1.** Electronically stored information is discoverable.
* **Principle 2 (proportionality).** In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: **(i)** the nature and scope of the litigation; **(ii)** the importance and complexity of the issues and interests at stake and the amounts in controversy; **(iii)** the relevance of the available electronically stored information; **(iv)** the importance of the electronically stored information to the Court’s adjudication in a given case; and **(v)** the costs, burden and delay that the discovery of the electronically stored information may impose on the parties. **[reflects rule 29.2]**
* **Principle 3 (preservation).** As soon as litigation is reasonably anticipated, the parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.
* **Principle 4 (cooperation – discovery plan).** Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review and production of electronically stored information.
* **Principle 5.** The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
* **Principle 6.** A party should *not* be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information that has been deleted in the ordinary course of business or within the framework of a reasonable information governance structure.
* **Principle 7.** A party may use electronic tools and processes to satisfy its documentary discovery obligations. [e.g. give specialist key words]
* **Principle 8.** The parties should agree as early as possible in the litigation process on the format, content and organization of information to be exchanged. [will usually come up in discovery plan]
* **Principle 9.** During the discovery process, the parties should agree to or seek judicial direction as necessary on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronically stored information.
* **Principle 10.** During the discovery process, the parties should anticipate and respect the rules of the forum or jurisdiction in which the litigation takes place, while appreciating the impact any decisions may have in related proceedings in other forums or jurisdictions.
* **Principle 11.** Sanctions should be considered by the Court where a party will be materially prejudiced by another party’s failure to meet its discovery obligations with respect to electronically stored information. [courts should use their hammers if parties not abiding by principles]
* **Principle 12.** The reasonable costs of all phases of discovery of electronically stored information should generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

# PRE-TRIAL PROCEDURES

* These are a bunch of steps that litigators need to take in advance of trial to help your case
* These steps also apply to obtaining settlements

(1) Offers to Settle: R.49

* A case can settle at any time
* Costs typically follow the outcome of the action/application and “follow the winner”
  + “Loser pays”: Loser pays the jurisdiction. If you lose, you’re going to contribute to the legal costs. If I lose, then I will have to contribute to your legal costs
* Two different scales of cost recovery
  1. Partial indemnity recovery: usually ~ 50% of costs plus disbursements – **DEFAULT**
     + The party paying these costs is partially indemnifying the other party for their costs
     + E.g. If I have a lawyer and I sue X, if I win, you have to pay me for damages AND you will have to contribute to some of my legal costs (in addition to the damages you owe). You won’t have to pay all the legal costs, but you will have to pay a portion of it (usually ~50%)
  2. Substantial indemnity recovery: usually ~ 75% of actual legal expenses
     + If you have to pay a significant amount of my legal costs (1.5x of 50%)
     + If someone is paying substantial costs, then something better than just a win took place
  3. Note: there is also full indemnity, but very rarely happens (considered to be far too punitive)
* Defined terms as per **R.1.03; s. 131 CJA, R.57,** and **R.49** [LOOK AT THESE]
* Lawyers must discuss offers to settle throughout the litigation process.

**R. 49: Formal Process for Offers to Settle**

* Manipulates general rule of “costs following the winner” to put significant settlement pressure on litigants (i.e. added disincentives for going to trial). It creates a formal process for offers to settle 🡪 rewards reasonableness
  + Some people see this as one of the major advantages of the Canadian system over the U.S. system
  + If an offer is a good offer, the court will punish you for not accepting it by making you incur extra costs
  + Different rules for P and D
    - If P wins, general rule is that they are entitled to partial indemnity costs (up to date of offer to settle)
    - If P beats offer to settle (specifically, if the plaintiff makes an offer that is rejected and obtains judgment as favourable or more favourable than the terms of the offer), P gets partial indemnity costs to date of offer and substantial indemnity costs after
      * This is one of the reasons you want to make an offer to settle *before* trial
    - If the other side beats their offer, they’re entitled to partial indemnity costs – but there are different rules
    - **SEE CHART IN BOOK**
    - if the plaintiff makes an offer that is rejected and obtains judgment as favourable or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs up to the date of the offer and substantial indemnity costs after the date of the offer. Absent an offer (or a clear finding of reprehensible conduct by the defendant), a successful plaintiff would likely only receive partial indemnity costs throughout.
    - In contrast, if a defendant makes an offer to settle that is rejected and the plaintiff obtains judgment less favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date onward. Absent these precise circumstances, there are no cost consequences to a defendant’s offer to settle.

### Serving an Offer to Settle

**R. 49.02(1):** A party to a proceeding may serve on any other party an offer to settle *any one or more* of the claims in the proceeding on the terms specified in the offer to settle (Form 49A).

**R.49.01(2):** Applies to actions, applications, and motions within actions and applications

**R. 49.03:** An offer to settle may be made at any time, but where the offer to settle is made less than 7 days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.

* Hearing commences on the day evidence is called (first witness is day that trial starts) 🡪 Jury selection is not sufficient
* The process under **R. 49** is triggered by serving an offer to settle (Form 49A) at least 7 days prior to the hearing of application, motion, or the start of the trial of the action
* Offers to settle take different forms
  + Can be time limited or open ended
  + Both can be formally withdrawn or replaced at any time
  + Tip: It is not good practice to have offers on the table once proceeding starts.

### Accepting an Offer to Settle

**R. 49.07(1):** An offer to settle may be accepted by serving an acceptance of offer (Form 49C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made.

* This will close the case
* Fairly obvious, but if the courts makes a judgment, cannot then accept an offer to settle afterward
* An offer sits on the table until they write you a letter saying they reject it (or time-limited offer and time has expired)
* Offers to settle are rarely accepted. If parties are going to settle, they will probably continue to negotiate the numbers and fight for every last dollar on the table. Real point of R. 49.07 is to provide significant downside to parties who do not accept offers to settle, but carry the litigation through to its conclusion—puts pressure on parties

### **The Effect of Counter-Offers**

**R. 49.07(2):** Where a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made.

* Even if they say they don’t want it, if you don’t officially withdraw it, the offer is still out there

Preservation of Confidentiality: Settlement Privilege – R.49.06

* **R. 49.06** preserves settlement communication privilege (settlement privilege)
  + If before the action was settled, the parties decide to settle and it’s not accepted, you can’t put in your SOC or SOD that this claim was put in for this $. This can compromise someone’s position before the trial even starts that they don’t really care about the ending. Settlement negotiations are confidential and cannot be admitted in court (because it would illustrate how strong parties felt their cases were)
    - Allows parties to be candid as to merits of their claim
    - Note: using “without prejudice” is not determinative—it turns on content (ie. whether it is a settlement offer—if so, privileged)
  + Court only learns about R. 49 offers once it gets to the stage of assessing costs (after trial)

**R 49.06 (1):** No statement of fact that an offer to settle has been made shall be contained in any pleading

* Cannot put in your pleading that there has been an offer to settle; they are confidential
* Cannot say anything about the offer in *any* part of the proceeding at all (e.g. cannot be in motion, affidavit, etc.)
* Supposed to all be private and without prejudice; if people think offers will be thrown in their face, they will not make them
* There are a few specific exceptions:
  + Private mediation (they will ask if there are any offers to settle, but everything said in mediation is confidential)
* Anything that has “without prejudice” typed in the letter also cannot be disclosed

**R 49.06(2):** Where offer to settle not accepted, no communication respecting offer shall be made to court at proceeding until all questions of liability and relief to be granted, other than costs, have been determined.

* If there have been offers, there’s a time of telling the court when offers have been made or rejected, but you can’t tell the court until there’s been a winner and loser identified. Can only look at offers when trial completed. If not, a judge or jury might be tainted by what the offer has to give. Want the jury to make their own decision based on evidence

**R 49.06(3):** An offer to settle shall not be filed until all questions of liability and the relief to be granted in proceeding, other than costs, have been determined (i.e. after trial)

* Can’t file offers to settle because if they’re there, they’re available to the judge

Cost Consequences of Failure to Accept\*\*

### (a) Plaintiff’s Offer

**Default position:** In general, a winning P will receive a damage award and partial indemnity costs

However, **R. 49.10(1)** changes the general rule: (manipulates it to try to put pressure on the parties to settle)

Where a plaintiff’s offer to settle:

**(a)** is made at least 7 days before the start of the hearing;

**(b)** is not withdrawn or does not expire before start of hearing; and (left on the table and available to be accepted)

* + - Lawyers will write offer so that it expires a minute into start of trial

**(c)** is not accepted by the D; AND

The plaintiff obtains a judgment as favourable or more favourable than terms of offer to settle, the P is entitled to partial indemnity costs to the date offer was served; and substantial indemnity costs from that date, unless the court orders otherwise

* RESULT: The D is punished for not taking an offer that is less than the award
  + This is the court saying to the D you now have to pay the extra amount because of the trial. If you’d have accepted that, everything else could have been avoided so punishment is to pay partial indemnity costs
  + This is an incentive to force the D to think carefully on whether or not it was a good offer
  + Is the P likely to get a judgment equal to or greater than the offer? If yes, then might be worth it to accept and shut it down

### (b) Defendant’s Offer

**R. 49.10(2)** sets out the consequences to plaintiff for not accepting a defendant’s offer

Where a defendant’s offer to settle:

(a) is made at least 7 days before the start of the hearing;

(b) is not withdrawn or does not expire before the start of hearing; and

(c) is not accepted by the plaintiff; AND

The plaintiff obtains judgment as or less favourable than terms of offer to settle, the plaintiff is entitled to partial indemnity costs to date offer was served, and the defendant is entitled to partial indemnity costs from that date**, unless court orders otherwise** (case law says it must be quite large to overcome this general rule, because otherwise it overrides the predictability of this rule)

* Rule deals with an offer that, in hindsight, the P should have accepted
* ***S. & A. Strasser Ltd. v Richmond Hill:*** where P did not accept D’s offer to settle and P’s action was dismissed at trial, court awarded D substantial indemnity costs after date of offer. This case sets out the principles.
* ***363066 Ontario v Gullo:*** "**Remain irrevocable**" until and then withdrew it and offered a worse one. Assessed by ONCA
* Tactically, don't want to leave offer open too long because they would accrue interest

Meaning of “More Favourable”

* For costs, the court add on partial indemnity costs (at time of offer) to figure out what is more favourable
  + Courts may have to do a pre-assessment of costs in order to determine whether decision more or less favourable (***Gardner v John***)
* With respect to prejudgment interest, courts concerned that passage of time can defeat point of offer (because cases can carry on for a very long time) (***Gardner***)
* A party may instead make an “escalating offer,” as in ***Rooney v Graham***
  + ***Rooney v Graham***: an offer may contain terms which “escalate until trial,” ie., it may include provisions for ongoing pre-judgment interest, and can provide for ongoing costs on partial indemnity or substantial indemnity basis.
    - Protects against increasing interest and costs
  + Problem: studies show parties are less likely to accept offer in this form because not certain what they will be required to pay
* Tactically, a party will not want to leave a settlement offer open for a long period of time where costs and interests are included (as running of costs and interest devalues the actual offer)
* After the partial indemnity costs they are entitled to, the P will be required to pay the DEFENDANT partial indemnity costs from the time they gave their offer to the settlement
* Depending on when the offer is made, this can have a significant impact (since the greatest costs are at the end right before the judgment)
* **SEE CHART IN THE BOOK WITH ALL THIS INFO**

**Typical exam question**: Gives facts, time of offer and amount, judgment amount. What are the likely costs?

* E.g. Offer made May 1 and trial starts May 6, so R.49.10 probably doesn’t apply and P just gets partial indemnity costs if they win
* **R.49.13:** court always has residual power

Residual Discretion

* The language of **R. 49.10** is premised with the phrase: “unless the court orders otherwise.”
* Thus, the court has discretion not to apply R. 49.10(1) and (2)
* Court may deviate from rule when offer to settle contains no element of compromise, for example (*Walker Estate*)

*K.K. v G. (K.W.)*, 2008 ONCA 489, 2008 CarswellOnt 3651 (C.A.)

* Even though P beat the offer, they did not get substantial indemnity cost. Judge likely had been influenced by D’s counsel repeatedly discussing the financial situation of the D (which wasn’t great). Likely made judge hesitant to give substantial indemnity costs due to effect on D
* **Ratio:** Case stands for the proposition “unless the court orders otherwise”

.

*Niagara Structural Steel Ltd v WD Laflamme Ltd [1987 ONCA]*

* It is rare for the court deviate from R. 49.10(1) and (2)
* Court should depart from prima facie cost consequences in R.49.10 only where, after giving proper weight to policy of the rule and importance of reasonable predictability and the even application of the rule, the interests of justice require a departure. The good faith of the party who failed to settle should get little weight

*Walker Estate v York Finch General Hospital [1999 ONCA]*

* Key issue in the exercise of court’s residual discretion is element of compromise. If there is no effort to compromise between parties, court should not exercise discretion (because parties are not really working towards settlement)
* In this case, parties agreed on damages (trial only for liability) and P served an offer to settle for very slightly less than amount- not a genuine offer of compromise.

*Data General v Molnar Systems Group [1991 ONCA]*

* An offer to settle need not always contain an element of compromise and a P’s offer to settle for 100% of liquidated claim may result in award of substantial indemnity costs However, the absence of an element of compromise is factor that court may consider in exercising its discretion to “order otherwise” (not determinative though)
* Might get away with this more easily if liability issue is clear
* **R. 49.11** sets out special conditions in cases with **multiple D’s and offers to settle**
* **R. 49.13** preserves the discretion of the court to consider other written offers (ie. that don’t fit requirements of R 49.10) 🡪 preserves flexibility and discretion for the court.

*Banihashem-Bakhtiari v Axes Investments [2003 ONSCJ]*

* P was catastrophically injured and Ds played “hardball” in refusing to admit liability and refusing to make advance payment. P’s settlement offer did not beat trial award, but was really close (1% difference). Court awarded substantial indemnity costs from date of offer under its R. 49.13 discretion
* Might also operate in cases where P withdraws offer before trial starts
* Notwithstanding Bakhtiari, it is unlikely that a court will consider a non-R. 49 offer like a R. 49.10 offer without compelling circumstances
  + I.e. it defeats the purpose of R. 49—it undermines the point of having all requirements under R. 49.10 before consequences are triggered
  + Here should not have gotten substantial indemnity costs, but they did.

(2) Pre-Trial Conference: R.50

* It’s now required that the parties attend for a pre-trial conference
* This is a meeting that involves judge, parties and their counsel
* Point is to get everyone together (often for the first time since discovery) to see what can be done before we start this
* Judge will listen to everything and say “if I was deciding this case, this is what I would do”
* **Role in Case Management:**
  + Pre-trial conferences ensure that proper steps have been taken before parties go to trial
  + Also an attempt to reach a settlement in the litigation
  + Significant as it provides parties with something they haven’t had up until this point in litigation- argue merits of case before a judge, who takes an aggressive position to make parties settle
  + Particularly useful where lawyer and his/her own client disagree
  + Although these theories sound promising, pre-trial conference is not really as successful in practice
  + Parties are skeptical of reaction of a judge who had little exposure to the case

### Process

* The pre-trial conference is kept rigorously separate from actual trial under **R. 50**
  + It is never the same judge
  + This is because it’s meant to keep everyone willing to compromise to settle
  + It’s kept separate because it might not work – whatever’s done at the pretrial has to stay at the pretrial (Vegas joke)

**R.50.05(1):** **Attendance**

* Lawyers shall be at pre-trial and unless the courts say otherwise, so will participants
  + The rule says that the parties must be there. The reality says that a lot of times, they sit in the chairs in the lobby
  + There is a **practice direction** right now that clients have to be there.
    - Note: practice directions are rules issued by courts for different regions [confirm]

**R.50.06: Lists the matters to be considered at pre-trial conference**

Forces you to think of your pretrial and trial in advance

1) possibility of settlement on any or all issues;

2) simplification of the issues

3) possibility of obtaining admissions that may facilitate the hearing;

4) question of liability

5) amount of damages

6) estimated duration of trial

7) advisability of having court appoint an expert

8) number of experts

9) advisability of fixing a date for hearing or trial

10) advisability of directing reference

11) any other matter that may assist in the just, least expensive proceeding

**R.50.09:** **Pre-trial Confidentiality – no disclosure after pretrial**

* Everything said at pre-trial conference is confidential and cannot be used at trial unless an order under R.50.07 or in pre-trial conference under rule R.50.08 (las vegas provision)
* No disclosure rule
* Allows parties to be candid as to the merits of their claim

**R.50.10:** **Issues with Judge – pretrial judge cannot be trial judge**

* Judge who conducts pre-trial cannot try dispute except with written consent of all parties
  + Consent – if the pretrial judge may be trial judge, then you might be afraid to say certain things

**R.50.10(2)** does not prevent judge from holding conference either before or during proceedings

* ***Bell Canada v Olympia & York Developments* (1994 C.A.):** Evidence of what occurred at pre-trial should not be used by the trial court even if the parties consent to admission of the evidence or consent to have same judge sit in. Litigants must be assured that at the pre-trial they can speak freely, negotiate openly, and consider recommendations from the pre-trial judge, without concern that their positions in the litigation will be affected.

(3) Admissions: R.51

* One of the goals as examining counsel is to get admissions (get the other side to admit something)

**Request to Admit**

**Request to Admit Fact or Document:** (1) A party may at any time, **by serving a request to admit (Form 51A),** request any other party to admit, for the purposes of the proceeding only, the **truth of a fact** or the **authenticity of a document**.

(2) A copy of any document mentioned in the request to admit shall, where practicable, be served with the request, unless a copy is already in the possession of the other party **[R 51.02(1)]**

**Effect Of Request To Admit:** (1) A party on whom a request to admit is served shall respond to it within *20 days* after it is served by serving on the requesting party a response to request to admit (Form 51B).

Deemed Admission Where No Response:(2) Where the party on whom the request is served fails to serve a response as required by subrule (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit

Deemed Admission Unless Response Contains Denial or Reason for Refusal To Admit**:** (3) A party shall also be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request, unless the party’s response,

(a) specifically denies the truth of a fact or the authenticity of a document mentioned in the request; or

(b) refuses to admit the truth of a fact or the authenticity of a document and sets out the reason for the refusal.  **[R 51.03]**

**Costs On Refusal to Admit:** Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs **[R 51.04]**

* There is NO absolute bar to the court’s reviewing a reply to a request to admit on an interlocutory motion. In this case the court struck out the respondent’s reply to the applicant’s request to admit and ordered the respondent to deliver a fresh response *(Foundation for Equal Families)*
* Where a party served an unresponsive response to a request to admit, the court ordered the party to serve an amended response *(Csak v Csak)*
* The plaintiff’s global denial of all facts set out in the defendant’s request to admit was held to be in compliance with rule 51. *(De Marco)*
* In responding to a request to admit, there needs to be a meaningful response given and if you do not, judge can take this into account *(Toronto Board of Education)*

### Withdrawal of Admissions

**Withdrawal of Admission [R 51.05]**

An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

* A party seeking to withdraw an admission must prove all 3 things (*Antipas v Coroneos, reaffirmed in Szelazek Investments Ltd*)
  1. A triable issue in respect of the new position
  2. The new position does not cause prejudice to others that could not be solved by adjournment or costs; AND
  3. A reasonable explanation for the change in positions

*Antipas v Coroneos* (1988 ON HC) – When new claim had been made, new claim exceeded policy limits. The insurance company said they cannot admit liability anymore since cannot admit liability over policy limits; if they do, they are screwing the defendant (e.g. limit is $1M, if insurance admits for $1.2M, then person is liable for the excess). Admission of liability prejudices the insured; there is good faith duty not to prejudice insured.

**Order Based On Admission of Fact or Document [Relatively Rare]**: (1) Where an admission of the truth of a fact or the authenticity of a document is made,

* 1. in an affidavit filed by a party;
  2. in the examination for discovery of a party or a person examined for discovery on behalf of a party; or
  3. by a party on any other examination under oath or affirmation in or out of court,

*Any party* may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just.

(4) Jury Notice: *CJA*, S.108 & R.47

**NOTE:** This is out of order. This is more properly dealt with at the time of pleadings. All of these rules between plaintiffs and defendants also apply to third parties, cross-claims, etc.

Rule 47 must be read in conjunction with s. 108 *CJA* which provides that “in an **action in the SCJ** (excluding Small Claims Court), a party may require that the issues of fact be tried or damages assessed, or both, by a jury, unless otherwise provided” **[CJA 108(1)].**

* Exceptions provided for in **CJA 108(2)** and by individual statute

**Actions to be Tried with a Jury:** A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a **jury notice (Form 47A)** at any time before the close of pleadings, unless section 108 of the *CJA* or another statute requires that the action be tried without a jury **[R 47.01]**

CJA s. 108(3) allows the other side to **challenge a party’s request for jury trial**; Procedure under Rule 47.02(2).

**Striking Out Jury Notice:** (1) **A motion may be made to the court to strike out a jury notice** on the ground that,

1. a statute requires a trial without a jury;
2. or the jury notice was not delivered in accordance with rule 47.01.

(2) A motion to strike out a jury notice on the ground that the **action ought to be tried without a jury shall be made to a judge.**

(3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury. **[R 47.02]**

[5] Evidence Notes: *Evidence Act* s. 35

**Where business records admissible**

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.  [Doctor’s notes, nurse’s notes etc.]

**Notice and production**

**(3)** Subsection (2) does *not* apply unless the party tendering the writing or record has given at least 7 days notice of the party’s intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within 5 days after giving notice to produce the same **[ON *Evidence Act* 35(2-3)]**

* This is a way to get around calling business witnesses at trial, however it is important that business records are made in the ordinary course of business
* Must complete a form called a ‘notice of intention’ under the Evidence Act – list of all the documents you intend to rely upon. If you don’t do that and then try to rely on these documents at trial, you will have a very difficult time getting them into evidence

# INJUNCTIONS & INTERIM ORDERS

In general

“**injunction**” = court order that orders a party *to do* or *to refrain from doing* a certain act (or acts)

There are several types of injunctions:

1. Interim (pre-trial/application hearing) 🡪 Tells someone to do or not do something until an official decision is reached, ex parte
2. Mandatory 🡪 Requires party to do a positive act or mandates a certain course of conduct
3. Interlocutory(pre-trial/application hearing)
   * *Quia Timet:* injunction to restrain wrongful acts that have not yet occurred but are threatened to occur
   * *Mareva:* that allows a plaintiff to restrain a D from disposing or otherwise removing assets away from the court's jurisdiction pending the final resolution of the plaintiff's action*.*
   * *Anton Piller:* right to search premise and collect evidence *without prior warning*
4. Permanent – results from trial/application

* Requires a positive or negative act (do something or refrain/stop them from doing something)
* Authority for granting injunctions found in **s. 101 CJA** and **R.40 (interlocutory injunctions)**
  + Provisions do not set out the test for injunctions – applicable tests found in case law
* There’s no restriction on what type of action you can stop/require
* These are things before the court makes a determination of who’s right or wrong
* Interim and interlocutory often asked for together
* The purpose of an interim injunction is to cover the period until the court can hear the case

Interim vs. Interlocutory vs. Permanent INJUNCTION

* An **interim injunction** request can be made ex parte or on notice. Argument on the motion is generally quite limited and, if an order is made for interim injunctive relief, the order is typically for a **brief, specified period** of time. To extend the duration of the order, the moving party will usually have to bring a further motion.
  + *Ex parte* means without the other party – very extreme thing to do (since system is based on reasonable notice)
    - Meant for emergencies
* An **interlocutory injunction** is an order restraining the other party for a limited period, such as until trial or other disposition of the action. Typically, more thorough argument by both parties will be required and they are usually granted for a **longer duration** than an interim injunction.
  + **Purpose:** protect moving party from injury by violation of its legal rights, for which it could not be adequately compensated by damages or which could not be cured (because moving party is unable to collect damages) if matter were to be resolved in party’s favour at trial.
  + They are granted within the context of an action and are not self-supporting causes of exceptions (certain limited exceptions apply)
  + Therefore, party seeking injunction ***must plead this interlocutory injunction*** in the prayer for relief
  + Examples of contexts in which interlocutory injunction might be ordered:
    - Restraining a defendant from disposing of assets;
    - Stopping the broadcasting of a television or radio story;
    - Stopping contact of customers;
    - Continuing supply under a contract.
* A **permanent injunction** is granted after a final adjudication of the parties’ rights.

**Note:** These injunctions are really based on “time” 🡪 what time frame, etc. you’re looking at

Mandatory Order vs. “Ordinary” Injunction

**Mandatory Order:** requires **positive action** and does not prohibit certain specified acts 🡪Can be an interim, interlocutory, or permanent injunction

* **DO:** A mandatory order (also called a mandatory injunction) is one that requires the other side to act positively such as to take certain steps to repair the situation consistent with the moving party’s rights, or it may require the other side to carry out an unperformed duty to act in the future.
* **DOES NOT:** a mandatory order does NOT prohibit certain specified acts
  + On the other hand, “ordinary” injunctive relief prohibits certain specified acts.
  + Can be an interim, interlocutory or permanent injunction
* Mandatory/plain injunction is really classifying what you’re asking for
* A regular injunction says don’t do something. Mandatory order says you must do something

*Tremblay v. Daigle [1989 SCC]*

**Facts:** Parties ended their relationship; appellant was 18 weeks pregnant at the time and decided to terminate her pregnancy

**Held:** The respondent, father of the unborn child, obtained an interlocutory injunction from the SCJ (upheld by the CA) preventing her from terminating the pregnancy, but ultimately overturned by the Supreme Court of Canada

* One of the most controversial cases in SCC history
* In this type of case, cannot wait for resolution in the normal course – father argued that injunction was needed because by the time it went to trial, the point would be moot

**Mandatory is not only Mandamus**

* Mandamus is an extraordinary remedy and has a well-defined and technical meaning in the law.
* The Rules Committee selected a different term in the revision of the Rules of Civil Procedure.
* Mandamus was a very specific remedy; mandatory order is broader and not constrained by, although it can be the same thing as mandamus if it meets those requirements

**Examples: Mandatory Orders (positive action)**

* Tracing procedure to determine whether certain funds can be traced (*Waxman v. Waxman*)
* Convey item or possession
* Make records available for inspection
* Make access to rights of way available

Process for Obtaining an Interlocutory Injunction: R.40

**R. 40.01:** An interlocutory order or mandatory order under s. 101 or 102 of the *CJA* may be obtained **on motion** to a judge by a party to a pending or intended proceeding.

* Motion typically sought on **notice** to all persons affected by the order sought [**R. 37.07(1)**].
* However, motions may be brought **without notice** (*ex parte*) to the other side where it is **necessary and appropriate** to do so [**R. 37.07(2)**].
  + **Test**: is it “genuinely impossible” to give notice to the other side without defeating the purpose of the order?
  + With *ex parte* motions, there is a higher obligation on the moving party to make full and fair disclosure of all material facts (court is trusting the party to give all sides of the story)

**R.40.02 Without Notice:** If motion brought without notice *(ex parte*)*,* Rule 40.02 applies

**(1)** An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding 10 days;

**(2)** A motion to extend the order may only be made with notice, unless the court decides otherwise.

Undertaking in Damages

**R. 40.03:** on a motion for an interlocutory injunction, the moving party must undertake to abide by any order concerning damages the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party

* **Rationale:** if order is granted, the moving party will be obtaining relief prior to proving entitlement to that relief on balance of probabilities at trial.
* So must be very cautious! If it comes out at trial that moving party had no case and basis upon which injunction made incorrect, moving party must compensate responding party for damage suffered. At trial, D must prove damages incurred as a result of the interlocutory injunction.
* The ultimate issue hasn’t been decided. For this reason, the court doesn’t really want to make a decision that will cause the whole trial to collapse. One of the ways to deal with this is to make an undertaking in damages
* Practically, can be a determinative, tactical factorin deciding whether to seek an injunction
  + It can also be a strategic/tactical reason to ask for, or not ask, for injunction
  + If in employment situation you’re told you have a non-compete clause and at trial it turns out that clause was invalid, the other side, because of that undertaking, has to pay it
* Examples:
  + ***Delrina Corp. v. Triolet Systems Inc:*** P obtained interlocutory injunction but then lost at trial. Ordered to pay $7 million to D in compensation for the injunction
  + ***United States of America v. Yemec:*** “a profound unfairness occurs since defendant’s assets are tied up indefinitely…which may force defendant to settle rather than await ‘vindication’ after trial”
* ***F. Hoffman-LaRoche & Co. AG v. Secretary of State for Trade and Industry*:** “It is not possible for the court to be absolutely certain that the plaintiff will succeed at the trial in establishing his legal right to restrain the defendant from what he is threatening to do. If he should fail to do so the defendant have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; any loss is likely to be *dammnum absque unjuria* [loss without injury]for which he could not recover damages from the plaintiff at common law. So unless some other means is provided in this event for compensating the defendant for his loss, there is a risk that injustice may be done.”

Must Proceed to Trial

\*Once the moving party has obtained an interlocutory injunction, they are required to move the litigation diligently forward.

* + The moving party cannot “sit” on the order.
  + The responding party can move to have the injunction set aside if the other side is not moving the matter along diligently
  + Important principle

Test to Grant Interlocutory Injunction

***CJA* s. 101:**A judge of SCJ may grant an interlocutory injunction or mandatory order where it appears just and convenient to do so.

* “The granting of an interlocutory injunction is a matter of judicial discretion, but it is a **discretion to be exercised on judicial principles**.” *(Aetna v. Feigelman* (SCC))

### Test for Granting an Interlocutory InjunctioN

The SCC in ***RJR MacDonald v. Canada***confirmed the **3-part test** applicable to requests for an interlocutory injunction:

1. Is there a **serious question to be tried**?
2. Would the litigant who seeks the interlocutory injunction suffer **irreparable harm** if it is not granted?
3. **Balance of convenience:** Which party will suffer greater harm from granting or refusing the remedy pending a decision on the merits
   * Who’s going to suffer greater harm? The party asking for it must prove they will suffer worse harm

**Note:** an injunction is an **equitable remedy**—it is discretionary, and there is no automatic entitlement (even if the test satisfied) 🡪 esp. if don’t come with clean hands

**Part One: A Serious Question to be Tried**

* This is a low threshold (on the merits of the claim): “Once satisfied that the application is neither frivolous nor vexatious, the motions judge should proceed to consider the send and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial” (***RJR****)*
* “It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of lawwhich call for detailed argument and mature considerations. These are matters to be dealt with at trial.” (***American Cyanamid Co. v. Ethicon Ltd***)
* **Exceptions** to this low threshold (i.e. a higher standard will be required):

(i) Where the motion will be entirely dispositive of the issue (e.g. ***Tremblay***).

(ii) If the case is clearly a legal dispute—the factual record is clear and trial process is unlikely to add much.

* + - There is an exception to this exception, however—*Charter* litigation should go to trial so there is a full evidentiary record (***RJR***)
* Not requiring proving that you will win
  + If Charter issue, they will require a lot more evidence of facts and won’t be determined at this stage

**Part Two: Irreparable harm if the order is not granted\***

* This is usually the most significant and most difficult hurdle to overcome
* ‘**Irreparable**’ = nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.” (*RJR, SCC*) 🡪 *type* of harm that matters
  + Must be harm to the moving party (harm to third parties not considered)
  + As a result, courts typically consider whether the harm is **difficult to quantify** in monetary damages – i.e. loss of goodwill or irrevocable damage to reputation, loss of market share and permanent loss of natural resources
    - Just have to prove that there’s a real risk of these things happening, not that they are happening
  + If monetary damages easily quantifiable, wait for trial.
  + If it’s more difficult to put a $ value on it, then it will more likely be considered irreparable harm]

**Part Three: The Balance of Convenience**

* Involves determining which party will suffer greater harm with the outcome of the motion. Factors to be considered are numerous and vary in each individual case.
* Court must weigh the moving party’s need for protection against the corresponding need of the respondent to be protected against injury and determine “where the balance of convenience lies.”
* In **public interest cases**, courts not only consider the impact of order vs. no order on the parties, but the impact on the public at large (***RJR***—anti-smoking, pro-health campaign) (so third parties can be considered under this aspect of the test)
  + So **harm to *third parties* can be considered in third stage of the test**
* Another reason this test is important to understand:
  + It is similar to the **test for a stay on an appeal:**
    - There is a serious question to be adjudicated on the appeal;
    - The moving party will suffer irreparable harm if the stay is not granted
    - An assessment as to which of the parties would suffer greater harm from the refusal or the granting of a stay
  + Also a discretionary order by the court

Special kinds of Injunctions: Quia Timet, Mareva, Anton Piller

* After general test, look to case law for the particular type of injunction you are seeking and your factual set

### (1) Quia Timet Injunction

* Latin for “because he fears or apprehends”
* While injunctions are generally aimed at preventing harm into the future based on the recent conduct of the defendant, **a *quia timet* injunction is unique in that it is granted before the threatened harm has actually been suffered**
  1. Moving party must be establish a ***strong prima facie*** case (versus a serious issue to be tried)
  2. Moving party must also establish **a high probability** that the harm will occur
* A very rare order, but see: ***Corp. of the Canadian Civil Liberties Assn. v. Toronto (City) Police Service*, 2010 ONSC**: Use of sound cannon as crowd control device. Harmful to the hearing of those targeted. Court gave injunction to disallow device, but police just agreed to turn the sound down.

### (2) Mareva Injunction

**Purpose**: ensure assets available to satisfy judgment if P successful; prevents Defendant from disposing of assets to prevent recovery

**The Test (*Chitel*):**

Moving party must show:

**(1)** A **strong *prima facie* case** on the merits (likely to succeed in litigation; higher hurdle than ***RJR***)

**(2)** **Good reason to believe D will dissipate its assets pending trial** with the result of avoiding judgment.

* + Must be clear that the defendant’s purpose in disposing of its assets is the avoidance of a potential judgment (*Chitel*)
  + Evidence of this purpose may be inferred if there is a strong *prima facie* case of **fraud** or **fraudulent misrepresentation**
    - Need evidence, not just speculation or rumour (i.e. a “real risk” of disposition of assets)

**(3)** B**alance of convenience** favors granting the order if this is satisfied

* Prevents the **removal of assets** from the jurisdiction or the **disposal of assets**—a “**freezing order**” (*Mareva,* Eng. C.A.). Accepted in Canada in *Aetna Financial Services Ltd v. Feigelman* (1985, SCC)and *Chitel v. Rothbart* (1982, CA).
* **Rationale** is that the defendant should not be permitted to thwart the court’s process by dissipating assets, especially assets claimed by the plaintiff, prior to the determination of the plaintiff’s entitlement to have those assets returned or to be compensated out of those assets.
* ***Ex parte* injunctions in general** and *Mareva* injunctions in particular are often the bane of the judicial process. They present judges with the most vexing of issues on an immediate and urgent basis while simultaneously obliging the moving party to make full and frank disclosure of the relevant facts, if known, including facts which may explain the position or inure to the benefit of the defendant. Moreover, when a *Mareva* injunction is ordered, a ‘profound unfairness occurs since the defendant’s assets are tied up indefinitely […] which may force the defendant to settle rather than await ‘vindication after trial” (*United States of America et al. v Yemec et al.*, [2003])
  + Courts don’t want people to be forced legally into bad situation rather than being able to have court hear their issue on the merits – judges very hesitant about one party being there alone and asking for something very punitive for the other party

### (3) Anton Piller Order

* An *Anton Piller* order grants the plaintiff access to the defendant’s premises to inspect and remove items over which the plaintiff asserts a proprietary claim
* **“Surprise order”** and has been characterized as the most “draconian” of all injunctions and mandatory orders – power to make order now codified in **Rule 45**
* This is a very powerful tool used in very particular circumstances: Will be granted where moving party is concerned about destruction of documents and other evidence that might be important to the litigation

**Test was set out by the SCC in *Celanese Canada Inc. v Murray Demolition Corp*, [2006]**

1. The plaintiff must demonstrate a strong prima facie case;
2. The damage to the plaintiff by the defendant’s alleged misconduct, potential or actual, must be very serious;
3. There must be convincing evidence that the defendant has in its possession incriminating documents or things; and,
4. It must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work. 🡪Mere speculation is insufficient: moving party must show evidence/reason to support extraordinary measure

Can see why the test’s threshold is very high: giving one party permission to go onto other party’s premises

* Damage: What you’re alleging in the lawsuit is not just important to you, but very serious. It can’t be a minor issue
* It’s most common in these days where there’s electronic information and where that electronic information is short lived
  + i.e. text messages or 30-day automatic erasing

Interim order for preservation and recovery of property

### Interim Preservation of Property

**R. 45.01(1):** The court may make an interim order for the custody or preservation of any property in question in a proceeding and for that purpose may authorize entry on or into any property in possession of a party or of a person not a party. 🡪 Extends to any property that is relevant to an issue in the proceedings.

**R. 45.01(2):** If property is perishable or likely to deteriorate, court may order its sale.

* While an order for the preservation of property could have fallen under R. 40 and the general test under ***RJR***, the *Rules* have set out specific provisions in **R. 45**.
  + Might not be as broad as *Anton Piller*, so might need to work in conjunction with R. 40. These rules overlap.
  + But might also be interpreted broad enough to parallel *Anton Piller* order.
  + Want to look at your situation to determine which order meets your situation, or if they both do.
* This isn’t evidence, this has to be about what you’re suing over (not evidence, like in Anton Pillar)

### Interim Recovery of Personal Property

* *CJA* s. 104 and Rule 44 deal with the interim recovery of personal property pending trial.

***CJA* s. 104(1):** In action in which the recovery of possession of personal property is claimed and it is alleged that property (a) was unlawfully taken from possession of the plaintiff; or (b) is unlawfully detained by the defendant, the court may, on motion, make an interim order for the recovery of possession of the personal property.

**(2)** a person who obtains possession of personal property by obtaining or setting aside an interim order under (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property (undertaking in damages).

* CJA S104: Not damages for loss of property – must be that you’re asking for recovery of the property

**Test for Recovery of Personal Property: *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd* (1996 Ont. Gen. Div.)**

* The moving party must show:
* (1) “Substantial grounds” for its claim to ownership of the property in question; and
  + The mere possibility that the moving party may succeed at trial is insufficient.
    - Have to show there’s a good chance you’re going to succeed before providing this extraordinary remedy of changing possession/property
  + Threshold is somewhere around a strong *prima facie* case
* (2) The “balance of convenience” favours the moving party recovering property during the interim period.

Interim Order for Security for Costs

* NOT an injunction – this is another way of protecting interests until the end of the trial
* Security for costs is focused on the protection of **defendant’s position** prior to trial
  + If defendant wins, protection is provided by costs
  + Motion for security for costs arises when defendant is concerned that there is a risk that the plaintiff will not have the money to pay those costs
* This is a motion for **defendants**

### Motions for Security for Costs

**R. 56.01(1):** Sets out 6 different factual situations under which a defendant can seek an order for security

* The most common are (a) and (d):
  + **(a)** Plaintiff is ordinarily resident outside Ontario.
    - **R. 56.02:** allows defendant to demand the plaintiff’s lawyer to advise whether plaintiff is ordinarily resident in Ontario.
  + **(d)** Plaintiff is a corporation, and there is good reason to believe that the Plaintiff does not have assets in Ontario to cover the costs of the Defendant.

### Process for Bringing Motion for Security for Costs

**R. 56.03:** Sets out starting times as to when Defendant can bring a motion for security for costs.

* In an action, after Defendant has delivered defence. Notice must be given to the plaintiff and every other defendant who has delivered a defence;
* In an application, after the respondent has delivered notice of appearance. Notice must be given to the applicant and every other respondent who has delivered a notice of appearance.
* Have to exchange some of the basic documents first before you can go ahead with bringing motion for security for costs

**R. 56.04:** If the Defendant’s motion for security is successful, the court’s order must address the amount and form of security.

**R. 56.07:** If circumstances change (e.g. costs increase), the Defendant may move to vary the amount posted for security in the order.

### Test to Obtain Security for Costs

**Test:** The defendant must establish that one of the conditions of **R 56.01** are met. Burden then shifts to the plaintiff.

* Plaintiff then has a number of possible responses to block the order:

(1) Plaintiff can demonstrate that he/she has sufficient assets available

(2) Can show ordinarily resident in Ontario and sufficient assets in Ontario

(3) Plaintiff can show that they have assets in another jurisdiction that has easy recognition and enforcement of Ontario orders (e.g. another Canadian province)

(4) Another way to beat order: Throw self at mercy of the court—courts may not want to prevent an impecunious plaintiff with a meritorious claim from proceeding.

* + - ***John Wink Ltd.* (1987):** The onus is on plaintiff to establish that it should be permitted to proceed to trial in spite of lack of assets. 🡪 Where plaintiff admits its poverty, may proceed to trial if it establishes it is not almost certain to fail—i.e. unless a claim is plainly devoid of merit, the plaintiff should be allowed to proceed
* Note: courts are willing to look at merits even in cases where P is not impecunious (the less merit your claim has, more security you will be required to post)
  + So you either claim you’re rich or poor, middle ground won’t defend you of this motion

SIMPLIFIED PROCEDURE: R 76.02

**R. 76.02(1):** The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff’s claim is exclusively for one or more of the following

i. money

ii. real property

iii. personal property

2. The total of the following amounts is $100,000 or less exclusive of interest and costs:

i. the amount of money claimed, if any

ii. the fair market value of any real property and of any personal property, as at the date the action is commenced

Originating Process: must say that the action is being brought under rule 76

Affidavit of Documents: Need List of potential witnesses

Discoveries: Two hours

Motion: Special form

Settlement Discussions: Mandatory

Timelines: 180 days to set down for trial

Pre-Trial Briefs: page limit

# TRIALS

Trials Procedure: R. 52

### [A] adjournments: R.52.02

**Rule:** “The judge may postpone or adjourn a trial to such time and place and on such terms, as are just.”

* + Often due to late service of expert reports. 90-60-30 day rule – any expert report
    - P must serve report 90 days before trial
    - Any responding reports have to be served 60 days of trial
    - Plaintiff reply report has to be in 30 days before trial

Process

* A motion is necessary to ask for adjournment. There has to be legitimate reason + oral argument. Even if motion is on consent doesn’t mean it’ll be granted.

Circumstances where necessary:

* + *Stetler v Christmas 2019 ONSC 1616* 
    - P served neurological report. Within days of that report being served, D said wanted to have P assessed by neurologist, but P refused to allow assessment to happen since could affect trial that had been rescheduled to 2019. Matter argued in March. Judge refused to allow neurological assessment to take place even though it would be more fair for D.
    - Judge didn’t allow for this assessment to take place since adjournments not granted easily.
  + Expert or lay witness not available
    - *Rado v Ahmed 2018 ONSC 2036* – court refused to grant adjournment for 3 week trial to accommodate vacation plans of expert.
  + Lawyers being double booked for 2 trials at the same time
    - 95% + settle so lawyers may double book themselves, but depending on judge this argument may not fly
  + Catastrophic impairment – D might want to wait for outcome of that investigation

### [B] Failure to Attend at Trial: R.52.01

(1) Where an action is called for trial and **all the parties fail to attend**, the trial judge may strike the action off the trial list.

(2) Where an action is called for trial and **a party fails to attend**, the trial judge may,

1. proceed with the trial in the absence of the party;
2. where the plaintiff attends and the defendant fails to attend, dismiss the counterclaim, if any, and allow the plaintiff to prove the claim;
3. where the defendant attends and the plaintiff fails to attend, dismiss the action and allow the defendant to prove the counterclaim, if any; or
4. make such other order as is just.

### [C] Exhibits

**Marking and Numbering** – **[52.04(1)]\*\***Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the person who produced it is not a party or a party’s lawyer, the name of that person.

**Return of Exhibits** – **[52.04(2) and (3)]**

(2)At any time following the trial judgment, on requisition by the lawyer or party who put an exhibit in evidence or the person who produced it and on the filing of the consent of all parties represented at the trial, the registrar may return the exhibit to the person making the requisition.

(3) Subject to subrule (2), the exhibits shall remain in the possession of the registrar or the registrar of the court to which an appeal is taken,

* 1. until the time for an appeal has expired; or
  2. where an appeal has been taken, until it has been disposed of.

(4) On the expiration of the time for appeal or on the disposition of the appeal, the registrar on his or her own initiative shall return the exhibits to the respective lawyers or parties who put the exhibits in evidence at the trial. **[R 52.04]**

* Basically this mean if you want you exhibit back and there is still time for an appeal or you are in appeal period you need to ask for the consent from all parties at trial before you will get the exhibit back

**Who can inspect the exihibits? – [52.05]**

“The **judge or judge and jury** by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their lawyers, inspect any property concerning which any question arises in the action, or the place where the cause of action arose” **[R 52.05]**

### [D] Exclusion of Witnesses: R.52.06

**General CL rule:** witnesses may sit in courtroom—open trial process.

* However, there may be concerns about witnesses tailoring their evidence based on what has already been said by counsel, other witnesses, etc.
* Thus, a party may obtain an exclusion order under R. 52.06

**Who makes the Order?**

**R. 52.06(1):** The **trial judge** may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).

**Who does it apply to?**

**R. 52.06(2):** An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.

* ***C.C.A.S. Hamilton-Wentworth v. S.(M.)* (1985):** Witness exclusion is at discretion of TJ; Where credibility at issue it will be ordered
* E.g. You need your expert to listen to the other side’s expert giving evidence to help you with your cross-examination – your expert is allowed to sit in and assist you, but if there’s any concern you could be forced to call your expert first
* In exceptional circumstances, an expert may stay even though an exclusion order made.

**What communication is allowed?**

**R. 52.06(3):** Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, except with leave of the trial judge, until after the witness has been called and has given evidence.

* Parties: \*\*Unlike witnesses, however, parties may not be excluded from civil litigation (even though same considerations may arise) 🡪 Right to be in room for their case
* Expert Witness: Also cannot exclude expert witnesses from sitting at trial (because may need to explain complicated testimony of other witnesses to counsel)

### [E] Order of Proceeding in Jury Trials: R.52.07

On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:

1. The plaintiff may make an opening address;
2. The defendant may then make an opening address, but only with leave of the trial judge;
3. The plaintiff shall then adduce evidence;
4. When the plaintiff’s evidence is concluded, the defendant may make an opening address, unless has already done so;
5. The defendant shall then adduce evidence;
6. When the defendant’s evidence is concluded, the plaintiff may adduce any proper reply evidence;
7. The defendant shall then make a closing address; and,
8. The plaintiff shall then make a closing address.
   * + This order is always subject to the discretion of the trial judge
     + Defendant can open right at the outset, or can wait until all of plaintiff’s evidence is called
     + Only permitted in reply to raise issues that you couldn’t have reasonably raised while calling your own evidence

(2) Where the **burden of proof in respect of all matters in issue in the action lies on the D, the trial judge may reverse the order of presentation.**

(3) Where there are two or more Ds separately represented, the order of presentation shall be as directed by the trial judge

(4) Where a party is represented by a lawyer, the right to address the jury shall be exercised by the lawyer. **[52.07]**

* Prof has never
* of (4) until started teaching this class. Represented party doesn’t have right to make submissions to jury directly

**Opening Statements**

* Inflammatory opening address can result in the Court declaring a mistrial
  + Don’t give impassioned account in opening; supposed to be giving the framework
  + Cannot say what the evidence will be; can say you anticipate that they will hear this
* In ***Burke v. Behan*** (2004 Ont. S.C.J.), Justice Quinn provides a list of 8 long-standing, key principles that govern opening addresses to a civil jury:

1. The object of an opening is to give a general notion of what will be given in evidence.
2. Counsel states what he/she submits to be the issues which have to be determined, the substance of the evidence to be adduced, and its effect on his/her case.
3. Counsel may not assert his/her personal opinion on the facts or the law.
4. Counsel should avoid inflammatory comments, in other words, “comments that appeal to the emotions of the jurors and invite prohibited reasoning.”
5. Inadmissible and irrelevant evidence may not be mentioned.
6. Counsel must not argue his or her case in the opening addr
7. ess.
8. Counsel should “not explain the importance of certain evidence, or comment on how evidence should be weighed” or “urge the jury to draw inferences from certain facts or to reach certain conclusions.”
9. Counsel must not read law from other cases to the jury.

* ***Baillargeon v. Paul Revere Life Insurance Co* (2006), 81 O.R. (3d) 35 (Ont. S.C.J.)*:*** “proficiency and elegance” should guide opening statements 🡪 otherwise potential for mistrial.

**Held:** Mistrial

**Reasons:** because of inflammatory opening statement

**Counsel given much more latitude in closing statement**

* Don't tell jury the conclusion they have to reach

**Closing Argument**

* Counsel afforded considerable latitude [***Baillargeon v Paul Rever Life Insurance Co***]:
  + “Counsel are required to advance their client’s cause fearlessly and with vigour, so long as this is done in accordance with the rules of court and professional conduct and in conformity with counsel’s obligations as an advocate and officer of the court”
* ***Abdallah v. Snopek*, [2008] O.J. No. 729 (Div. Ct.)**

### [F] A JURY THAT DOESN’T AGREE

**(1)** Where the jury

1. Disagrees
2. Makes no finding on which judgment can be granted; or
3. Answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings

The trial judge may direct that the action be **re-tried with another jury** at the same or any subsequent sitting, but where there is no evidence on which a judgment for P could be based or where for any other reason P is not entitled to judgment, the judge may **dismiss the action [R 52.08(1)]**

**(2)** Where the answers given by a jury are sufficient to entitle a party to judgment on **some but not all** of the claims in the action, the judge may grant judgment of the claims in respect of which the answers are sufficient, and sub-rule (1) applies to remaining claims. **[R 52.08(2)]**

**Recording a Jury Verdict**: The verdict of a jury shall be endorsed on the trial record **[R 52.09]**

* A trial judge does not have the authority to declare a jury verdict perverse ***(Baboi v Gregory)***

### [G] Failure to Prove a Fact or Document: R.52.10

Where, through accident, mistake or other cause, a party fails to prove some fact or document material to the party’s case,

**(a)** the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs; or,

**(b)** where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on proof of the fact or document afterwards as directed, and, if it is not so proved, judgment shall be granted to the other opposite party, unless the trial judge directs [**R. 52.10**]

* Basically saying we accept you have proof of this and will give a verdict, but the verdict will only take effect once you give us proof
* Case law suggests that before a moving party will be successful in **re-opening a trial**, have to establish the following:

(i) The evidence he/she seeks to adduce is such that, if it had been presented at trial, it would *probably* have changed the result, and

(ii) The evidence could not have been obtained through reasonable diligence before the trial.

* + ***Scott v. Cook* (1970) 2 O.R. 769 (HCJ)**
* A fundamental consideration in determining whether to re-open a trial is whether or not a miscarriage of justice would occur *(****Lo. v. Ho*, [2010] S.C.J.**)

Evidence at Trial: R.53

The rule regulated various aspects of evidence at trial. It is, of course merely supplementary to the *Evidence Act* and the common law of evidence. Nevertheless, it contains a number of minor clarifications or changes on the law and several changes that are minor.

### Witnesses Evidence: [R.53.01]

**(1)** **Oral Evidence as a General Rule:** Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination

**(2) Trial Judge to Exercise Control:** The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial

**(3):** The trial judge has the power to recall a witness for further examination.

* + Requesting party must have a good reason for doing so, however.

**(4) Leading Questions on Direct Examination**: Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine him or her by means of leading questions

**(5) Interpreter:** Where a witness does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the witness is called, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and his or her answers

**(6)** Where an interpreter is required under subrule (5), the party calling the witness shall provide the interpreter, unless the interpretation is to be from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General.

### Affidavits Evidence: [R.53.02]

**(1) With Leave of Court**: Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination

**(2)** Where an order is made under subrule (1) before the trial, it may be set aside or varied by the trial judge where it appears necessary to do so in the interest of justice

* Most lawyers wouldn’t allow an affidavit to go into evidence without an opportunity to cross-examine. There are a lot of other factors in giving oral evidence (e.g. manner of speaking, body language, mistakes – the lawyer wrote the affidavit, but the witness must give their own evidence, so story could change).

### Expert Witnesses: [R.53.03]

[Note: If you hire an expert to produce a report but do not like the findings, you do not have to disclose the report to the other side. You can just put it in your Schedule B of documents, which is not disclosed]

**(1) Experts Reports:** A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

**(2)** A party who intends to call an expert witness at trial **to respond to the expert witness of another party** shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

**(2.1)** A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.
2. The expert’s qualifications and employment and educational experiences in his or her area of expertise
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert’s opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert’s own opinion within that range.
6. The expert’s reasons for his or her opinion, including,
   1. description of the factual assumptions on which the opinion is based,
   2. a description of any research conducted by the expert that led him or her to form the opinion, and
   3. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert’s duty (Form 53) signed by the expert. **[53.03(2.1)]**

* **Westerhof v Gee (Estate) 2015 ONCA:**Only litigation experts (opinion evidence) have to comply with R. 53.03. Participation experts and non-party experts (factual evidence) do not have to comply with R. 53.03
* **Moore v Getahun, 2015 ONCA:** It is proper for counsel and expert witnesses to discuss draft reports, however, the court may order disclosure of such discussions if there are grounds to suspect interference with the expert’s duties of independence and objectivity. The 2010 amendments to rule 53.03 didn’t create new duties but rather codified and reinforced basic common law principles.

**(2.2) Schedule for Service of Reports:** Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts’ reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

**(3) Sanction for Failure to Address Issue in Report or Supplementary Report:** An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

1. A report served under this rule; or
2. A supplementary report served on every other party to the action not less than 30 days before the commencement of the trial

**(4) Extension or Abridgment of Time:** The time provided for service of a report or supplementary report under this rule may be extended or abridged,

1. by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or
2. by the court, on motion.

Expert Evidence

### Acknowledgement of Expert’s Duty: [R. 4.1.01(1)]

**(1)**  It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

**(2)** **Duty Prevails:** The duty in sub-rule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged

* + Expert must sign this acknowledgement of expert’s duty form (form 53)
  + Bullet #2: do not want expert trying to give opinions on areas for which they are not an expert
  + Expert’s duty is to court first, not to the person who hired the expert (lawyer must inform them of this)

### Court-Appointed Experts (Uncommon)

Under **R. 52.03(1)**, a judge may, on motion by a party or on his/her own initiative, appoint an expert.

* + Way around issues discussed earlier (bias, impartiality, costs, etc.)
    - Party may bring a motion to request a court-appointed expert to ensure neutrality and impartiality, especially if the party is unable to afford one. The other side may resist the motion, however.
  + This person acts almost as a friend of the court to help the court to understand (in extremely complex cases)
  + Court may suggest it pre-trial: select one expert to save time and money, and save judge having to resolve disputes between experts

### Compelling Attendance

**Summons to Witness: R 53.04**

**(1) By Summons to Witness:**  A party who requires the attendance of a person in Ontario as a witness at a trial may serve the person with a summons to witness (Form 53A) requiring him or her to attend the trial at the time and place stated in the summons, and the summons may also require the person to produce at the trial the documents or other things in his or her possession, control or power relating to the matters in question in the action that are specified in the summons.

**(2) Summons may be issued in blank:** On the request of a party or a lawyer and on payment of the prescribed fee, a registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses.

**(3) Where Documents may be Proved by Certified Copy:** No summons to witness for the production of an original record or document that may be proved by a certified copy shall be served without leave of the court

**(4) Summons to be Served Personally:** Summons to witness shall be served on the witness personally and not by an alternative to personal service and, at the same time, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness **(5)** Service and payment of attendance money may be proved by affidavit

**(6) Summons in Effect until Attendance no Longer Required:** A summons to witness continues to have effect until the attendance of the witness is no longer required

**(7) Sanctions for Failure to Obey Summons:** Where a witness whose evidence is material to an action is served with a summons to witness and the proper attendance money is paid or tendered to him or her, and the witness fails to attend at the trial or to remain in attendance in accordance with the requirements of the summons, the presiding judge may by a warrant for arrest (Form 53B) cause the witness to be apprehended anywhere within Ontario and forthwith brought before the court

**(8)** On being apprehended, the witness may be detained in custody until his or her presence is no longer required, or released on such terms as are just, and the witness may be ordered to pay the costs arising out of the failure to attend or remain in attendance

* The opposing side can bring a motion to set the summons aside on the grounds that:
  + The witness not relevant to the litigation (i.e. vexatious summons), is immune from testifying, is in ill health
  + List first date of trial, then can go on until no longer required

**Interprovincial Subpoena**

A summons to a witness outside Ontario to compel or her attendance under the *Interprovincial Summonses Act* shall be in Form 53C **[R 53.05]**

**In Custody Witness: [R 53.06]**

The court may make an order (Form 53D) for attendance of a witness in custody whose evidence is material to an action, directing the officer having custody of a prisoner to produce him or her, on payment of the fee prescribed under the *Administration of Justice Act*, for an examination authorized by these rules or as a witness at a hearing

* Witness may be in jail for unrelated reasons. Sent to custodian of prisoner (jail guards). A fee would be paid and brought to hearing

### Adverse Party: R 53.07

General: The rules under **R. 53.07** allow a party to secure the attendance of an adverse party (or representative of party) as a witness at trial, in examination-in-chief, for their own case. E.g. Driver that hit your client’s car in an accident.

**(1) Persons to Whom Rule Applies:** Subrules (2) to (7) apply in respect of the following persons:

1. An adverse party.
2. An officer, director, employee or sole proprietor of an adverse party.
3. A partner of a partnership that is an adverse party.

**Securing Attendance**

**(2)** A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial,

1. by serving the person with a summons to witness, or by serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and
2. by paying or tendering attendance money calculated in accordance with Tariff A at the same time.

**(3)** If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness.

**When Adverse Party May Be Called**

**(4)** A party may call a person referred to in subrule (1) as a witness **unless,**

1. the person has **already testified;** or
2. the adverse party or the adverse party’s lawyer undertakes to call the person as a witness.

**Manner of Examination**

**(5) Cross-Examination:** A person referred to in subrule (1) **may be cross-examined** **by the party who called him** or her as a witness and by **any other party who is adverse** in interest to that person. 🡪 Permitted to cross examine the adverse party even though you called them

* + ***Whiten* v. *Pilot Insurance:***Rules allow party to cross-examine adverse party, even though it's your witness. Can asked them closed, direct questions (normally in examination-in-chief, you must ask open-ended questions)

**(6) Re-Examination:** After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that Subrule.

**(7) Failure to Testify:** The court may grant judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just where a person required to testify under this rule,

1. refuses or neglects to attend at the trial or to remain in attendance at the trial;
2. refuses to be sworn; or
3. refuses to answer any proper question put to him or her or to produce any document or other thing that he or she is required to produce

### Evidence Requiring Leave: R 53.08

**(1) Evidence Admissible Only With Leave:** If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

**(2)** Subrule (1) applies with respect to the following provisions:

* **Failure to disclose document**
* **Failure to abandon claim of privilege**
* **Failure to answer on discovery**
* **Failure to correct answers on discovery**
* **Failure to serve expert’s report**

### Admissibility of Expert Evidence

Based on ***R. v. Mohan*, [1994 SCC]**

1. The evidence must be relevant;
2. The evidence must be necessary to assist the trier of fact.
3. There must be no exclusionary rule otherwise prohibiting the receipt of the evidence, and,
4. The evidence is given by a properly qualified expert.

* This is the test
* If it’s self-evident, do not need an expert to tell you (must be outside of common knowledge)

### Challenging the Expert:

* It is not uncommon for experts to be challenged, the expert must be accepted (qualified) by court as expert witness
* An expert may be challenged if:
  1. Offering an opinion outside his or her qualifications and/or scope of expertise;
  2. Offering an opinion not contained within the written report;
  3. Conflict of Interest;
  4. Opinion based on factual assumptions not proven at trial.
* If person does not get qualified as an expert, this is problematic but they can still give evidence on observations (just cannot comment on area of expertise)
* Conflict of interest, e.g. Can ask person how much money they make giving evidence. If they are a full-time expert witness for insurance companies, this could be a conflict of interest and way of disqualifying them.
* Factual assumptions, e.g. Ask expert if their factual assumption wasn’t true, would their conclusion fail? Then you seek to disprove all of the factual assumptions at trial.

### Restrictions on Number of Experts:

* ***Evidence Act*, R.S.O. 1990, s. 12**: A party can only call 3 experts unless the trial judge grants leave to call more.
  + There are very few trials where you don’t need more than 3 experts – bring motion for leave to call more than 3 experts to trial on first day and it gets rubber-stamped by the court
* ***Bank of America Canada v. Montreal Trust Company:*** 
  + Interpreted as 3 experts for entire case, not each issue
  + However, the court routinely grants leave for more experts pursuant to s. 12 of *Evidence Act*, if the judge believes the case so warrants
    - Practice tip: Should ask for leave at the outset of trial

# COST ORDERS AND INTERESTS: R.57

Awarding and Fixing Costs as Between the Parties: R.57

* Now looking at issues after a trial or case-ending motion has been resolved and decided
* Crown is entitled to costs and these costs are not to be reduced (money goes into fund) **[CJA 131(2)]**

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding [e.g. costs of motion] or a step in a proceeding are in the **discretion of the court**, and the court may determine by whom and to what extent the costs shall be paid **[CJA 131(1)]. CJA s.131(1)** is expressly subject to the Rules of Civil Procedure regarding costs. 🡪 **although general rule is losers pay costs**

### Rule 57.01

* ***CJA* s.131(1)** is expressly subject to the Rules of Civil Procedure regarding costs

**R.57.01(1):** Court’s discretion is subject to the following factors, which the court takes into account when fixing costs under R.57.01(3)

1. Principle of indemnity (experience of lawyer, rates)
2. Reasonable expectations (The other party should be able to ball park what costs will be)
3. Amount claimed and recovered in proceeding
4. Apportionment of liability
5. Complexity of proceeding
6. Importance of issues
7. Conduct of parties (shortening/lengthening duration)
   * Where the court found that a 9 day trial where there were moderate amounts at issue could have been 2-3 days, the court fixed costs to successful party at $50,000 *(Alan Webster Family Trust v Midlad Walwyn)*
   * The matter was contentious and both parties were to blame, the court awarded no costs to either party 🡪 you created this mess together *(Salib v Cross, ONCA)*
8. Improper, vexatious, unnecessary, negligent, mistaken, excessively cautious steps
9. Denials or refusals to admit (recall Requests to Admit)
10. Unnecessary multiple proceedings
11. Other relevant matters
    * **Exercising Discretion under 57.01(1)(a):** court reviews offers, counsel fees, disbursements, premium fees. *(Monks v ING Insurance Co of Canada)* 🡪 the CA did not allow the “risk premium” payable to the Plaintiff’s lawyers in this case
      + Facts: Insurance action from MVA. P commenced action. An offer to settle was made, the D didn’t accept the offer, P was successful at trial. The parties agreed that costs would be fixed by the TJ. Judge went through 38 page analysis.
        - The P gets partial indemnity up to settlement offer and substantial indemnity after that until date of judgement.
        - P’s counsel was 26-year veteran. In the bill of costs, they said for any partial indemnity costs, we want $X (50%)/hr for our experienced lawyer. For the substantial indemnity costs, we want $X (75%)/hr for lawyer. This could have been reasonably expected by the D’s to pay
        - P was awarded a premium of $75k as bonus on top – the P didn’t have the financial means to fight this trial. If she had lost at trial, she wouldn’t have been able to proceed. This was to encourage lawyers to take these types of clients (can’t fund litigation but have meritorious claims)
      + This premium was taken away at the CA (they had the discretion to do this). You’re always supposed to try to do a good job
      + Held: The court reviews offers, counsel fees, disbursements, premium fees
        - On issue of premium, considers “seven relevant principles”:
        - Legal complexity
        - Responsibility assumed
        - Monetary value
        - Importance to client
        - Degree of skill and competence
        - Results achieved
        - Ability to pay
      + Note, however, that the Court of Appeal did not allow the “risk premium” payable to the Plaintiff’s lawyers
      + Premium is not awarded very often, but is available in the right case

**Costs Against Successful Party:** Success does not prevent the court from awarding costs against a party [**R.57.01(2)]**

* Can win the case but be ordered to pay some costs to the other side e.g. when have improper, vexatious, unnecessary behaviour

**Fixing Costs – Tariffs:** Court to fix costs in accordance with factors in (1) and with Tariffs (see tab in Rules book) **[R.57.01(3)]**

* P. 1543 details what disbursement are (costs of service, cost of certified copes, etc)
* Considers the work done and expenses occurred and will fix the costs
  + i.e. you got 500k as your judgment but on top of that, I will reimburse you X in costs
  + tariffs: i.e. overnight meal accommodation

**Assessment Officer:** In exceptional cases, can refer to an assessment officer **(Rule 58) [R.57.01(3.1)]**

* i.e. where it was a very long trial, or very complicated
* Each party will make submissions on what they want or how they shouldn’t be paid that much
* Usually dealing with costs between clients and lawyers, not costs between parties

### Authority of Court: [R.57.01(4)]

Court maintains authority under s.131, *CJA* [\*more discretion!]:

(a) to award or refuse costs re an issue or part of proceeding

* Doesn’t necessarily mean you’ve won and you get costs. I’ll ding you on costs for 2 days because you were unsuccessful on an issue during the proceeding because it was unnecessary.

(b) to award a percentage of assessed costs or assessed costs up to a particular stage

* Not sure if it was necessary but it did have a good result so I’ll assess what the costs should be and then I’ll give you 70% of that

(c) to award substantial indemnity costs

* Substantial indemnity – when you beat your offer (~75% of the other guys cost) – doesn’t have to just be given in R.49 situation

(d) to award full indemnity costs

* How much is the successful lawyer billing? Unsuccessful client has to pay that bill. This is rare and would usually only be done as a punitive measure

(e) to award costs to a party acting in person

* This is interesting because costs are usually given to pay legal fees. If a person’s self-represented, they can still be entitled to costs

### Bill of Costs: [R.57.01(5)]

After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties…

* Set out details: who the lawyers, law clerks, articling students, assistants were that worked on the file. Hourly rates, dates of call, how much time did they spend and doing what. Enough details so the judge can see why we want those costs

### Cost of a Motion: [R 57.03]

(1) Unless the court is satisfied that a different order would be more just, the court shall

1. Fix the costs and order them paid within 30 days
2. In exceptional cases, refer for assessment

(2) Where party fails to pay costs, the court may dismiss, stay or strike the defence or order as it just

(3) Where the motion is made without notice, no costs

* Discretion can also apply to a motion
* “Costs on the cause”: sometimes the court will award costs, but they go to the ultimate winner of the trial

### Settlement: [57.04]

If a party is to pay or recover costs under a settlement agreement, but the amount is not included in the settlement, the amount may be assessed pursuant to R 58 by an assessment officer, upon inclusion of the minutes of the settlement**.**

### Action Brought in Wrong Court: [R 57.05]

(1) If you recover amount that is **within the Small Claims Court’s jurisdiction,** the court may order that you get no costs

(2) Subrule (1) does not apply to when the action is *transferred* to the SCJ

(3) If your default judgment is within the small claims jurisdiction, court shall assess costs with small claims court tarfiffs

(4) Where the action is dismissed for want of jurisdiction, court may make order for costs

* Rule shows that you can get slap on writs for bringing case in wrong jurisdiction

### Lawyer Paying Costs: [R 57.07]

(1) Where a lawyer caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, or other default, court may:

1. Disallow costs between lawyer and client
2. Direct lawyer to reimburse client any costs paid to another party
3. Require lawyer to personally pay costs of any party

* Costs consequences of being a bad lawyer

### Rule 49: Offers to Settle

The purpose of this rule is to encourage parties to make offers to settle by providing that if the result of the hearing shows that it would have been better for the recipient of the offer to have accepted it, the party that made the offer will secure a better costs order than otherwise. Because of these costs consequences, a party has an incentive to compromise by making a reasonable offer and the recipient must take the offer seriously 🡪 **incentive to compromise**

**Timing to Trigger Cost Consequence.** An offer to settle may be made at any time, but where the offer to settle is made less than 7 days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply **[R 49.03] 🡪** to trigger cost consequences, must make offer at least 7 days prior commencement of hearing

* To be effective, the offer cannot be withdrawn nor expire before the commencement of the hearing

**Cost Consequences of Failure to Accept Offer to Settle**

**[A] Plaintiff’s Offer: [R 49.10(1)]**

* When P makes an offer to settle (1) at least 7 days before the commencement of the hearing (2) the offer is not withdrawn and does not expire before the commencement of the hearing and (3) D does not except the offer…If P obtains a judgment equal or better than the P’s offer, P is entitled to partial indemnity costs to date of the offer and substantial indemnity costs thereafter, unless the court orders otherwise

**[B[ Defendant’s Offer: [R 49.10(2)]**

* When D makes an offer to settle (1) at least 7 days before the commencement of the hearing (2) the offer is not withdrawn and does not expire before the commencement of the hearing and (3) P does not except the offer… if P obtains a judgment equal to or worse than D’s offer, the plaintiff is entitled to partial indemnity costs to the date of the offer and the defendant is entitled to partial indemnity costs thereafter, unless the court orders otherwise

**[C] Burden of Proof**

The party who wants to claim benefit under Subrule 1 or 2 has the burden of proving that the terms of the settlement are more or less favourable than the judgment **[R 49.10(3)]**

* + Cost consequences (R.49.10) are always subject to the court’s discretion (“unless the court orders otherwise”)
  + Court of Appeal: depart from *prima facie* consequences only where the interests of justice require departure (***(K(K) V G (KW))***. 🡪 The costs consequence of R 49.10 is not automatic. In this case, the court refused to grant the plaintiff substantial indemnity costs, despite the fact that she obtained judgment in excess of her offer to settle 🡪 interest of justice.

INTEREST

### [A] Pre-Judgment Interest

[CJA s.128, s.127(1), s.128(3)]

A person entitled to an order for payment is entitled to interest on the amount at the pre-judgment interest rate (PJI rate) calculated from the date the cause of action arose to the date of the order **[CJA 128(1)] 🡪** idea is if awarded money in outcome of trial, you’ve been out of pocket for that money since at least the start of the action

* + January 1, 2015 - Bill 15, the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014 (the “Act ”) amends various Ontario statutes, including the *Insurance Act*. The Act amends section 258.3 of the Insurance Act by adding the following new provision:
  + (8.1) Subsection 128(2) of the Courts of Justice Act does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action… [for loss or damage from bodily injury or death arising from the use or operation of an automobile].
  + 5% PJI rate for non-pecuniary losses no longer applies - the prejudgment interest rate for nonpecuniary losses will be equal to the PJI rate for pecuniary losses. The current rate is 2%. Look on website to determine interest rate, it changes every quarter

Pre-judgment Interest Exceptions: [CJA 128(4)]

1. Exemplary or punitive damages
2. Interest accruing
3. Award of costs in the proceeding
4. Future losses
5. With respect to any advance period for the period after the advance was made
   * Advance is when defendant agrees to pay plaintiff a sum of money in advance (generally they are reluctant to do so because they want to see the outcome of the action)
   * Advance payment example for client who’s a lawyer – it would help mitigate their losses. In that case, if they lose, they won’t have to pay interest on it

### [B] Post-Judgment Interest

[CJA s. 129, 127(1)]

Money owing under an order, including costs to be assessed or fixed by the court, bears interest at the post-judgment interest rate, calculated from the date of the order **[CJA 129(1)].** Where an order provides for **periodic payments**, each payment in default shall bear interest only from the date of default **[CJA 129(2)].**

### [C] Discretion of the Court re. Interest

Pursuant to section 130 of the CJA, court can:

1. Disallow pre-judgment or post-judgment interest
2. Allow for higher or lower rate of pre-judgment or post judgment interest
3. Allow interest for a different period **[CJA 130(1)]**

* This is where you’d try to argue that some other form of interest rates apply 🡪 contractual interest rates for example, judges will usually apply these

**Factors re discretion:**

Pursuant to section 130(2) CJA, in exercising discretion, court shall take into account:

1. Circumstance of the case;
2. Fact that advance payment was made
3. Circumstances of medial disclosure by P
4. Amount claimed and recovered
5. Conduct of any party that unnecessarily lengthened or shortened duration of proceeding
6. Any other relevant considerations **[CJA 130(2)]**

JUDGMENTS AND ORDERS

**Definitions: R 1.03**

**Judgment:** A decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party.

**Order:** Includes a judgment

* For example, ordering damages in favour of the plaintiff is a judgment because its disposes of the action (and order), however a judge may make an order for adjournment (this is not a judgment though because it does not dispose of the action)

### Creation of Orders

**Effective Date:** Orders are effective from the date they are made unless otherwise provided **[R 59.01]**

**Endorsement by Judge or Officer:**

(1) an 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 (where practical) **[R 59.02(1)]**

(2) Where written reasons are delivered: (a) appellate court, endorsement is not required (2) elsewhere, endorsement may consist of reference to reasons **[R 59.02(2)]**

**Preparation and Form of Order:**

(1)Any party affected may draft formal order and circulate for approval.

(3) An order shall be in Form 59A (order), 59 B (judgment) or 59C (order or certificate on appeal) and shall contain the name of the person who made it, the date it was made on, and recitals of particular necessary to understand the order **[R 59.03]**

### Issuing and Entering Orders:

**General:** Order submitted for signature of registrar unless the court, judge or officer who made it has already signed it **[R 59.04(1)]**

**Where Form or Draft Order Approved:** When draft is approved by parties, left with registrar for signing, if registrar satisfied; if not, returned to fix or for appointment made to settle offer by the court, judge or officer who made it **[R 59.04(5), (8), (9)]**

* Where registrar is satisfied, they will sign [R 59.04(8)]
* **When the registrar is not satisfied**, the order will be returned to the party who submitted it, they will need to amend it, have parties approve, and then file approval with amended order and submit again to registrar **or** make appointment with judge, officer, or court who made the order to have it settled, in which case the party shall serve the other parties with notice of appointment **[R 59.04(9)]**

**Appointment to settle dispute order before judge or officer:** Where there is an objection to the proposed form by a party, the registrar shall settle as considered proper **[R 59.04(10)]**, the objecting party may obtain an appointment before the court, judge or officer that made the order to settle it **[R 59.04(12)]**

**Entry of Order - Every Order to be Entered and Filed:** Every order shall be entered once signed, the registrar notes entry book and inserts original into entry book **[R 59.05]**

**Amending Orders:** A order that contain an error arising from an “accidental slip or omission” or requires amendment in any particular on which the court did not adjudicate may be *amended on a motion* in the proceeding **[R 59.06]**

**Satisfaction of Order:** A party may acknowledge satisfaction in writing and file in Court office where Order was entered **[R 59.07]**

### Enforcement of Orders: R. 60

**Enforcement Order for Payment or Recovery of Money:** In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,

1. Writ of seizure and sale (Form 60A) **(R 60.07)**;

* you need to know where the person holds assets and then file with the appropriate sheriff, then you pay sheriff to enforce the write 🡪 this is often not successful and is very expensive

1. Garnishment **(R 60.08)**;
2. Writ of sequestration (Form 60B) **(R 60.09)**; and
3. The appointment of a receiver.  **[R 60.02(1)]**

**Enforcement of Order for Possession of Land:** An order for recovery or delivery of possession of land may be enforced by a writ of possession under rule 60.10 **[R 60.03]**

**Enforcement of Order for Recovery of Personal Property:**

(1)An order for the recovery of personal property other than money may be enforced by writ of delivery (Form 60D), which may be obtained on filing with the registrar where the proceeding was commenced a requisition together with a copy of the order as entered

(2) Where the property is not delivered up upon a writ of delivery, the order may be enforced by writ of sequestration under rule 60.09. **[R 60.04]**

**Enforcement Order To Do or Obtain From Doing Any Act:** 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. **[R 60.05]**

* It takes many attempts to get a contempt order

**Failure to Comply with Interlocutory Order:** Where a party fails to comply with an interlocutory order, court may, in addition to other sanction:

1. Stay proceeding
2. Dismiss proceeding or strike defence; or
3. Make such other order as is just **[R 60.12]**

**Examination in Aid for Execution:**

**(**1) “creditor” includes a person entitled to obtain or enforce a writ of possession, delivery or sequestration; “debtor” includes a person against whom a writ of possession, delivery or sequestration may be or has been issued

(2) **Examination of Debtor:** A creditor may examine the debtor in relation to,

1. the reason for nonpayment or nonperformance of the order;
2. the debtor’s income and property;
3. the debts owed to and by the debtor;
4. the disposal the debtor has made of any property either before or after the making of the order;
5. the debtor’s present, past and future means to satisfy the order;
6. whether the debtor intends to obey the order or has any reason for not doing so; and
7. any other matter pertinent to the enforcement of the order. **[R 60.18(1)]**

* You do this when you are having trouble enforcing the order 🡪 want to know why they are not paying you, do they truly have no assets?

# CIVIL APPEALS

Summary of Appeals

* Final order of SCJ → CA (**carve out:** if fall within s.19(1)(a) i.e. less than 50k 🡪 DC)
* Interlocutory order of the SCJ → DC (with leave)
* Final order of a master → DC
* Interlocutory order of a master → SCJ
* Interlocutory order of OCJ → SCJ (CJA, s.19(4))
* Interlocutory order of a master 🡪 SCJ (CJA s. 17)
* Certificate of assessment of costs 🡪 SCJ (CJA s. 17)
* Appeals from the Family Court 🡪 Divisional Court
* **E.g. 1**: X sues for $100,000. The Judge dismisses the case and in dismissing the claim, states that had the claim been successful, he only would have awarded $45,000.00
  + Handled by Div. Ct. under **s. 19(1)(a)(iv)**
* **E.g. 2**: X sues for $100,000. The judge finds in favour of the plaintiff but only awards $30,000.00 in damages
  + Handled by Div. Ct. under **s. 19(1)(1.2)(a)(i)** (*McGrath,* 2001)
* **E.g. 3**: X is successful in recovering $50,000.00, but also receives a pre-judgment interest award of $7,000.00
  + Handled by CA (*Medis Health*)
  + See ***Medis Health and Pharmaceutical Services Inc. v. Belrose* (1994), 17 O.R. (3d) 265 (C.A.)**

Appellate Courts

\*Cross reference with earlier notes on the jurisdiction of the courts, final and interlocutory orders, etc.

**(1) Divisional Court**

* Single judge for appeals from Small Claims Court decisions
* 3 judge panel from Superior Court of Justice or administrative tribunals

**(2) Court of Appeal for Ontario**

* Single judge for motions
* 3 judge or 5 judge panels for appeals

**(3) Supreme Court of Canada**

* Quorum is 5, but most appeals are 7 or 9 judges

Appellate Court Jurisdiction

### (1) Appeals to the SCJ

**R.62.01:** Subrules (2-10) apply to appeals made to a judge (a Superior Court of Justice appeal)

**(a)** from an **interlocutory order of a master**

**(b)** from a **certificate of assessment of costs**

**(c)** under any other statute, unless another procedure is provided in the statute

* Also *CJA s. 17*

### (2) Divisional Court

* It will hear appeals of interlocutory orders from SCJ with leave
* Small claims court: if it’s a high enough level (of money)
* If a specific statute says that appeals have to go to the Divisional Court, then that will override the CJA
  + This typically occurs in statutes of tribunals

**From SCJ**

**CJA S.19 (1):** An appeal lies to the Divisional Court from,

**(a)** a **final order** of a judge of the SCJ, as described in subsections (1.1) and (1.2) 🡪 P. 32: basically only if **claim < $50k**;

**(b)** an **interlocutory order** of a judge of the SCJ, with leave as provided in the rules of court;

**(c)** a **final order** of a master or case management master

**From Small Claims Court**

**S.31:** An appeal lies to the Divisional Court from a **final order** of the Small Claims Court in an action,

**(a)** for the **payment of money in excess** of the prescribed amount (only if order > $2500), excluding costs; or

**(b)** for the **recovery of possession of personal property exceeding** the prescribed amount in value.

### (3) Court of Appeal for Ontario (ONCA)

Things you would appeal would include the following:

(a) Can appeal decision from Divisional Court to ONCA

(b) A final order

(c) Costs decision

**CJA, S.6(1):** An appeal lies to the Court of Appeal from,

**(a)** An **order of the Divisional Court**, on a question that is ***not*** a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

**(b)** A **final order of a judge of the SCJ (if order > $50k)**, except an order referred to in **clause 19(1)(a)** or an order from which an appeal lies to the Divisional Court under another Act;

**(c)** A **certificate of assessment of costs** issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court

### (4) SCC

***Supreme Court Act*, s.40(1)**

* “the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.”
  + Test for leave = must be a matter of public importance, issue of law, or issue of mixed fact and law
  + Vast majority of civil cases are denied leave (less than 5% get leave; most are criminal cases)
  + Can go to the SCC only with leave; cannot get to this court by right
* 3 courts 🡪 In many cases, you can only get to appeal with leave/permission
* SCC: can only have one appeal going on at one time
* ONCA: has several court rooms and can hold multiple appeals on the same day. Also deal w/ motions on appeals they will hear.

### Combining & Transferring Appeals

**To be Heard by the CA:** The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the SCJ if an appeal in the same proceeding lies to and is taken to the CA**.** **[CJA 6(2)]**

* The Court of Appeal may, **on motion,** transfer an appeal that has already been commenced in the Divisional Court or the SCJ for the purpose of 6(2). **[CJA 6(3)]**

**To be Heard by the Divisional Court:** The Divisional Court has jurisdiction to hear and determine an appeal that lies to the SCJ if an appeal in the same proceeding lies to and is taken to the Divisional Court **[CJA 19(2)]**

* The Divisional Court may, **on motion,** transfer an appeal that has already been commenced in the SCJ to the Divisional Court for the purpose of subsection 19(2). **[CJA 19(3)]**

### Judge

**A Judge Cannot Hear Appeal of Own Decision**

* ***CJA*, s. 132:** a judge cannot hear an appeal of his or her own decision
  + This possibility can arise because all judges of Superior Court are judges of Divisional Court.
  + Also, a judge could be promoted to higher court.

Appeal Process

* Div. Ct and ONCA process governed by *Rules of Civil Procedure in Ontario*
  + Seek leave vs appeal as of right (one that is guaranteed by statute or some underlying constitutional or legal principle. The appellate court cannot refuse to listen to the appeal) 🡪 file appeal 🡪 perfect appeal 🡪 argue appeal 🡪 outcome
* Appeals to SCC follow procedure set by that court
  + Leave to appeal is sought in most cases from a panel of 3 judges of the Supreme Court (do not need to do so in "as of right” cases such as certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by a provincial government)
  + Court provides advisory opinions on questions referred to it by the Governor in Council.

STEPS:

* (1) Can you go straight to appeal or do you need to file leave for appeal?
* (2) Commencing the appeal
* (3) Perfect the appeal

### Step 1: Obtain Leave to Appeal (if required): R.61 + 62

**(a) Divisional Court**

Most common reasons to appeal to the Divisional Court is for interlocutory orders

**R.62.02:** Appeal from an interlocutory order of a judge to the Divisional Court requires leave

**(1)** from a different judge

**(2)** notice of motion served within 7 days after the making of the order

**(3)** first available hearing date at least 3 days after service of notice of motion

* + Interlocutory vs final 🡪 does the order resolve the real underlying dispute between the parties? Only if you can never pursue that issue again does it become a final order. Summary judgment motions are a way to say throw out this issue and determine it before trial. If you bring that motion and win, it’s a final order 🡪 if successful on summary judgment motion, you have a final determination of rights. If you lose at summary judgment motion, then it’s interlocutory
* **Test for Appeal from Interlocutory Orders (R 62.02(4)):** Leave to appeal shall *not* be granted unless,

**(a)** there is a conflicting decision on the matter and it is desirable that leave to appeal be granted; **OR**

* + - “Conflicting decision” = must be as to law that had been applied by judge (i.e. actual legal conflict), and not exercise of judge’s discretion (*Comtrade Petroleum*).
    - “Desirable” = refers to the need for appellate court to provide certainty and a definitive appellate answer (*Lodge v. Regier*). Conflict between decisions is not enough on its own—the court must also believe there is a need to resolve this conflict.

**(b)** there appears to be good reason to doubt the correctness of the decision and the proposed appeal involves matters of such importance that leave should be granted.

* + - “Correctness” = it is open to serious debate whether decision is right or wrong 🡪 low threshold
    - “Importance” = an issue of broader significance or general application, beyond the parties, that makes it worth being heard by an appellate court (*Greslik*). I.e. Matters are relevant to development of law and administration of justice

**R. 61.03** sets out the process for obtaining leave to appeal to the Divisional Court. If not granted 🡪 CANNOT appeal it further.

* Motion needs to be in writing **[62.02(2)]**
* **Procedure for Leave to Appeal to Divisional Court:** Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

1. State that the motion will be heard on a date to be fixed by the Registrar;
2. Be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and
3. Be filed with proof of service in the office of the Registrar, within five days after service **[R 61.03(1)]**

* Although it also arises re: consent orders [***CJA* s. 133(a)**]
* Various statutes provide for appeals of final decisions of the SCJ to go to Div. Court with leave

**R. 62.02 (1)** a party may appeal an interlocutory order of a judge to the Divisional Court **with leave** (below) 🡪 not automatic, need leave

**(4)** **Leave:** Sets out the two-part test for leave to appeal to Divisional Court.

* Leave to appeal (of an interlocutory order) shall not be granted unless:

**(a)** there is a conflicting decision on the matter and it is desirable that leave to appeal be granted; **OR**

* + - “Conflicting decision” = must be as to law that had been applied by judge (i.e. actual legal conflict), and not exercise of judge’s discretion (*Comtrade Petroleum*).
    - “Desirable” = refers to the need for appellate court to provide certainty and a definitive appellate answer (*Lodge v. Regier*). Conflict between decisions is not enough on its own—the court must also believe there is a need to resolve this conflict.

**(b)** there appears to be good reason to doubt the correctness of the decision and the proposed appeal involves matters of such importance that leave should be granted.

* + - “Correctness” = it is open to serious debate whether decision is right or wrong 🡪 low threshold
    - “Importance” = an issue of broader significance or general application, beyond the parties, that makes it worth being heard by an appellate court (*Greslik*). I.e. Matters are relevant to development of law and administration of justice

**R. 61.03** sets out the process for obtaining leave to appeal to the Divisional Court. If leave not granted, CANNOT appeal it further.

**(b) Court of Appeal: [R. 61.03.1]**

* Usually you go straight from the SCJ (**appeal as-of-right** for final orders from trials) for decisions over $50,000
* However, if you have already done a first appeal at the Divisional Court (interlocutory decision of SCJ is already heard by Div. Court, now party wants it heard by a second appellate court), then you need to seek leave to appeal
* **Test for leave to appeal to Court of Appeal [*Sault Dock Co.* (1973)]:**
  + Must be a general issue or principle of importance to the public at large, beyond the concerns of the parties, before appeal from Div. Court will be permitted i.e. a “**provincial importance test**”

Summary:

* If over $50,000, get appeal as of right to C.A.
  + But if you have already done a first appeal at Div Ct, must seek leave to appeal
* If under $50,000, get appeal as of right to the Divisional Court
  + Must seek leave for further appeal

**(c) Process for Leave Motions**

* Where an appeal to the Divisional Court **[R. 61.03]** or CA **[R. 61.03.1]** requires leave, the notice for motion for leave shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, and shall be filed with proof of service in the office of the Registrar within 5 days after service.
* Very short timeline – pay attention to this
* Divisional Court – in person
* Court of Appeal – in writing

### Step 2: Start the Appeal

* If granted leave to appeal, you can then start the appeal

#### (a) Appeal as of Right

* Usually wrt a decision that was final as of trial
* Notice of appeal – served within 30 days of court releasing endorsement/written reasons on merits

**R. 61.04(1)** and **(4):** Appeal commenced by serving and filing a **notice of appeal** (Form 61A) on

(a) every party whose interest may be affected by the appeal, and on

(b) any person entitled by statute to be heard on the appeal.

* Notice must be served within 30 days of the making of the order appealed from - i.e. when court releases endorsement or written reasons on the merits
* ***Byers* (2003):** time starts running even if costs have not been settled – this is because there can be 2 orders: one on merits, one on costs (clock runs at different times).
* Issue of costs: Discretionary decision by judge that’s hard to overturn

#### (b) Leave to Appeal Granted

* Where leave is granted, the notice of appeal shall be delivered within 7 days after the granting of leave [**R. 61.03(6)** and **R. 61.03.1(16)**] 🡪 The timing for when you start your appeal (file Notice of Appeal) runs from the time the order grants you the right to appeal

#### (c) Cross-Appeal

**R. 61.07:** the Respondent of an appeal can cross-appeal. Instances:

* Where the R seeks to set aside or vary the Order appealed from; or
* Where the Respondent will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than an Order appealed from
* Timeline - 15 days 🡪 A respondent must serve a notice of cross-appeal (Form 61E) within 15 days after service of the notice of appeal **[R. 61.07(1)]**.
* Might have tactical reasons to not cross-appeal and preserve order as a whole.
* Might want the court to defer to trial judge on certain issues, etc.
  + The general principle on appeals is that the CA will defer to the first instance judge.
  + A cross-appeal, on the other hand, opens **entire order** up to question.
* Danger – if appellant just asking to look at one narrow aspect of the appeal, the court will only look at that. If respondent challenges the appeal, then the court will blow it up and look at the entire appeal (risky).
* It’s easier to support what you like in the order. If both sides question what the judge did on various parts on the order, then courts will say this is a matter where the entire issue needs to be examined in its entirety

#### 

#### (d) Special Situations

***CJA* s. 133** adds in a leave requirement for certain types of appeals:

**(a)** a **consent order**

* + I.e. the parties agreed to this order, so there needs to be a good reason for wanting to appeal – court wants to know what happened

**(b)** where the appeal is to discretionary **costs only**

* + Leave is required even where pursuing as-of-right appeal on merits in addition to costs order (*Thomas v. Bell Helmets Inc.* (1999), CA and *Murano* (1998), CA).
    - Rationale: once party loses as-of-right appeal on merits, all party has left is appeal based on costs.
* It’s unlikely that a discretionary order as to costs will apply to general public unless it was a major legal error. They don’t want to waste their time on appeals with costs so they’ve limited the time available for leave to appeal

#### 

#### (e) Appellate Court Jurisdiction - Costs

* There is a separate leave component for any costs appeal when attempting to join a costs appeal to an as of right appeal.
  + **R. 61.03(7)** deals with joining costs appeal with appeal as of right to the Divisional Court.
    - Cross-appeal – **R 61.03(8)**
  + **R. 61.03.1(17):** joining costs appeal with appeal as of right to the CA.
    - Cross-appeal – **R 61.03.1(8)**
* Under both rules, party may seek leave for their costs appeal while arguing their as-of-right appeal before the court (but the request for leave must be included in their notice of appeal)— this simplifies the procedure.
* Still have to ask for costs leave separately

### Step 3: Perfect the Appeal

**General**

Perfection is the process by which an appeal is made ready for hearing by the appellate court (R. 61.09) 🡪 the preparation and delivery for appeal books, factums and certificate of perfection. Before appellant has perfected the appeal, all that has been done is serving/filing notice of appeal

Timing under **R.61.09(1)** depends on whether the transcript of evidence from the trial is required

**(a)** If not required, the appellant shall perfect the appeal within 30 days after filing the notice of appeal

**(b)** If required, the appellant shall perfect the appeal within 60 days after receiving notice that the evidence has been transcribed

* Transcripts can take very long to be typed; if they are required, everyone goes into a holding pattern

**R. 61.09(3)** Need paperwork to perfect appeal:

1. Factum (white or green)
2. Appeal book and compendium (buff)
3. Transcripts (red)
4. Exhibit book (rules are silent)

#### Constitutional Questions

**S. 109 *Courts of Justice Act***

**(1)** Notice of constitutional question shall be served on the AG of Canada and the AG of Ontario where:

**(i)** The constitutional question validity or applicability of an Act of Parliament or Legislature of a regulation or by-law or a rule of common law is in question

* + **s** A remedy is claimed under s. 24(1) of the *Charter of Rights and Freedoms.*

**(2)** Failure to give notice = no finding of invalid or inapplicable or no remedy.

**(2.2)** Served as soon as circumstances known and, in any event, at least 15 days before the day to be argued.

* If you’re going to raise a constitutional question, must serve notice [see above]
* Sometimes raised in course of appeal. They’re handled differently
* If you’re raising a constitutional question, you have to give a notice of constitutional question. You have to serve it as soon you realize as soon as you think the argument will be made and at the latest 15 days before the argument will be made

Appeal Process - Stay Pending Appeal

* What is the status of the original decision in the interim (i.e. while it is being challenged)?
  + Can ask for a stay of the underlying order. Until I get this appeal heard, don't make me comply with the original order that was granted
* 2 types of stays that might be granted: Automatic stays vs. Motion for a stay

### (a) Automatic Stay: R.63.01

There is an automatic stay of the order upon delivering the notice of appeal, in certain cases, in particular, an order for the payment of money. Exceptions:

**(1)** Except appeals of support orders (family law)

**(2)** Except where appealing an order refusing to set aside a default judgment.

**R.63.01(5)** Automatic stays can be lifted by the appellate court.

* All other orders remain in force pending appeal (by default)

### (b) Motion for a Stay: R 63.02(1)

* If there is no automatic stay, a party must seek stay by way of motion

**Where There Needs to Be a Motion for Stay** = Non-Money Order or Where Leave to Appeal is Required

Such interlocutory order of final orders may be stayed on such terms are just

(a) by the court that heard the original decision that is being appealed

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken **[63.02(1)]**

**Test for Motion for Stay**

Same as for interlocutory injunctions (***RJR-MacDonald*** (1994) SCC, see p. 99):

(1) A serious question to be tried;

(2) Irreparable harm; and

(3) The balance of inconvenience favours stay.

### Effect of a Stay: R.63.03

**(1)** Winning party cannot enforce the order.

**(2)** But winning party can enter the order and can assess costs.

**(3)** Judgment creditor can start process for collecting on the order so as to give notice of judgment in their favour to other creditors or possible creditors (cannot go farther than that)

Appeal Process - Outcome

### Powers of the Appellate Court

***CJA* s. 134:** Sets out the statutory basis for handling appeals. Appellate courts can:

* 1. make any order that could have been made by original court;
  2. can order new trial; or
  3. can make any other order or decision that is considered just.

### Appeal the Appeal Decision

* From Div Ct – seek leave to CA?
* From CA – seek leave to SCC?
  + “appeals from the decisions of the highest courts of final resort”

Enforcement of Orders: R 60

**Enforcement Order for Payment or Recovery of Money [R 60.02(1)]:** In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,

**(a)** writ of seizure and sale (**R.60.07**)

**(b)** garnishment (**R.60.08**)

**(c)** writ of sequestration (**R.60.09**)

**(d)** appointment of a receiver

* These often don’t come up because you’re often dealing with a party that has an insurance company. This doesn’t happen often in civil disputes. More likely to occur in commercial disputes

**R.60.03:** An order for recovery or delivery of possession of land may be enforced by a writ of possession (R.60.10)

**R.60.04:** For recovery of possession of personal property (not money) may be enforced by a writ of delivery and then writ of sequestration if necessary

**R.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 **R. 60.11.**

# CLASS PROCEEDINGS

* **Class action legislation** – body of procedural rules which allow one person to advance a claim on behalf of a group of persons who have identical or similar claims
* A class action allows the court to determine an issue (or several issues) in one proceeding that are common to the whole group
* Class proceeding allows entire group to be bound by result of single proceeding
* Certain subject matter lends itself to class proceedings – generally involve large sums of money and affect large numbers of people
* Why do we need class actions? ***Western Canadian Shopping Centres Inc. v Dutton* [2001 SCC]**: “The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega‐corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis‐à vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties”

Potential alternatives to class actions: Individual Actions, Mass Torts, Joinder, Test cases, Arbitration, Representation Proceedings, Regulatory Schemes, Settlement

(1) 3 policy objectives of class actions

**1. Judicial Economy**

* By aggregating similar actions, class actions avoid unnecessary duplication of fact-finding and legal analysis (Can decide a whole bunch of cases together)
* Frees-up scarce judicial resources by allowing one judge to deal with multiple claims
* Avoid potentially contradictory decisions
* Reduce litigation costs for both Ps (share expenses) and Ds (only litigate once)

**2. Access to Justice\***

* By aggregating claims to a large number of plaintiffs, allow access to justice by making it economical to prosecute cases that would be too costly to prosecute individually
* Claims that might not come to the attention of or be brought by all affected, can be brought to the court by a single plaintiff who has discovered the claim
  + There are a lot of times when the claim would never have been brought if it wasn’t for the class action. People would never have known even if they suffered a loss.
* Economical, social, psychological
* Most important goal of the three

**3. Behaviour Modification**

* Ensures that actual and potential wrongdoers do not ignore their obligations to the public
* Without class actions, lacking a mechanism to hold ‘industrial’ scale wrongdoers to account for anything other than a small amount of the consequences of their wrongdoing, if at all
* Cost sharing among Ps deters potential Ds who might otherwise assume that minor wrongs will escape scrutiny because of the expense of pursuing individual claims
* E.g. McDonalds serving coffee far too hot; after lawsuit, they lowered the temperature of their coffee

(2) Overview and Procedure

***Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA)”**

* Contains most procedural provisions for class proceedings 🡪 procedural statue, contains no substantive law
* Only 37 sections in the Act, so the cases are very important
* CPA is legislation which allows one person to advance a claim on behalf of a group of persons who have identical or similar claims
* Allows the court to determine an issue (or several issues), in one proceeding that are common to the entire group

***Rules of Civil Procedure***

* The Rules of Civil Procedure still apply to class actions pursuant to **s. 35, *CPA***
* Rule 12 predates the CPA, and contains relatively few provisions affecting the procedure in class actions.
* Predates CPA, contains relatively few provisions affecting procedure in class actions
* Rule 12 is part of a regulation, CPA is an act, therefore CPA governs to the extent of any inconsistency

**Can be Actions or Applications**

* **Class Actions**
  + By far the most common
  + Actual law suits
* **Class Applications**
  + Must meet usual conditions for application under **R.14.05**
  + ***Williams v Toronto* [2011 ONCA]:** Application against the City of Toronto alleging that Toronto had failed to inform residents of municipally subsidized housing projects of their entitlement to reduction in rent, due to a decrease in property taxes payable by the landlord.

**Fundamental Difference**

* Ordinarily, only the parties to a law suit are bound by the result
* Instead of having multiple proceedings to decide the same question(s) repeatedly, a class proceeding allows the entire group to be bound by the result of a single proceeding
* The entire group, class, is not a party to the proceeding they are bound by the outcome
* Absent litigants
* Special considerations can apply at different stages

**Limitation Periods**

[**28.** (1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92c06_f.htm) **Limitations** Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise

**Types of Class Proceedings**

Plaintiff’s class proceeding

* One or more members of a class may commence a proceeding on behalf of class members
* A person who commences a P class proceeding shall bring a motion for certification
* An action is not a class action unless and until it is certified 🡪 action with ambition
* Time requirement:
  + **S. 2(3)** – motion for certification shall be made within 90 days of **(i)** the last statement of defence or notice of intent to defend is delivered, and **(ii)** the date on which the last day provided in the rules for delivery of a statement of defence or notice to defend expires
  + Or, subsequently with leave of the court
  + Note: ALMOST NEVER OBSERVE 90 DAY RULE IN PRACTICE, LEAVE IS ALWAYS GRANTED

Defendant’s class proceeding

**S. 3 CPA** – a defendant to two or more proceedings may, at any stage of the proceedings, make a motion to certify the proceedings as a class proceeding and appoint a representative plaintiff

**S. 4 CPA** – Any party to a proceeding against two or more Ds may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative D

* IN PRACTICE, BOTH OF THESE ARE RARE

**Procedure - Case Management**

Motions – Judge: CPA s. 34

(1) The **same judge** shall hear all motions before the trial of the **common issues**

(2) Where a judge who has heard motions under (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues

**Specialized Judges** - The Regional Senior Justice in each region assigns one or more judges from that region as the "Class Proceedings Judge." The Class Proceedings Judge(s), or other judge assigned by the Regional Senior Justice, will hear motions for certification under the *CPA* brought in that region

Broad Discretionary Power: CJA s. 12

**Courts may determine conduct of proceeding**: 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.

* Can be exercised by case management judge; or trial judge
* A broad, discretionary jurisdiction

(3) Stages of a class action

* Commencement of Action
* Motion for Certification
  + An action is not a class action until it is certified by a court to proceed as a class action
  + This is a big difference from a regular claim
* Notice of Certification/Opt-Out
* Discovery
  + Documentary
  + Oral Examinations for discovery
* Pretrial Conference
* Common Issues Trial: First trial that takes place. Depending on how it is resolved there may be some issues that relate to different members of the class. Could decide all the issues. Want to have all the issues determined together
  + There can sometimes be sub-classes
* Individual Issues Trial (or alternative dispute resolution of individual issues)

### Motion for Certification Test: s. 5(1) CPA

**S. 5(1) Mandatory 5-part Test:**

The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

**(a)** the pleadings disclose a **cause of action**;

**(b)** there is an **identifiable class of 2 or more persons** that would be represented by the representative plaintiff;

**(c)** the claims or defences of the class members can raise **common issues**;

**(d)** a class proceeding would be the **preferable procedure** for the resolution of the common issues; AND

**(e)** there is a **suitable representative plaintiff and a workable litigation plan**.

* Unless you can meet the 5-part test under s. 5(1), you do not get certified as a class action
* **S. 5(1)(a)** – no evidence; but on (b) to (e) you do have evidence

#### s. 5(1)(a) - Cause of Action

* Same test that is applicable under **rule 21.01(1)(b)** – is it plain and obvious that claim does not exist?
* Very low threshold
* The court will presume that the facts pleaded in the statement of claim are true, unless patently ridiculous and capable of proof
* Statement of claim is read generously in favour of finding that a cause of action exists
* No evidence is to be considered under **s. 5(1)(a)** 🡪 Courts do not want to look at the merits
* While only one cause of action is needed for the claim to proceed, the court will examine each of the causes of action pleaded, and will weed out any claims that do not disclose a clause of action
* If D argues that a cause of action has not been pleaded, the defendant will often bring a **Rule 21** motion before the certification motion, or concurrently with the certification motion
* D’s will try to knock off as many causes of actions as they can because they want to limit the scope of the action by claims/defendants as much as possible
* One way to get around the restrictions of a s. 5(1)(a) analysis is to bring a summary judgment motion, where evidence can be considered (i.e. you put your best foot forward)

#### s. 5(1)(b) - Identifiable Class

* Must be an identifiable class of two or more persons
* Plaintiff has burden of framing a class definition that meets the purpose of the provision:

(a) it identifies those who have a potential claim for relief against the defendant;

(b) it identifies those who will be bound by result of the action; and

(c) it describes those persons who are entitled to notice

* The definition must allow the public to know whether they are, or are not, members of the class
* Must be defined with objective criteria
* The definition should not be unduly narrow (such that it excludes from the class persons who have a potential claim)
* The definition should not be overly broad such that it would include persons with no interest in the action
* The class definition does not need to include only those persons whose claims will be successful
* The class definition does not depend on whether class members have a meritorious claim
* Example:
  + ~~All those persons who suffered heart failure as a side effect of taking drug X~~ (not acceptable because it assumes damage *caused* by the drug)
  + All those persons who took drug X, and who subsequently suffered heart failure (acceptable because it does not assume that the damage was caused by the drug)
* There must be at least one representative plaintiff with a claim against each defendant
* There must be evidence of two or more individuals with a claim against each defendant

#### s. 5(1)(c) - Common Issues

* Common issues or commonality requirement is central to the purpose of class actions
* **s. 1 – “common issues” means:** (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts
* An issue will be common only where it is necessary to resolution of *each* class members’ claim – can’t be something that is only relevant to some members of the class, it must advance everybody’s claim
* Issue will NOT be common in the requisite sense unless the issue is a “substantial ingredient” of each claim in the sense that it will meaningfully advance the class members’ claim
* For an issue to be common, it must avoid duplication of fact-finding or legal analysis
* A common issue cannot be dependent upon findings of fact that have to be made with respect to each individual claimant
* A common question can exist even if the answer given to the question might vary from one class member to another
* For an issue to be common, success for one class member does not necessarily have to lead to success for all. However, success for one member must not result in failure for another
* The resolution of a common issue need not decide the entire case, or provide relief to the class
  + Don’t have to have a common issue decide all of the cases
* E.g. it is common for the issue of whether the defendant was negligent to be a common issue – leaving the issues of individual causation and damages to be determined on an individual basis
  + Liability – if owed a duty and breached that duty can be common
  + Causation – sometimes general/class-wide causation can be common versus individual/specific
  + Damages – individual basis versus aggregate damages

#### s.5(1)(d) Preferable Procedure; and

* The preferability inquiry is to be conducted through the lens of the 3 goals of class actions
  + Judicial economy, behaviour modification and access to justice\* (emphasis is on access to justice)
* The ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals.
* Central question is whether the resolution of common issues will significantly advance the action
  + For example, if each individual claim is quite large, such that it could be brought economically through individual claims, and there are many individual issues to be decided in the case, a class action is less likely to be considered the preferable procedure
* **TWO CORE QUESTIONS:**

(1) Whether a class action would be a fair, efficient and manageable method for advancing the claim; and

(2) Whether a class action would be preferable to other reasonably available means of resolving the class members’ claims (e.g. individual actions, test cases, other statutory dispute resolution procedures such as OSC proceedings)

* + - D will try to argue that it is unmanageable and inefficient
* **S. 5(1)(d) – Issues**

(1) Nature of proposed common issues

* + - Court wants to see real “mileage” on the common issues side

(2) Individual issues which remain

(3) Factors in the CPA

(4) Complexity and manageability of the action

* + - Is the class action itself manageable, or too wieldy?

(5) Alternative Procedures

(6) Extent certification furthers goals of CPA

(7) Rights of the parties

* In considering access to justice issues the court will consider:

(1) What are the barriers to access to justice – barriers may include economic, social or psychological

(2) What is the potential of a class proceeding to address the barriers?

(3) What are the alternatives to a class proceeding?

(4) To what extent can the alternatives address the barriers?

(5) How do the two proceedings compare?

* Remember: burden is on the plaintiff to prove that class action is the preferable procedure

#### s. 5(1)(e) Representative P or D

There is a representative plaintiff who,

**(i)** would **fairly and adequately represent** the interests of the class,

**(ii)** has **produced a plan** for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

* Must produce a workable plain for advancing the proceeding on behalf of the class
* The “Litigation Plan” must show that a class action is capable of achieving resolution of the class members’ claims from beginning to end (individual adjudication of individual issues)
* Thus the Plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members’ claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined

**(iii)** **does not have**, on the common issues for the class, an interest in **conflict** with the interests of other class members.

* Court is primarily concerned with “straw man” plaintiffs
* Court must be satisfied that the plaintiff has a real stake in the outcome of the claim, and will devote the necessary time and effort to advance the claim
* The plaintiff need not be typical of the class, nor be the best possible representative
* The court must be satisfied that the proposed representative plaintiff will vigorously and capably prosecute the claim in the best interests of the class

### Certification - not a merits test

* ~~The Ontario Law Reform Commission suggested that the P should be required to make a preliminary merits showing at the certification hearing~~ – don’t have to show a prima facie case here in order for the case to succeed
* This was not taken up in the CPA
* **S. 5(5)** – An order certifying a class proceeding is not a determination of the merits of the proceeding
* The Courts have held that the merits of the claim are not to be considered at all at the certification stage
* The focus of the certification motion is on the form of the action, not on whether the action will succeed

### Standard of Proof – Some basis in fact

* Representative of asserted class must show “some basis in fact” to support the certification order
* This requirement applies to all certification criteria **except** **s. 5(1)(a)** – cause of action
* Asserted class must show “some basis in fact” to support the certification order
* Court will not resolve conflicts in the evidence at the certification stage – very common to have conflicting evidence

### Where Certification Refused: s. 7

* When certification is refused, the P’s individual claim continues against the D
* **S. 7 *CPA*** – Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate.

### Notice of Certification: s. 17

Important – you need to get word out to the class

* **s. 17 CPA** - The P is required to give notice of the class action, and the certification order, to potential members of the class
  + This occurs after certification
* The manner in which notice is given to the class depends on the nature of the class (i.e. size, geographic location, whether its composition is known or unknown)
* Purposes of Notice of Certification:
  + Ensure that interests of class members are adequately representative
  + Advise the class members certified and of the right to opt-out of a proceeding if they wish to sue individually
  + Inform the class members what they have to do to participate if there is a judgment in favour of the class
* Notice can be given by:
  + Direct mailing
  + Local advertising
  + National advertising
  + Trade publications
  + Websites

### Opting Out: s. 9

* **S. 9 CPA** - Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.
* Ontario is an “opt out” jurisdiction (versus B.C., which has an “opt in” system)
* Class members are bound by the result of the action unless they opt out of the action within the time specified in the Notice of Certification 🡪 Usually this will happen after they get notice
* Notice will advise the class members of the time within which they must opt out, and how to do so
* All class members are deemed to receive the notice, and after the opt-out period ends, no further opting-out (or opting-in) is permitted

### Procedures before Trial

* Ordinary rules for the progress of an action apply in advance of the common issues trial:
  + Documentary discovery
  + Examinations for discovery
  + Motions
  + Pre-trial conference
* Once certified, it proceeds like any other lawsuit
* Court can order that class members submit for examinations for discovery
* The primary substantive difference is that any steps or orders taken in advancing toward the common issues trial will bind the class
  + Importantly, this can include motions for summary judgment on the common issues (by either P or D)
* Procedures prior to trial will be case managed and **s. 12** powers can be used

### Stages of a Class Proceeding: s. 11, CPA

(a) common issues for a **class** shall be determined together;

(b) common issues for a **subclass** shall be determined together; and

(c) **individual issues** that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

### Common Issues Trial: S.27(1)

* The first or “common issues” trial resolves the issues that were certified as common issues for the class
  + When judge certifies the action, the judge certifies the common issues
* The substantive law, including the requirements of proof with respect to the common issues, are not lessened merely because the action is a class action
* The result of the common issues trial binds all members of the class who did not opt out
* **S. 27(1) CPA** – A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted.

* Vast majority of Canadian Class Actions settle but at significantly smaller amounts than US – Significant number of common issues trial in part due to ease of certification
* Approximately 140 common issue trials in Canada – vast majority in Quebec
* Increasing number of common issues trial in part due to ease of certification
* Increasing number of summary judgment motions being used to determine common issues
* Examples: Kerr v Danier Leather – 44 day trial – securities representative; Smith v Inco – 45 day trial – environmental contamination; Jeffrey v London Life – 44 day trial – claim by policy holders; Anderson v St. Jude Medical – 146 day trial – product liability; Mandeville v Manufacturers Life – 29 day trial – claim by policy holders

### Aggregate Damages: s. 24(1) *CPA*

**S. 24(1)** **Aggregate assessment of monetary relief**: The court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and

(c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

* E.g. Union gas case with late payment penalties (illegal interest) – wouldn’t be possible to go through each client’s case to determine how much they were overcharged, so damage awarded divided by number of plaintiffs and everyone got the same amount

### Individual Issues: s. 25(1) *CPA*

* **s. 25(1)** – When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under **section 24**, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; **AND**

(c) with the consent of the parties, direct that the issues be determined in any other manner.

* Judge can arrange to have a series of trials set up to decide individual issues

### Individual Trials and Dispute Resolution: S. 25

* Court has wide discretion to give directions with respect to procedures and evidentiary rules for the resolution of individual issues
* **CPA s. 25(3):** In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

* Examples of individual issues that might remain:
  + Damages
  + Causation
  + Limitations Defences
  + Individual Reliance
    - The two issues that seem to get litigated the most are damages and causation
* **CPA, S. 25**: Individual issues can be determined by individual trials, or by reference (referees) or any other procedure to which the parties agree

### Distribution of Judgment: s. 26 *CPA*

**(1)** The court may direct any means of distribution of amounts awarded under **s. 24 or 25** that it considers appropriate.

**(2)** In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant’s liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

**(7) Supervisory role of the court**: The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

* Mandatory ongoing supervision by trial judge – supervising to make sure that systems are in place to make sure that there’s a proper payout

**(10) Return of unclaimed amounts**: Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

* Typically the court will require the money handed to the class administrator to invest it. So those that are a part of the fund will get the interest.
* Take-up rate: how many plaintiffs claimed the award? Can be an indicator of how successful notice was, or possibly whether the action was suitable as a class proceeding

Section 26 gives the court a lot of flexibility in distributing funds in the way that it determines is the most appropriate

### Discontinuance and Settlement: s. 29 *CPA*

**(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 proceeding;

**(b)** a statement of the result of the proceeding; and

**(c)** a description of any plan for distributing settlement funds.

* + Section 29 is important
  + Approval motion will require that notice be given
  + Judge will evaluate how fair the settlement is to the members of the class
  + Representative plaintiff is the person who pursues the action – they are the one settling

### Costs: s. 31 *CPA*

* General rule is that costs follow the event. Costs in a class proceeding can be very substantial. One exception to that is **s. 31.**

**S. 31(1)** In exercising its discretion with respect to costs under subsection **131 (1) *CJA***, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

* **Test case**: a legal action whose purpose is to set a precedent. Test cases are brought to court as a means to provide a clearer definition to laws with disputed meaning and/or intent.

**(2)** **Liability of class members for costs:** Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

* Protection against adverse cost awards
  + Indemnification by counsel
  + Class Proceedings Fund
  + Third Party Funding or Insurance
* Representative plaintiff takes on a lot of extra risk (i.e. exposure to costs) without any additional rewards – so lawyers started to indemnify clients for legal costs
  + But cost awards have gotten extremely high, so firms almost never indemnify clients now
  + Class Proceedings Fund is a government fund, so not always reliable (nearly bankrupt at one point)
  + Third Party Funding is now very prevalent

### Fees and Disbursements of Counsel: s. 32 *CPA*

**s. 32(1)** An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

**(a)** state the terms under which fees and disbursements shall be paid;

**(b)** give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

**(c)** state the method by which payment is to be made, whether by lump sum, salary or otherwise.

* Provision for court to approve these agreements up front

**(2)** **Court to approve agreements:** An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable **unless** approved by the court, on the motion of the solicitor.

**(4) Determination of fees where agreement not approved**: If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

* Courts will often apply a multiplier to determine a reasonable amount based on the amount of time the lawyer is putting in

### Limitation Periods: s. 28(1) *CPA*

**S. 28(1)** Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

**(a)** the member opts out of the class proceeding;

**(b)** an amendment that has the effect of excluding the member from the class is made to the certification order;

**(c)** a decertification order is made under section 10;

**(d)** the class proceeding is dismissed without an adjudication on the merits;

**(e)** the class proceeding is abandoned or discontinued with the approval of the court; or

**(f)** the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

# ADR

ADR is a term used to define a set of approaches aimed at resoling disputes in a non-confrontation way 🡪 In civil litigation, ADR is represented as a technique used by parties in disputes that allows for agreements and settlements outside the litigation process

**General Features: Confidential, cooperative, flexible** in that the parties can define the process, **more control over process**, facilitation of **a third party neutral** (arbitrators, mediators, negotiators)**, arguably more efficient**

[1] Arbitration

* Most formal and adversarial form of ADR, the guiding principle is party autonomy.
* Parties resolve the dispute privately and such can design the process as they see fit, **subject to minimal court oversight**
* Proceedings subject to the ***Arbitrations Act*** 🡪 if there is an international dispute, use ***International Commercial Arbitration Act***
* Parties can agree to exclude most provisions of the *Arbitration Act* except for *Scott v Avery Clauses* (these are clauses that require arbitration before court), equality and fairness, Court directed time extensions, Court intervention in limited circumstances (ss 46-48) and enforcement of arbitral awards in Court.

**Why Arbitration?**

* Arbitration Awards can be enforced by court
* Not uncommon for parties to agree in commercial contract for disputes to be resolved by arbitration as opposed to court proceedings
* Confidential process opposed to open court 🡪 family disputes, secrets, etc.
* Parties can agree on decision maker, level of disclosure,

**Arbitration Appeals**

* Arbitration agreement can provide for right of appeal and arbitration agreement sets out the questions to be decided and the process 🡪 can also eliminate appeals including appeals on issues of law 🡪 appeals can be made to court if the agreement is silent on appeals, can also provide for an appeal on question of fact or mixed question of law and fact
* **Limited grounds to set aside an award:** such as legal incapacity, invalid arbitration agreement, an issue is beyond the arbitration agreement, the composition of the arbitral tribunal is not right, the subject matter is not capable of being arbitrated (such as criminal law), a lack of fairness, misconduct by the arbitrator, or an award is obtained by fraud

**Arbitrators**

* Usually given authority to make binding decisions
* Can agree to *any number* of arbitrators, many want arbitrators with differing backgrounds (law and medicine)
* Must be independent and impartial
* Must disclose any circumstances that could give rise to RAB; can be challenged for reasons of bias or lack of necessary qualifications

[2] Mediation

Mediation facilitates parties to reach a resolution, the mediator **listens and directs questions**

Informal process

Parties must agree on a resolution

**Unless under case management, it is a voluntary process**

**It is not about deciding who is right or wrong but agreeing upon a resolution of the dispute**

Pros include reduced costs and lower demands on court resources

* Arbitrators are not overly common (except of labour issues), however in the coming years arbitrations may increase due to the costs of litigation
* Mediation on the other hand is more common and around 80% of cases settle here, it is rare that you do not settle at mediation because mediation in itself is still costly and by mediating you are showing you want to settle

[3] Negotiation

**Direct discussion between parties/counsel, parties bargain without assistance**

Goal is to reach an agreed upon compromise of the positions and the process is **entirely controlled by the parties**

Parties must be cooperative and motivated to reach a resolution of the dispute and need to identify their goals

Parties under **Simplified Procedure Matters** required to have settlement discussion by phone or in person within 60 days after the first SOD or notice of intent to defend is filled **[R 76.08]**

* Regardless, parties should always be negotiating, a very good time to have settlement conference is after discovery

# CASE MANAGEMENT

What is Case Management

### 1. General

* Case management is a system designed to reduce unnecessary delay and cost, facilitate early and fair settlements, and bring cases promptly to a just conclusion.
* Under case management, the court imposes time limits for steps in the litigation process
* The process provides opportunities for the parties to settle, narrow or consolidate issues in order to streamline proceedings and focus trial resources where they are most needed. It also involves the early and active intervention by the court to promote the resolution of disputes or to bring cases to trial in a timely manner.

### 2. Rule 77

* Rule 77 of the Rules of Civil Procedure sets a system of case management in three regions. It applies to civil actions and applications commenced in Toronto, Ottawa and Windsor.
* A civil case in these three regions can be assigned into case management by an order of a judge or case management master. The judiciary may assign an action into case management if the parties agree to case management or if a judge or case management master decides that the case is suitable for case management (see: rule 77.05).
  + 77.05(4) – look this up
* Under rule 77 judges and case management masters can preside over case conferences, hear motions (for that specific case), extend or abridge a time required by an Order or the rules, set a timetable and to make orders, impose terms and give directions and award costs as necessary (see: rule 77.04).
  + In terms of a civil law suit, up to parties to drive the litigation. Once P files SOC and D files SOD. Court won’t do anything until P moves. In contrast, in case management, court plays active role and try to move the parties along.
  + When have 3rd party claims, when cases become more complicated, case management really comes into effect and
  + 77.02 look up
  + 76 simplified procedures

### 3. Development of Case Management

* In 1988, the Joint Committee on Court Reform called for implementation of a system of caseflow management. Pilot projects were established in three cities ‐‐ Sault Ste Marie, Windsor and Toronto.
* In 1993, an assessment of the pilot projects was conducted by the Ministry of the Attorney General. The report concluded that the pilot projects were successful and made recommendations for their implementation.
* A year later, in 1994, the Joint Committee on Court Reform engaged the QUINDECA Corporation, to conduct an independent review of the three pilot projects. QUINDECA's Report concluded that the case management experience in Ontario was sufficiently successful to warrant continuation.
* As a result, the Ministry of the Attorney General's Civil Justice Review Committee produced a report endorsing the implementation of a caseflow management system in their 1995 First Report. The Civil Justice Review Committee called for a case flow management system on a province‐wide basis by the year 2000. The report contained a draft rule on the subject, which later emerged as Rule 77. The draft rule was based on the experience gained in a previous pilot project conducted in Toronto, Essex and Algoma

### 4. Exemptions to Case Management

* Pursuant to Rule 77.02(2), Rule 77 does not apply to:
  + family law actions
  + class proceedings
  + estates
  + bankruptcy and insolvency proceedings
  + mortgage actions (rule 64)
  + construction lien proceedings (except trust claims)
  + Toronto Commercial List matters, or
  + simplified rules (rule 76) proceedings.

### 5. Purpose and Objectives of Case Management

* Caseflow management is a case‐processing mechanism which manages the time and events of a law suit as it passes through the justice system. It does so with a view to achieving the following objectives:
  + the earlier resolution of disputes, where that is possible;
  + the reduction, and eventual elimination, of delays and backlogs;
  + the allocation of judicial, quasi‐judicial and administrative resources to cases in the most effective manner; and,
  + reduction of the cost of litigation.

### 6. Assignment to Case Management

* A case can be assigned into case management at any time if the parties agree to case management and a judge or case management master decides it is appropriate. Rule 77.05(1)
* A case can also be assigned into case management after the filing of the first defence if a party requests it and a judge or case management master decides it is appropriate or if a judge or case management master on his or her own initiative assigns the case into case management. Rule 77.05(2)
* To determine whether to assign a proceeding for case management, a judge or case management master will consider specific criteria (see: rule 77.05(4)).

### 7. Case Management Judge – R 77.06

* All the steps in a case managed proceeding might be heard by one particular judge. A Regional Senior Judge or other authorized judge can assign a particular judge to hear all the steps in the proceeding.
  + Pros and cons. With new judges, can get fresh povs, but waste more time on familiarizing new judge with facts each time.
* A judge who is directed to hear all the steps in the proceeding will not be the trial judge or the judge who hears the application unless all parties agree.
* A judge who is directed to hear all the steps in a proceeding can refer a motion to a case management master in certain circumstances.
  + Masters have jurisdictions in some matters but not others

### 8. Mandatory Mediation

* All actions in Toronto, Windsor and Ottawa, whether they are case managed or not, are subject to mandatory mediation under rule 24.1. The only actions that are not subject to mandatory mediation are those specifically exempt by rule 24.1 or by a court Order.
* Mandatory mediation gives parties a chance to discuss the issues in dispute. A trained mediator helps the parties explore settlement options. Mediation may help the parties to achieve a settlement and avoid the trial process.
* Parties must attend a mandatory mediation session within 180 days of the filing of the first defence. The court may extend this deadline by a court Order or, the parties can agree to extend the deadline. If the parties agree to postpone the mediation to a later date, they must file a written consent with the mediation co‐ordinator within 180 days of filing of the first defence (see: rule 24.1.09(3)). If the case settled, or a mediator has been selected and a mediation date set, the parties must notify the court of this within
* 180 days of the filing of the first defence (rule 24.1.09(6)). Where the parties do not comply with these rules, a mediator will be assigned by the court (see: rules 24.1.09(6)(6.1)).

### 9. Pre-Trials Under Case Management

* A pre‐trial must be scheduled by the parties within 180 days of the matter being set down for trial. An action is set down for trial by filing a trial record (see: rule 48.02).
* To schedule a pre‐trial, parties must ensure that the date is acceptable to all parties. If the pre trial is not scheduled within 180 days of the set down for trial, the court will schedule the pre‐trial.
* This process is the same for ordinary procedure cases (see: rule 50.02).

### 10. Case MAnagement Motions – R 76.07

* Parties can bring a motion in case managed actions. The motion may be heard by a judge assigned to the case, or may be heard by a case management master in certain circumstances.
* A motion may be made with or without supporting material or a motion record. Parties can attend a motion in person, in writing by fax, or by telephone or video conference if the facilities are available at the court.
* The costs of the motion will be determined at the conclusion of the motion by the judge or case management master.
* Formal Order may not be required

Can just tell you decision orally

### 11. Case Conference – R 76.08

* A judge or case management master may hold a case conference if a party asks for one or if the judge or case management master decides there should be a case conference.
* A case conference helps parties to identify the issues or move the case forward. It can also help parties to explore ways to resolve issues and to create or amend a case timetable.
* A party can bring a motion at a case conference for:
  + a procedural order
  + asking for a pre‐trial conference
  + directions
  + an Order for interlocutory relief
  + an Order to convene a hearing
  + deal with procedural matters and move case along (explored more in rule 50.1.3?)

Mandatory Mediation in Case Management Cases R 24.1

### 1. Purpose of Mandatory Mediation

* Establishes program for mandatory mediation in case managed case in Toronto, Windsor, and Ottawa
* Regulation sets fees paid to Mediator; list of mediators for the county maintained by mediation coordinator
  + There are private mediators that aren’t as reasonably priced
  + Good mediators will force parties to see the flaws of their own cases, even if they don’t make the decision. You should up your offer or go down on your offer depending on strength of your case
* **Rule 24.1.01** sets out purpose of Rule: “This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.”

### 2. Nature of Mediation

* **Rule 21.1.02** provides that in mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.
  + Parties will give opening statements, broken out into two different rooms. Mediators go to each room and take their offers. Good mediators will contribute to the process while bad mediators will just take the offers back and forth.

### 3. Exceptions

* Pursuant to Rule 24.1.04, Mandatory Mediation does not apply to
  + (a) actions to which Rule 75.1 (Mandatory Media􀆟on ― Estates, Trusts and Substitute Decisions) applies;
  + (b) actions in relation to a matter that was the subject of a mediation under section 258.6 of the Insurance Act, if the mediation was conducted less than a year before the delivery of the first defence in the action;
  + (c) actions placed on the Commercial List established by practice direction in the Toronto Region;
  + (d) actions under Rule 64 (Mortgage Actions);
  + (e) actions under the Construction Lien Act, except trust claims; and
  + (f) actions under the Bankruptcy and Insolvency Act (Canada). O. Reg. 438/08, s. 16 (1).

### 4. Order to Exempt for Mandatory Mediation

* Rule 24.1.05 The court may make an order on a party’s motion exempting the action from this Rule.
* • ***Owen v. Hiebert (2000), 50 O.R. (3d) 82 (SCJ)***
  + 23min
  + Former spouse sued former wife for \_\_funds. Alleging sexual assault, indecent assult and other torts. Wife tried to get out of mandatory mediation since fearful of being in same room and he’ll try to intimidate her. Court did not set aside mandatory mediation – this case suggests threshold is very very high since this would be a case you would think court would allow you to get away with not having mediation
  + There are trained mediators in dealing with these type of issues.

### 5. Time to Mediate and Extensions

**24.1.09**

(1) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise.

(2) Extension or Abridgment of Time: In considering whether to exercise the power conferred by subrule (1), the court shall take into account all the circumstances, including,

(a) the number of parties, the state of the pleadings and the complexity of the issues in the action;

(b) whether a party intends to bring a motion under Rule 20 (Summary Judgment), Rule 21

* (Determination of an Issue Before Trial) or Rule 22 (Special Case);
  + (c) whether the mediation will be more likely to succeed if the 180‐ day period is extended to allow the
* parties to obtain evidence under,
  + (i) Rule 30 (Discovery of Documents),
  + (ii) Rule 31 (Examination for Discovery),
  + (iii) Rule 32 (Inspection of Property),
  + (iv) Rule 33 (Medical Examination), or
  + (v) Rule 35 (Examination for Discovery by Written Questions); and
* (d) whether, given the nature of the case or the circumstances of the parties, the mediation will be more likely to succeed if the 180‐ day period is extended or abridged.
  + Mediation won’t go anywhere if parties don’t know the (26min)

### 6. Consent to Extensions

* Pursuant to Rule 24.1.09(3), The mediation session may also be postponed to a later date if,

(a) the parties consent to the date in writing; and

(b) the consent is filed with the mediation coordinator.

### 7. Statement of Issues

* 24.1.10 (1) At least seven days before the mediation session, every party shall prepare a statement in Form 24.1C and provide a copy to every other party and to the mediator.
  + (2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 453/98, s. 1.
  + (3) The party making the statement shall attach to it any documents that the party considers of central importance in the action. O. Reg. 453/98, s. 1. [any documents they wish to rely on]

**Copy of Pleadings**

* + (4) The plaintiff shall include a copy of the pleadings with the copy of the statement that is provided to the mediator. O. Reg. 453/98, s. 1.

**Non‐Compliance**

* + (5) If it is not practical to conduct a mediation session because a party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the mediation co‐ordinator a certificate of non‐compliance (Form 24.1D). O. Reg. 453/98, s.1
* Will include factual issues, legal issues, and the position of the party
* Enclose any documents they wish to rely on
* Pleadings
  + Interesting thing in mediation is that it’s a unique opportunity to speak to opposing client and help them see the flaws in their case (their lawyer might have never told them, we don’t know what the opposing counsel has told them)

### 8. Attendence at MEdiation: R 24.1.11

**Who is Required to Attend**

**(1)** The parties, and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise.

Representative of Insurer

**(1.1)** Unless the court orders otherwise, if an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse an insured party for money paid in satisfaction of all or part of a judgment in the action,

(a) a representative of the insurer shall attend the mediation session; and

(b) despite subrule (1), the insured party is not required to attend the mediation session.

**(2)** **Authority to settle:** A party who requires another person’s approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours.

* If insurance company involved, insurance company takes over that defence and hire lawyers to defend hat individual. It’s realistically the insurance company that pays. D doesn’t have to show up. It’s the insurance company and insurance company’s lawyers that shows up and takes it to trial and deal with everything.
* Parties must come ready with authority to settle (whether given authority prior to mediation, if don’t have authority to settle case, then why go to mediation in first place?)

### 9. Failure to Attend: R 24.1.12

If it is not practical to conduct a scheduled mediation session because a party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the mediation coordinator a certificate of non‐compliance (Form 24.1D).

### 10. Non-Compliance: R24.1.13

**(1)** When a certificate of non‐compliance is filed, the mediation coordinator shall refer the matter to a judge or case management master.

**(2)** The judge or case management master may convene a case conference under rule 50.13, and may,

(a) establish a timetable for the action;

(b) strike out any document filed by a party;

(c) dismiss the action, if the non‐complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;

(d) order a party to pay costs;

(e) make any other order that is just.

### 11. Confidentiality

**24.1.14:** All communications at a mediation session and the mediator’s notes and records shall be deemed to be without prejudice settlement discussions

* Everything is made on a without prejudice basis – encourages parties to negotiate in good faith. That nothing would come back to haunt client.

### 12. More than One Mediation: R 24.1.16

**(1)** With the consent of the parties the court may, at any stage in the action, make an order requiring the parties to participate in an additional mediation session.

**(2)** The court may include any necessary directions in the order.

**(3)** Rules 24.1.09 to 24.1.15 apply in respect of the additional session, with necessary modifications.

* You can have several mediations, multiple tries to settle. Some clients require more exposure. Sometimes landscape of cases change.
* Can be done at any stage of the proceeding.

**ADR Takeaways**

* Court actions are complex and very costly
* ADR is a set of systems that allow parties to bypass the typical justice system and take control of their own case
  + No case is ever 100% guaranteed win. Court system can be very unpredictable.
* ADR is a cost effective means to resolve dispute
* Based on the simple principle that parties have to be prepared to come to the table and talk about the strengths and weaknesses of their case in an attempt to resolve the dispute

# SMALL CLAIMS COURT

Jurisdiction and Rationale

**i) General**

***CJA* s. 22(1):** the Small Claims Court is a **branch of the SCJ**

* The Small Claims Court is **NOT a s. 96 court** (provincially-appointed judges) and so it doesn’t have unlimited power
  + While it is a branch of the SCJ, it is stripped of additional powers (e.g. no equitable remedies, declarations)

***CJA* s. 22(3):** all judges of the SCJ are automatically, by virtue of their office, judges of the Small Claims Court.

* However, these judges **do not sit** on the court—under the *CJA*, the province designates full or part time **Small Claims Court judges** and **deputy judges** (provincially-appointed).

**(ii) Rationale for Small Claims Court**

* Concerns about delays, cost of litigation, and access to justice for ordinary citizens (too expensive to hire lawyers for such matters).
* Judge plays a more **active role** in directing the proceedings (because litigants often bring matters themselves, acting in person).
* Easy, **informal procedure** – relaxed rules: *Rules of Small Claims Court*.

**(iii) Jurisdiction and Remedial Authority**

* Jurisdiction is **(a) statutory, (b) civil (no criminal matters),** and **(c) first instance.**

***CJA* s. 23(1)** (and regulations thereunder): the Small Claims Court has jurisdiction over actions involving:

(a) the payment of money ($25,000 or less); or

(b) the recovery of possession of personal property (valued at $25,000 or less).

***CJA* s. 23(2):** provided the statutory jurisdiction of s. 23(1) is satisfied, **an action in the SCJ maybe transferred to the Small Claims Court** if all the parties consent.

**ss. 96(3) and 97 of the *CJA*:** only the CA and SCJ, “**exclusive of the Small Claims Court**,” may grant **equitable remedies** (injunctions, orders for specific performance, etc.) or **declarations.**

* + Cannot get an equitable remedy or declaration in Small Claims Court (can only get that from CA and SCJ)
  + While court must administer equity and CL concurrently [all courts must do so under *CJA* s. 96(1)], its **remedial authority** is strictly curtailed.
  + But see: *Hodgins v. Grover*, 2011 ONCA 72**:** “court has jurisdiction to grant equitable relief when the order involves the return of personal property or a monetary payment within the limits of the small claims court.”
  + Limits flow from constitutional concerns under s. 96 of the *CA, 1867.*

**Summary hearings**

**CJA 25** The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

**Evidence**

**CJA 27** (1) Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon any oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything unduly repetitious.

Contents of Rules of Small Claims Court

### R 1 General

***General Principle***

**1.03 (1)** These rules shall be **liberally construed** to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act.*

***Matters Not Covered in Rules***

**(2)** If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by **analogy** to these rules, by reference to the *Courts of Justice Act* and the Act governing the action and, if the

court considers it appropriate, by reference to the Rules of Civil Procedure.

### R 2 Non-Compliance with Rules

***Effect of Non-Compliance***

**2.01** A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute.

***Court May Dispense with Compliance***

**2.02** If necessary in the interest of justice, the court may dispense with compliance with any rule at any time.

### R 3 Time

***Computation***

**3.01** If these rules or an order of the court prescribe a period of time for the taking of a step in a proceeding, the time shall be counted by excluding the first day and including the last day of the period; if the last day of the period of time falls on a holiday, the period ends on the next day that is not a holiday.

***Powers of Court***

**3.02 (1)** The court may lengthen or shorten any time prescribed by these rules or an order, on such terms as are just.

### R 6 Forum and Jurisdiction

***Place of Commencement and Trial***

**6.01 (1)** An action shall be commenced,

**(a)** in the territorial division,

**(i)** in which the cause of action arose, or

**(ii)** in which the defendant or, if there are several defendants, in which any one of them resides or carries on

business; **OR**

**(b)** at the court’s place of sitting that is nearest to the place where the defendant or, if there are several defendants, where any one of them resides or carries on business.

**(2)** An action shall be tried in the place where it is commenced, but if the court is satisfied that the balance of convenience substantially favours holding the trial at another place than those described in subrule (1), the court may order that the action be tried at that other place.

**(3)** If, when an action is called for trial or settlement conference, the judge finds that the place where the action was commenced is not the proper place of trial, the court may order that the action be tried in any other place where it could have been commenced under this rule.

**6.02** A cause of action shall not be divided into two or more actions for the purpose of bringing it within the court’s jurisdiction.

### Pleadings

***Plaintiff’s Claim***

**7.01 (1)** An action shall be commenced by filing a P’s claim (Form 7A) with the clerk, together with a copy of the claim for each D.

***Defence***

**9.01** A defendant who wishes to dispute a plaintiff’s claim shall, within 20 days of being served with the claim,

(a) serve on every other party a defence (Form 9A); and

(b) file the defence, with proof of service, with the clerk.

***Defendant’s Claim***

**10.01 (1)** A defendant may make a claim,

(a) against the plaintiff;

(b) against any other person,

(i) arising out of the transaction or occurrence relied upon by the plaintiff, or

(ii) related to the plaintiff’s claim; or

(c) against the plaintiff and against another person in accordance with clause (b).

### R 8 Service

***Service of Particular Documents Plaintiff’s or Defendant’s Claim***

**8.01 (1)** A plaintiff’s claim or defendant’s claim (Form 7A or 10A) shall be served personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03.

***Time for Service of Claim***

**8.01 (2)** A claim shall be served within 6 months after the date it is issued, but the court may extend the time for service, before or after the six months has elapsed.

### R11.1 Dismissal by Clerk

***Dismissal***

**11.1.01 (1)** Unless the court orders otherwise, the clerk shall make an order dismissing an action for delay if, by the 2nd anniversary of the commencement of the action, **(a)** the action has not been disposed of by order; and **(b)** no step has been taken by the plaintiff under R11.03 (2) or (2.1) to obtain judgment, nor has a trial date been requested.

***Exceptions***

**(2)** Subrule (1) does not apply if,

(a) an offer to settle the action has been accepted and filed;

(b) the defence contains an admission of liability for the plaintiff’s claim in the action and a proposal of terms of payment under subrule 9.03 (1); or

(c) at the time the clerk would otherwise be required under that subrule to dismiss the action, the plaintiff is under disability.

### R 12 Amendment

***Right to Amend***

**12.01 (1)** A plaintiff’s or defendant’s claim and a defence to a plaintiff’s or defendant’s claim may be amended by filing with the clerk a copy that is marked “Amended”, in which any additions are underlined and any other changes are identified.

***No Amendment Required in Response***

**12.01 (5)** A party who is served with an amended document is not required to amend the party’s defence or claim.

### R 13 Settlement Conferences

***Settlement Conference Required in Defended Action***

**13.01 (1)** A settlement conference shall be held in every defended action.

**Timing**

**(3)** The settlement conference shall be held within 90 days after the first defence is filed.

***Attendance***

**13.02 (1)** A party and the party’s representative, if any, shall, unless the court orders otherwise, participate in the settlement conference,

(a) by personal attendance; or

(b) by telephone or video conference in accordance with rule 1.07.

***Orders at Settlement Conference***

**13.05 (1)** A judge conducting a settlement conference may make any order relating to the

conduct of the action that the court could make.

**(2)** Without limiting the generality of subrule (1), the judge may,

**(a)** make an order,

(i) adding or deleting parties,

(ii) consolidating actions,

(iii) with written reasons, staying or dismissing the action,

(iv) amending or striking out a claim or defence under subrule 12.02 (1),

(vi) directing production of documents,

(vii) changing the place of trial under rule 6.01,

(viii) directing an additional settlement conference under subrule 13.02 (3), and

(ix) ordering costs; and

**(b)** at an additional settlement conference, order judgment under subrule 13.02 (6).

### R 15 Motions

***Notice of Motion and Supporting Affidavit***

**15.01 (1)** A motion shall be made by a notice of motion and supporting affidavit (Form 15A).

**(2)** The moving party shall obtain a hearing date from the clerk before serving the notice of motion and supporting affidavit under subrule (3).

### R 12 Striking Out

***Motion to Strike out or Amend a Document***

**12.02 (1)** The court may, on motion, strike out or amend all or part of any document that,

(a) discloses no reasonable cause of action or defence;

(b) may delay or make it difficult to have a fair trial; or

(c) is inflammatory, a waste of time, a nuisance or an abuse of the court’s process.

### R 11.2 Request for Clerk’s Order

***Consent Order***

**11.2.01 (1)** The clerk shall, on the filing of a request for clerk’s order on consent (Form 11.2A), make an order granting the relief sought, including costs, if the following conditions are satisfied:

**1.** The relief sought is,

1. amending a claim or defence less than 30 days before the originally scheduled trial date,
2. adding, deleting or substituting a party less than 30 days before the originally scheduled trial date,
3. setting aside the noting in default or default judgment against a party and any specified step to enforce the judgment that has not yet been completed,
4. restoring a matter that was dismissed under rule 11.1 to the list,
5. noting that payment has been made in full satisfaction of a judgment or terms of settlement, OR
6. dismissing an action.

### R 18 Evidence at Trial

**18.01** **Affidavit:** At the trial of an undefended action, the plaintiff’s case may be proved by affidavit, unless the trial judge orders otherwise.

**18.02 (1)** ***Written Statements, Documents and Records:*** A document or written statement or an audio or visual record that has been served, at least 30 days before the trial date, on all parties who were served with the notice of trial, shall be received in evidence, unless the trial judge orders otherwise.

### R 19 Costs

**19.01 (1)** ***Disbursements*:** A successful party is entitled to have the party’s reasonable disbursements, including any costs of effecting service or preparing a plaintiff’s or defendant’s claim or a defence and expenses for travel, accommodation, photocopying and experts’ reports, paid by the unsuccessful party, unless the court orders otherwise.

**19.04** ***Representation Fee*:** If a successful party is represented by a lawyer, student-at-law or paralegal, the court may award the party a reasonable representation fee at trial or at an assessment hearing.

**CJA 29 *Limits on Costs***: An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15% of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to **penalize a party** or a party’s representative for unreasonable behaviour in the proceeding.

### R 14 Offers

**14.01** A party may serve on any other party an offer to settle a claim on the terms specified in the offer.

***Costs Consequences of Failure to Accept***

Conditions must be satisfied:

* Judgement as favourable or more favourable than the terms of the offer;
* Offer was made at least 7 days before trial; and,
* Offer was not withdrawn and did not expire before trial.

### Appeals

**CJA 31** An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,

(a) for the payment of money in excess of the prescribed amount ($2500), excluding costs; OR

(b) for the recovery of possession of personal property exceeding the prescribed amount ($2500) in value.