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**Civil Procedure Summary**

# Limitation Period – *Limitations Act*

* Unlike the other rules, this is a hard and fast rule (not flexible)
* S 4 **2 years** is the general limitation period from discovery (s 4)
	+ S 5(1) Claim **discovered** when person first knew (either (a) or (b) need to be satisfied):
		- (a)
			* (i) Injury/damage/loss
			* (ii) That injury/loss/damage was caused by or contributed to by an act or omission
			* (iii) Act/omission of person against whom claim is made, AND
			* (iv) Having regard to the nature of the injury, a proceeding would be the appropriate
		- (b) when 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 (a)
			* Mixed objective-subjective test
	+ (2) presumed to have known matters in (a) unless contrary is proved
		- Burden of proof on P
	+ (3) injury with respect to failure to perform obligation (e.g. contract) occurs once a demand for the performance is made
	+ S 18 claims for contribution/indemnity (date of claim is when alleged wrongdoer is accused)
* **Suspension of limitation period**
	+ S 6 Minor AND is not represented by a litigation guardian in relation to a claim
	+ S 7 incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, AND is not represented by a litigation guardian in relation to the claim
	+ S 11 attempted resolution (while they try to resolve it through a third party)
* 15(1) **15 years** is the **ultimate limitation period** (regardless of examination)
	+ (4) exceptions:
	+ minor w/o litigation guardian, incapable w/o litigation guardian, OR
	+ Person against whom claim is made:
		- wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, OR
		- Wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage
	+ (5) Burden of proving that subsection (4) applies is on the person with the claim
* S 16(1) **No limitation periods with respect to certain claims** (page 809)
	+ (a) Proceeding for a declaration if no consequential relief is sought
	+ (b) Proceeding to enforce an order of court
	+ (c) Proceeding to obtain support under the Family Law Act
	+ (f) Proceeding by a debtor in possession of collateral to redeem it
	+ (g) Proceeding by a creditor in possession of collateral to realize it
	+ (h) Proceeding based on sexual assault
	+ (h.1) Sexual misconduct with minor if certain requirements met
	+ (h.2) Assault of minor if requirements met
	+ s. 17 No limitation period for undiscovered environmental claims
* s 21(1) adding parties (can’t add party to existing proceeding if limitation period expired)
	+ (2) exception: to correct misnaming or misdescription of party
* S 22 **Altering Limitation Period**
	+ Default limitation period: May be suspended/extended by agreement
	+ Ultimate limitation period: May be suspended/extended by agreement but only if relevant claim has been discovered

# General Matters



* S 135 Public access to courts
	+ (2) sealing documents
	+ *Fraleigh v Great-West*: Confidentiality Order, publication ban regarding personal health records (mental health issues of a non-party)
	+ *Stubbs*: Publication ban regarding plaintiff’s identity refused in an action claiming damages for penile enhancement surgery
	+ S 137 entitled to see documents on payment of a fee
* S 97 declaratory orders may be given
* S 1.02: RCP apply to all civil proceedings in CoA and SCJ
	+ Small claims court has its own rules

**Rules of Civil Procedure General Matters**

* 1.04: ***These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits***
	+ *Wawanesa*: A court has jurisdiction to relieve against strict compliance where trial fairness so demands.
* (1.1) In applying these rules, the court shall make orders and give directions that are **proportionate** to the importance and complexity of the issues, and to the amount involved, in the proceeding.
* 1.05 When making an order under these rules the court may impose such terms and give such directions as are just
* 2.01 Effect of non-compliance:
	+ 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,
	+ (a) 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; or
	+ (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.
	+ Usually could be compensated w/ adjournment or costs w/o prejudice
* 2.02 attacking a proceeding: must do it ASAP if you are to
	+ A motion to attack a proceeding or a step, document or order in a proceeding for irregularity **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.
* 2.03 Court may dispense with compliance: The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.
* 3.02(1) court may **by order** extend/abridge any time
	+ Considerations: for extension; other party prejudiced? Shortening: urgency, necessity?
	+ For prejudice, note that it is prejudiced suffered that cannot be remedied by adjournment, imposition of a deadline on timetable, allowing other party a further opportunity to respond, costs
* 3.02(4) **time** for serving/filing/delivering document **may be extended or abridged** by filing a **consent**

**Time**

* 3.01 **Computation** (Rules for time):
	+ Period of seven days of less, holidays **not** counted (see holidays definition!)
		- Otherwise they are
	+ Where time for doing something expires on a holiday, **extended to next day that is not a holiday**
	+ Service of a document, *other than originating process*, made after **4pm** or **during holiday** shall be deemed to have been made on the next day that is not a holiday
	+ Reference to time in b/w events: first day not counted and last day counted
		- E.g. May 1-8 = 7 days
* **Breaches fatal or difficult to correct:**
	+ Failing to have a notice of action or statement of claim issued or a party or new claim added to an existing proceeding within a **limitation period** (fatal – limitations act, not liberally construed)
	+ Failing to amend a pleading before the commencement of trial
	+ Failing to **list for trial** within 5 years of issuing the claim
	+ Failure to deliver a **notice of appeal** within 30 days
	+ Failing to act promptly to remedy a discovered omission

**Communication with Opposing Party**

* RPC 7.2-6 if person represented by legal practitioner, lawyer shall not communicate with person directly
* 7.2-8 corporation rep by legal practitioner, lawyer shall not communicate with director/officer
* Inadvertent communication: 7.2-10: promptly notify sender
* 5.3-1: third parties: can communicate with potential witnesses
* 5.4-2 **communication w/ witnesses** (in court but also in examination for discovery): in b/w direct and cross examination, no communication w/ witness about evidence/proceeding
	+ This can extend to overnight if the examination occurs over a couple days
	+ Lawyer may discuss evidence w/ witness who is adverse in interest
* Communication w/ other lawyers 7.2-1 to -5
	+ Civil, courteous, etc.

# Rules of Professional Conduct (RPC)

* RPC 1.1-1 Client: a person who (broad definition!)
	+ a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
	+ b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf
	+ “…and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work”
* 3.6-1 shall not charge fee unless it is fair and reasonable
* 3.6-2 Contingency fees allowed if not in family/criminal matters, must be in a written agreement, etc.
	+ Appropriate percentage factors: Likelihood of Success, Nature and Complexity of Claim, Expense and Risk of Pursuing It, Amount of the Expected Recovery and Who Receives It
* 3.4-5 joint retainer:
	+ Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that
	+ (a) the lawyer has been asked to act for both or all of them;
	+ (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
	+ (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.
* 3.4-1 conflicts of interest: a lawyer shall not act or continue to act for a client where there is a conflict of interest (except with their informed consent (2))
	+ Bright line rule: immediate legal interests are directly adverse in matters
	+ Can’t be raised by party who seeks to abuse it
	+ Doesn’t apply where it is unreasonable for a client to expect that a lawyer firm won’t act against it in an unrelated matter (professional litigant exemption)
* 3.4-10 Former clients: Unless the former client consents, a lawyer shall not act against a former client in (a) the same matter, (b) any related matter, or (c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.
	+ When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer’s firm may act in the new matter against the former client provided that:
		- (a) the former client consents…;
		- (b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of isclosures of the former client’s confidential information to the other lawyer having carriage of the new matter
* 3.7-1 duty of commitment to client’s cause – shall not withdraw from representation except for good cause and on reasonable notice to a client
* 3.2-2 duty of candour
* 3.3-1 duty of confidentiality
	+ *Kovjevic* and RCP: require that the “risk” that confidential information may be disclosed must be “substantial” and “serious” and more  than “a mere possibility that the impairment will occur
* 3.6-6-6.0, 3.6-6.1 Referrals

# 15- Representation by lawyer

* Getting on the Record
	+ Commence an Originating Process (Statement of Claim or Application)
	+ File a Statement of Defence or Responding Application Record
	+ File a Notice of Intent to Defend (RCP 18.02)
	+ Easy to Get On Record Than Off
* 15.01 where **lawyer required**:
	+ (1) Party under disability
	+ (2) Corporation *except with leave of court*
	+ (3) Any other party may act in person or be presented by a lawyer
* 15.03 change in lawyer
* 15.04 motion for **removal** as lawyer of record
	+ Special rules; see
	+ *Todd*: concluded that not feasible for client to properly advocate for issues on his own, that he could not retain alternative representation at this late date and at the mid-trial juncture
		- retention of present counsel outweighs the interest of Robins
* 15.05 duty of lawyer of record
	+ Shall act as lawyer of record until client delivers notice under rule 15.03 or removal as lawyer of record under rule 15.04

# 7- Parties Under Disability & Capacity

* Presumption of Capacity
	+ *Substitute Decisions Act*: s 2(1) **Presumption of Capacity** – A person who is **eighteen years** of age or more is presumed to be capable of entering into a contract
		- (2) A person who is **sixteen years** of age or more is presumed to be capable of giving or refusing consent *in connection with his or her own personal care*
		- (3) A person is **entitled to rely upon the presumption of capacity** with respect to another person **unless** he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be
	+ *Limitations Act*: 7(2) person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved
* RPC 3.2-9: clients w/ diminished capacity: When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship
	+ Commentary [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions
	+ Commentary [3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned
* Limits on the right to be self represented or make one’s own decisions
	+ Courts inherent right to appoint Amicus Curiae- (see *Gligorevic)*
	+ In litigation concerning their capacity, appointment of legal counsel under section 3 of the *Substitute Decisions Act*
		- **3** (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
		- (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
		- (b) the person shall be deemed to have capacity to retain and instruct counsel.
	+ Appointment of Litigation Guardian under Rule 7 of RCP
		- RCP 1.03 “disability” means that the person is,
			* (a) a minor,
			* (b) mentally incapable **within the meaning** of section **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 (two tests – s 6 and s 45)
				+ S 6: incapable of managing property: A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision
				+ S 45 incapacity for personal care: A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision
			* (c) an absentee within the meaning of the *Absentees Act*
				+ S 1 “absentee” 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
				+ S 2(1) declaration by the court: The Superior Court of Justice may by order declare a person to be an absentee if it is shown that due and satisfactory inquiry has been made, or may direct such further inquiry to be made and proceedings to be taken as the court considers expedient before making any order
		- **Rule 7 Parties under disability**
			* 7.01(1) parties under disability represented by litigation guardian: 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
				+ (2) Despite subrule (1), an application under the Substitute Decisions Act, 1992 to appoint a guardian of property or a guardian of the person may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise
			* **LG for P** – 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
				+ (1.1) mentally incapable person or absentee – Unless the court orders otherwise, where a plaintiff or applicant,

(a) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;

(b) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) is an absentee and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian

* + - * + (2) **affidavit to be filed** – see these reqs (page 940)
			* **LG for D** – 7.03(1) **appointment of court necessary** for **defendant** or respondent who is under disability *except* for (2), (2.1), (3)
				+ (2) **minor interest in estate/trust** – Where a proceeding is against a minor in respect of the minor’s interest in an estate or trust, the Children’s Lawyer shall act as the litigation guardian of the minor defendant or respondent, unless the court orders otherwise
				+ (2.1) **mentally incapable person or absentee** – Unless the court orders otherwise, where a proceedings is against,

(a) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;

(b) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) is an absentee and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian

* + - * + (2.2) affidavit
				+ (5) motion by P to appoint litigation guardian for D
				+ (10) **evidence on motion** – of disability (to appoint LG) (page 942)
			* **Representation of party under disability**
				+ 7.04(1) Unless some other person willing/able to act as LG, court shall appoint

(a) children’s lawyer for minor

(b) Public Guardian and Trustee for mentally incapable

* + - * **Powers and duties of LG**
				+ 7.05(1) can do anything that the disabled party is otherwise required/authorized to do
				+ (2) LG shall gently **attend to the interests of the person under disability and take all steps necessary for the protection of those interests**, including the commencement and conduct of a counterclaim, crossclaim or third party claim

7.06(2) where not acting in best interests, court may substitute LG with CL or PGT

* + - * + (3) A litigation guardian other than CL and PGT shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding
			* **Removal of LG**
				+ 7.06(1) (a) minor turns 18, file affidavit
				+ (b) party under any other disability ceases to be under disability may move for an order to continue proceeding w/o LG
				+ Order served on parties & LG
			* **Noting in Default Party Under Disability**
				+ 7.07 **w/ leave of court**
				+ (2) notices to be served (page 945)
			* **Discontinuance**
				+ 7.07.1 **w/ leave of court**
			* **Approval of settlement**
				+ 7.08(1) **w/ judge’s approval**
				+ (2.1) This rule does not apply to a settlement or judgment respecting the appointment under the *Substitute Decisions Act*, 1992 of a guardian of property or guardian of the person
				+ (4) materials required (946)
			* ***Business Names Act***
				+ S 2 must **register** name *otherwise*: s 7 not capable of bringing a proceeding except w/ leave
				+ S 7(2) shall grant leave if:

(a) the failure to register was inadvertent;

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

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

# 8- Partnerships and Sole Proprietorships

* 8.01(1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership
	+ (3) defence together unless you don’t admit to being a partner at the time
* 8.03(1) **serve** **notice to partner if you want to go after their personal assets**
	+ (2) deemed to have been a partner unless person defends separately denying to have been a partner
* 8.05(1) partnership must **disclose its partners** upon service of notice (after commencement of proceeding)
* 8.06 order enforced against property of partnership and if 8.03 complied w/ any partner’s personal assets
* 8.07(1)(2) Sole proprietor – 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

# 9- Estates/Trusts

* 9.01(1) 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
* (2) Subrule (1) does not apply to a proceeding, (wills require beneficiaries to be joined as parties)
	+ (a) to establish or contest the validity of a **will**;
	+ (b) for the interpretation of a will;
	+ (c) to remove or replace an executor, administrator or trustee;
	+ (d) against an executor, administrator or trustee for fraud or misconduct; or
	+ (e) for the administration of an estate or the execution of a trust by the court
* 9.02 Proceeding against estate w/ no executor/administrator; motion to appoint litigation administration to represent estate
* 9.03(1) proceeding commenced before probe/administration and person subsequently receives grant of probe/administration, proceed shall be deemed to have been properly constituted from commencement
* (2) commence against estate by **naming**: “the estate of A.B., deceased” (or similar)
	+ Where wrong person is named as personal representative, not a nullity
* (5) **proceeding against deceased person or estate not properly constituted, not a nullity**
* (6) stay of proceedings until properly constituted
* (7) terms imposed, incl. executor not liable for property distributed in good faith

# 10- Representation order

* Rule for binding persons who are unborn, unascertained or who may have an interest and cannot be readily found or served
* 10.01(1) In a proceeding concerning,
	+ (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
	+ (b) the determination of a question arising in the administration of an estate or trust;
	+ (c) the approval of a sale, purchase, settlement or other transaction;
	+ (d) the approval of an arrangement under the *Variation of Trusts Act*;
	+ (e) the administration of the estate of a deceased person; or
	+ (f) any other matter where it appears necessary or desirable to make an order under this subrule,
* a **judge may by order appoint one or more persons to represent** any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served
	+ (2) binds represented people
* (3) **settlement can be approved** by judge for persons who are not parties
	+ if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons
* 10.03 **Relief from order:** Not bound if judge satisfied:
	+ - (a) the order or approval was obtained by fraud or non-disclosure of material facts;
		- (b) the interests of the person or estate were different from those represented at the hearing; or
		- (c) for some other sufficient reason the order or approval should be set aside

# 11- transmission of interest

* 11.01 Where interest/liability of person transferred to another person (e.g. assignment, bankruptcy, death), **proceedings stayed** against transferor unless order obtained by judge
* 11.02(1) **order to continue** against transferee and (2) shall be served
	+ 11.03 failure to get order within reasonable time = action dismissed for delay

# 13- intervention

* 13.01(1) 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
* (2) shall consider whether it will unduly delay or prejudice the determination of rights of parties
* 13.02 any person may with leave of a judge intervene ad a friend of the court for the purpose of rendering assistance to the court by way of argument

# Vexatious Proceedings & Litigants (vexatious, frivolous, or abuse of process)

* **Disposition prior to trial** available for D
	+ RCP 21.01(3) – 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
		- and the judge may make an order or grant judgment accordingly
* s 140(1) CJA: **Vexatious litigant** (requires leave of court to commence an action)
	+ 140(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
	+ (4)(a) leave shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding
		- (b) court may rescind order under (1)
		- (e) no appeal lies from refusal to grant relief
* Rule 2.1.01 (1) ***The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court***
	+ (2) summary procedure available – see page 892!!
		- Summary procedure is available, with written materials due 15 days after receiving notice
			* Responding materials due within 10 days of receipt, no more than 10 pages in length.
			* Modified notice provisions
* S 138 CJA multiplicity of proceeds – attempts to avoid that
* S 139(2) CJA where person brings **two proceedings in respect of the same damage**, **not entitled to costs** unless court is of the opinion that there were reasonable grounds for bringing more than one proceeding
* **What is frivolous or vexatious?**
	+ Lacking a legal basis or legal merit; not serious; not reasonably purposeful
	+ they were instituted without any reasonable ground; an abuse of the process of the Court
	+ Form/Content definitely can give you insight into what is frivolous/vexatious

# Demands Before an Action

* **Formal demands**
	+ **Requirement to sue**
		- E.g. certain causes of action do not exist before a demand is made
			* E.g. promissory note or other debt payable on demand
	+ **Constitutional Questions**
		- S 109(1) *CJA*: **Notice** of a constitutional question shall be served on the Attorney General of Canada IF: (whether in court or before boards/tribunals)
			* The **constitutional validity** or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question
			* A **remedy** is claimed under subsection 24 (1) of the Canadian *Charter* of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario
		- (2.2) **time**– as soon as circumstances requiring it become known, or in any event at least 15 days before the day the question is argued
		- (2) Failure = no adjudication
			* If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted
	+ **Actions against Municipalities**
		- S 44(10) *Municipal Act*: **notice** provided within **10 days** of occurrence of injury
			* (11) exception: death
			* (12) **exception** – Failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence
			* 10 days from discovery
	+ **Actions against Crown**
		- *Public Transportation and Highway Improvement Act*- ss. 33(2) and 94) – when intention to claim injuries / damages arising from alleged failure of Ministry of Transportation to keep a King’s highway in repair – **10 days**
		- Same exception
	+ **Libel**
		- S 5(1) *Libel and Slander Act*: **notice** **6 weeks** of discovery of libel
		- Same exception
* **Informal Demands**
	+ Not required to sue
	+ Written request for payment or performance prior to commencement of action

# Place of Commencement, Forum and Jurisdiction

* **Transfer**: S 110 CJA: Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, **it may be transferred** or adjourned to the proper court, judge or officer.
	+ If under simplified procedure, make sure to transfer it into that court otherwise cost consequences are significant
		- RCP 76.13 cost consequences
* RCP 13.1 **Place of commencement and hearing of trial**
	+ 13.1.01(2) May be commenced in any county unless (1) statute/rule requires it to be heard in a specific county
		- (3) mortgage claims in designated county
	+ 13.1.02(1) **Motion to transfer to another county where it *should* have been commenced**
		- (2) motion to transfer to another county (just ordinary transfer, not wrongly commenced), the court shall consider the **factors** (see page 977)
	+ 46 trial to be heard where commenced or transferred unless ordered otherwise

# Naming Defendants – proper identification of Defendants

* Important: judgment in the name of the wrong person can be unenforceable
* Methods of identifying individual Ds
	+ searches – driving record (if have driver’s licence number) – need to obtain authorization from Ministry of Transportation which restricts uses of search information but includes litigation and debt collection
	+ licence plate search (but need plate number)
	+ vehicle VIN number search
	+ google – general search, Canada 411, reverse searches
	+ private investigators
* Businesses
	+ Corporations – must sue in name of corporation
	+ Registered Business Names
	+ Partnerships – can sue in name of partnership or individual partners – Rules of Civil Procedure – Rule 8.01
	+ Sole Proprietorships – sue in name of owner
	+ searches – business name search – Ministry of Government and Consumer Services - corporate profile searches – Ministry of Government and Consumer Services
* Estates/trusts (rule 9)
	+ Note: (5) proceeding not a nullity if wrong named used (for estate)

# Assets of D

* **Assets**
	+ consider title search to see if any real property owned and whether there is any equity in it
* **Bankruptcy**
	+ search through Office of the Superintendent of Bankruptcy
	+ if Defendant is already bankrupt, any court proceeding will be automatically stayed
	+ consider instead filing a claim with the Trustee in Bankruptcy
	+ Secured creditors have priority over unsecured judgment creditors
* **Writ of Seizure and Sale / Execution Searches**
	+ search in Sheriff’s office
	+ must search each individual county – consider where Defendant is likely to have assets, lives, carries on business
	+ are any other writs already filed against defendant
	+ can still share pro-rata with other creditors unless priority, example – taxes, family support

# Insurance considerations

* always consider whether the Defendant may have insurance that would respond to the claim
	+ automobile insurance
	+ property insurance – covers liability for slips and falls, negligence, etc.
	+ commercial general liability policies
	+ errors and omissions insurance in the case of professional negligence
* consider pleadings carefully – emphasize negligence, downplay any intentional act (b/c insurance policies don’t usually cover intentional acts – only negligence)
* if aware of insurer – put them on notice immediately

# 14- Originating Process

* 14.01(1) proceeding commenced by **issuing originating process**
* (2) exceptions- counterclaim that is only against parties who are already parties to the main action and crossclaim – no need to be issued
* 14.02 Proceedings by action as general rule
* **Actions** – 14.03(1) actions by **statement of claim** or (2) **notice of action** (where there is insufficient time – grants you **30** more days to file statement of claim)
	+ (4) Notice of action and statement of claim served together
	+ 27.03 counterclaim against a person not already a party
	+ 29.03 third party claim
* **Applications** – 14.05(1) applications by **notice of application**
	+ (3) **instances** when you can bring proceeding by application (page 987)
* 14.06 title of proceedings
* 14.08 action **served within 6 months**
* 14.09 may strike out/amend originating process
* See rule 18 for statement of defence timelines

# 38- Applications – jurisdiction and procedure

* 38.01(3) s 140 CJA applies (vexatious litigants)
* 38.03 place and date of hearing
* 38.03 Lengthy hearing (>2 hours), urgent application
* 38.04 **Content of notice of application**
* 38.06 **service** – min 10 days before hearing but if outside Ontario 20 days
* 38.07 **Respondent** – notice of appearance
* 38.09 **material** for use on application
* 38.09.1(1)(a) party shall confer with other party
	+ (b) Not later than 2pm **three days** before hearing date, give registrar notice of application, and
	+ (c) send confirmation to other party
* Evidence on applications rule 39!!

# 39- evidence on motions and applications

* Evidence by **affidavit**
	+ 39.01(1) **Evidence** on motions and applications given by **affidavit**
	+ (2) **served** with notice of motion/application and heard at least seven days before the hearing
	+ (3) affidavits in opposition served and filed at least 4 days before hearing
	+ (4) motion – may contain statements of deponent’s info/belief, so long as the source of info and fact of belief are specified
	+ (5) application – may contain statements of deponent’s info/belief if they are not contentious, so long as the source of info and fact of belief are specified
	+ (6) motions/apps **w/o notice** – **full and fair disclosure** (otherwise order set aside)
		- “all material facts are all those that might reasonably affect the outcome (*Fox*)
		- 37.07(2) and (3) – circumstances where notice not required
* Evidence by **cross-examination of affidavit**
	+ 39.02(1) opposing party may cross-examine deponent of affidavit
	+ (3) right to cross-examine should be exercised with reasonable diligence
	+ (4) cost consequences
* Evidence by **examination of witness**
	+ 39.03(1) Person (not necessarily a party) may be examined before hearing (to have transcript for use at the hearing)
	+ (2) may be cross and re-examined
	+ (3) right to examine shall eb exercised with reasonable diligence
	+ (5) summons to witness available (compel them to come)
* Evidence by examination for discovery
	+ 39.04 may use evidence in advertise party’s examination for discovery (not own)

# 4- court documents

* Format of affidavits important
* **See the section for details (brief outline below)**
* **Issuing and filing of documents**
	+ Issuing documents
	+ Deemed issuing
	+ Notice – document issued
	+ Place of filing
	+ Filing by leaving in court office or by mail
	+ Electronic filing
	+ Confirmation of filing
	+ Date of filing where filed by mail
	+ Where document filed by mail not received
	+ Date of electronic issuance, filing
	+ Issuance, filing outside of business hours
	+ Requirement to keep original
* **Civil claims online portal**
	+ Documents that may be filed through portal
	+ Agreement
	+ Inconsistencies
	+ Documents that may be issued through portal
* **Affidavits**
	+ Format
	+ Contents
	+ Exhibits
	+ For a corporation
	+ By an illiterate or blind person
	+ By a person who does not understand that language
	+ Alterations
* **Binding of documents**
	+ Records
	+ Transcripts
	+ Transcripts on appeal
	+ Factums and case books
	+ Electronically filed documents
* **Requisition**
* **Transcripts**
	+ Paper size
	+ Heading
	+ Standards
* **Transmission of documents**
* **Notice of constitutional question**

# 5- Joinder

* In line w/ objective of avoiding multiplicity of proceedings (s 138 CJA)
* **Joinder of claims**
	+ 5.01(1) P may join any claims the P has against an opposite party
		- (3) Not necessary to have an interest in all the relief claimed
* **Joinder of parties**
	+ 5.02(1) 2+ **Ps** with same lawyer of record **may** join in same proceeding where
		- (a) claim out of same transaction
		- (b) common question of law/fact
		- (c) appears that joining them may promote the convenient administration of justice
	+ 5.02(2) 2+ Ds may join where
		- (a) claim arising out of the same transaction
		- (b) common question of law/fact
		- (c) doubt as to person from whom P is entitled to relief
		- (d) damage caused to P by more than one person
		- (e) appears that joining them may promote the convenient administration of justice
* **Joinder of Necessary Parties**
	+ 5.03(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
		- (4) court power to add parties
	+ (2), (3) – specific rules, see (page 919)
	+ (5) if required to join as P and do not consent, joined as D
	+ (6) relief against joinder – court discretion
* **Misjoinder, non-joinder and incorrectly named parties**
	+ 5.04(1) no proceeding shall by defeated by this reason ^
	+ (2) court **may** add/delete parties and **correct parties incorrectly** named *unless* prejudice would result that could not be compensated for by costs or an adjournment

# 6- consolidation or hearing together

* In line w/ objective of avoiding multiplicity of proceedings (s 138 CJA)
* 6.01 where 2+ proceeding pending **in *the* court** (note: see s 107 CJA for transfer to different courts), and it appears to the court that
	+ Common questions of law / fact
	+ Relief claimed arises out of same transaction / occurrence or series of transactions or occurrences
	+ For any other reason acceptable by court
* **Court may order that:**
	+ Consolidation (revised title of proceedings, one court file, one set of pleadings)
	+ Hearing at the same time
	+ Hearing one immediately after the other
	+ Stay of one proceeding until other is determined
	+ Amend to counterclaim
* 6.02 at trial, Trial judge has ultimate power to decide how matters will proceed if previously ordered to be tried together or one immediately after the other
* RELEVANT FACTORS:
	+ Convenience and expense
	+ Whether jury notices in all actions – if not, unlikely to consolidate
	+ Status of the actions
	+ Legal representation – if not identical, unlikely to consolidate
* **Transfer Between Courts – s 107 CJA**
	+ If multiple proceedings in different courts with:
		- Common questions of law / fact
		- Relief claimed arises out of same transaction / occurrence or series of transactions or occurrences
		- For any other reason acceptable by court
	+ can seek order for consolidation, trial together, trial immediately after the other, stay, counterclaim
		- Motion to be brought in higher Court
	+ Cannot order transfer out of Small Claims Court without the consent of the Plaintiff – but see *Vigna v. Toronto Stock Exchange (Div. Ct)* (court’s inherent jurisdiction)
* Rule 6.1 **separate hearings** (**bifurcation**)
	+ w/ consent of parties, court may order separate hearing on 1+ issues
	+ inherent jurisdiction though – court may do it on its own initiative

# 16- Service

* 16.01(1) **Originating process** – served personally or alternative to personal service
	+ (2) For party not served w/ originating process but delivers defence, notice of intent to defend or notice of appearance, originating process deemed to have been served
	+ (3) no other document req to be served personally or by an alternative to personal service unless specified by rules
* (4) document **NOT required** to be served personally or alternative to personal service
	+ Shall be served on party who has a lawyer of record by serving the lawyer (see below for rules)
	+ May be served on a party acting in person or on a non-party by
		- Mailing copy to last address provided by party, or if not provided, last-known address
		- Personal service or alternative to personal service
		- If parties consent, email
* 16.02 where document required to be **served personally**, LIST OR RULES – pages 1017-18
	+ E.g. contempt order
* 16.03 where rules permit service by an **alternative to personal service**, LIST OF RULES – page 1020
* 16.04 **Substituted service or dispensing with service**
	+ If impractical to effect service, court may make an order for substituted service or where necessary in interests of justice, dispense w/ service
* 16.05 **service on lawyer of record** (SEE page 1023)
* 16.06 service by mail – only effective 5th day after it is mailed (except 16.03(4))
	+ Recall rules about days (don’t calculate holidays b/c under 7 days)
* 16.06 where document doesn’t reach person served (even if compliant w/ rules), may set aside consequences of default and/or request for adjournment
* 16.08 **validating service** – court may order validating service that has not been served in accordance w/ rules (usually for person trying to evade service)
* 16.09 **proof of service** (affidavit)

# 17- service outside Ontario

* 17.02 Person **may** be served outside Ontario **w/o leave** in certain circumstances (SEE RULES – page 1027-28)
	+ Note: may still dispute jurisdiction (see below) if it falls under these, but it would be very difficult
* 17.03(1) service outside Ontario **with leave**
	+ (2) evidence by affidavit
* 17.04 **additional requirements** for service outside Ontario
	+ (1) **w/o leave** originating process shall disclose the facts and specifically refer to rule 17.02 in support of such service
	+ (2) **w/ leave** originating process shall be served together w/ order granting leave
* 17.05 Manner of service outside Ontario (complex)
* 17.06 **Motion to set aside service** outside Ontario
	+ (1) party may move after being served but **before delivering defence** for order setting aside service or order staying proceedings
	+ (2) court may make such order when satisfied that:
		- (a) Service outside Ontario is **not authorized by these rules**
		- (b) An order granting leave to serve Ontario should be set side
		- (c) Ontario is **not a convenient forum for the hearing of the proceeding**
			* ***Forum non conveniens*** – common law concept
			* This is **different from jurisdiction** (may have jurisdiction but may not be the a convenient forum to hear the dispute)
				+ *Sullivan v Four Seasons*

While Ontario court had jurisdiction in claim for wrongful dismissal of New York employee of Ontario based multinational, New York was the more appropriate forum

* + - * Consideration is the amount of witnesses here/elsewhere (e.g. *Sullivan v Four Seasons*; *Legge v Young*)
			* SEE THIS DISCUSSION BELOW!!!!!!

# Jurisdiction and *Forum Non Conveniens*

* Two separate doctrines
* **Jurisdiction**
	+ **Does the court have jurisdiction to try the matter?**
	+ Not the same as choice of law (Ontario courts may adjudicate dispute based on foreign laws)
	+ Club Resorts
		- Should plead this in the statement of claim
		- **“real and substantial connection” test**
		- **Presumptive connecting factors:** (party arguing that court should assume jurisdiction has the burden of establishing presumptive factor. If you establish this then the presumption is that the court has jurisdiction – unless proven otherwise other party. Affidavit evidence required to rebut presumption)
			* (a) the defendant is domiciled or resident in the province;
			* (b) the defendant carries on business in the province;
				+ Carrying on business = question of fact
				+ *Club Resorts*: “business activities in Ontario were specifically directed at attracting residents of the province” to their resorts. Advertising however “does not, on its own, establish a connection” sufficient for the assumption of jurisdiction. Have the commercial activities gone “well beyond” promotion and advertising? Are Ontario bookings targeted or reasonably foreseeable?

Held: real and substantial connection in *Club Resorts*

* + - * + Difficult in product liability cases too – e.g. subsidiary sells but parent company controls research and product development. Must connect to parent company fi you want to sue them. E.g. that they had a defect in manufacturing it
			* (c) the tort was committed in the province; and
			* (d) a contract connected with the dispute was made in the province.
		- presence of the plaintiff in the jurisdiction is **not**, *on its own*, a sufficient connecting factor
		- Where damages are sustained is not listed as a presumptive connecting factor.
	+ Med mal: *Brock v Hsu*: research treatment protocol developed in US and administered at CDN hospitals. Allegation of failure to warn about neurotoxicity. Evidence that it was reasonably foreseeable that consent forms would be used ij Ontario. Held has jurisdiction
	+ Tobacco Litigation: *Rothmans*: *A “good arguable case” has been compared to a “serious issue to be tried” or a “genuine issue” or “with some chance of success”. The threshold test is low*
	+ Related Issues: multiplicity of proceedings
	+ **Attornment**
		- Common law concept that by participating in a court proceeding (*beyond* challenging jurisdiction and *forum non conveniens*) you are agreeing (attorning) to the jurisdiction (*Wolfe*)
			* *Gelber*: by seeking summary judgment beyond jurisdiction “he implicitly accepted that the New York court had jurisdiction to decide those issues. That is attornment”
			* *Wolfe*: patent litigation w/ prof; Pennsylvania court found in favour of company; held that company attorned to Ontario jurisdiction by participating it in beyond challenging jurisdiction
		- Cofiied in RCP 17.06: party can only challenge jurisdiction before delivering a defence notice of intent to defend or notice of appearance
		- 17.06 (4) says challenging jurisdiction is “**not in itself** a submission to the jurisdiction of the court”
* RCP 21.01(3)(a) D may move before a judge to have an action stayed b/c the court has no jurisdiction over the subject matter of the action
* Even if jurisdiction is established, the action may be stayed based on *forum non conveniens* doctrine (*Club Resorts*)
* ***Forum non conveniens***
	+ Common law doctrine that was codified in RCP (17.06(2)(c))
	+ This is **different from jurisdiction** (may have jurisdiction but may not be the a convenient forum to hear the dispute)
		- *Sullivan v Four Seasons*
			* While Ontario court had jurisdiction in claim for wrongful dismissal of New York employee of Ontario based multinational, New York was the more appropriate forum
	+ *Club Resorts*: **Factors** include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties. Ultimately, the decision falls within the reasoned discretion of the trial court
	+ A consideration is the amount of witnesses here/elsewhere (e.g. *Sullivan v Four Seasons*; *Legge v Young*)
* **Choice of Forum Clauses**
	+ *Examined separately*; not only part of the forujm non conveniens analysis
	+ **Default is that they should be enforced** (*Expedition Helicopters*)
	+ **not** enough for the plaintiff to establish a "strong" case that Ontario is the more convenient forum. The plaintiff must show "strong cause" that the case is exceptional and the forum selection clause should not be enforced (*Expedition Helicopters*)
	+ The case law is quite clear; in commercial contexts, it will be enforced unless there are some exceptional circumstances which would displace the clause (*Expedition Helicopters*)
	+ ***Pompey Test***
		- Is the clause valid, clear and enforceable?
		- Onus shifts to party seeking to displace the clause. Must show “strong cause” factors including convenience of parties, fairness of parties and the interests of justice, favour unenforceability?
	+ Douez
		- In consumer context – “strong cause” factor met by P – contract of adhesion, public policy considerations (privacy) – therefore clause held unenforceable
	+ Legislature can make forum selection clauses unenforceable (*Consumer Protection Act*)

# Enforcing Foreign Judgments

* Rule 73 enforcing judgments from United Kingdom
* Rule 17.02(m) says service without court approval on a judgment of a court outside Ontario is fine
* ***Test* regarding whether to enforce foreign judgment:**
	+ (1) “Real and Substantial Connection” Between *Foreign Court* and The Parties? (*Chevron*)
	+ (2) Any defences? (*Chevron*)
		- Fraud: Are there new allegations undetectable by the foreign court?
		- Natural Justice: Were the foreign proceedings contrary to fundamental justice?
		- Public policy: Is foreign law contrary to Canadian view of basic morality?
* *Chevron*: generous and liberal approach to recognition and enforcement of foreign judgments
	+ Evidence of fraud/bribery in obtaining foreign judgment, not enforced (also not enforced against Canadian corporation which was a diff corporation from the one obtained judgment from)
* Letters rogatory means “letter of request” – a communication sent by a court in one country to a court in a foreign country requesting the assistance of the court.
	+ S 60 evidence act
	+ Requires a series of basic preconditions
		- Competent Court
		- Relating to a matter pending in a foreign court
		- Witness in Ontario
		- Evidence is relevant and not otherwise obtainable, not overly broad
		- No public policy concerns
	+ Applicant bears onus

# 18- time for delivery of statement of defence

* 18.01 time for delivery of statement of defence: (NOTE: has exceptions!! See page 1048)
	+ Within **20** days after service of statement of claim, where D is in Ontario
	+ Within **40** days after service of statement of claim, where D is elsewhere in Canada or US
	+ Within **60** days after service of statement of claim, where D is anywhere else
* 18.02 May service notice of intent to defend; (2) grants an extra **10 days** to deliver statement of defence
	+ (3) applies to D in counterclaim and third party claim

# 25- pleadings generally

* 25.01 What pleadings should consist of in each type of action (page 1158)
	+ E.g. for action commenced by statement of claim, pleadings are statement of claim, statement of defence and reply (if any)
* 25.01(5) Reply = cannot address new grounds; only those that were raised (*Green*)
* Service of pleadings (on all parties) (note that b/c no special rule here, personal/alternative service not required – see service rules)
* 25.02 **One allegation** per numbered paragraph
* 25.05 close of pleadings – P delivered reply or D in default of delivering defence noted in default
* 25.06 **Rules of pleadings**
	+ (1) **concise statement of material facts** on which the party relies for the claim/defence, but ***not* the evidence by which those facts are to be proved**
	+ (2) may raise any point of law, but conclusions of law can only be pleaded if the material facts supporting them are pleaded
	+ (3) allegations of performance of all **conditions precedent** to the claim **are implied** and need not be set out
		- Any opposite party who intends to contest the performance of a condition shall specify in the pleading the condition and its non-performance
	+ (4) may make inconsistent allegations where it is being pleaded **in the alternative**
	+ (5) new allegations **by amendment**
	+ (8) where **fraud**, **misrepresentation**, **breach of trust**, **malice** or **intent** is alleged, the pleadings shall contain **full particulars**
		- Otherwise serious cost consequences!
	+ (9) claim for relief must be specified (e.g. damages, declaration, equitable relief, interests, costs, etc.) and quantified for each claimant
* 25.07 **Rules of pleadings** for **DEFENDANTS**
	+ (1) admit every allegation of fact in opposite party’s pleadings that the party does not dispute
	+ (2) allegations of fact that are not denied shall be deemed to be admitted, unless they had no knowledge of such fact
	+ (3) denial of facts insufficient, must plead party’s own version of facts
	+ (4) shall plead any matter on which it intends to rely to defeat the claim, which, if not specifically pleaded, might take opposite party by surprise or raise an issue not raised in opposite party’s pleadings
		- For example:
		- expiry of limitation period
		- failure to mitigate damages
		- statutory defences
		- lack of condition precedent - notice / demand
		- want of jurisdiction
		- estoppel
		- contributory negligence
		- *res judicata* – that a matter has already been adjudged
	+ (5) denial of agreement = denial of making of agreement, not legality (unless specifically mentioned)
	+ (6) damages deemed to be an issue unless specifically admitted
	+ S 111 CJA: for debt owed by D, D may claim set-off for any debt the D alleges P owes
* 25.08 **where** **reply necessary**
	+ 25.08 different version of facts not already pleaded
	+ (2) any matter not already pleaded that it intends to rely on otherwise it would take opposite party by surprise
* 25.09 **rules of pleadings for REPLIES**
	+ Party who delivers reply (aka able to not deliver and deemed to deny) shall admit every allegation of fact in the opposite party’s defence that the party does not dispute
* 25.04(3) **time for REPLY** – **reply** delivered in **10 days**, unless D counterclaims in addition to statement of defence, in which case **20 days**
	+ All other times are prescribed by their rules (counterclaim 27; crossclaim 28; TPC 29)
* 25.10 **demand for particulars** – must supply within **7 days** otherwise court may order them supplied
	+ Why:
		- Where pleading lacks material facts as required by Rule 25.06
		- Where a party makes bald allegations without particulars
		- Where issues need to be defined
		- To prevent surprise
	+ Important to serve Demand before responding pleading is delivered
* 25.11 **strike out pleading**
	+ Court may strike out all or part of a pleading on ground that
		- It may prejudice or delay the fair trial of action
		- Is scandalous, frivolous, or vexatious
		- Is an abuse of process

# 27- counterclaims

* 27.01 D asset any claim against P including claim for contribution/indemnity
	+ (2) may join any other person necessary for the counterclaim against the P
* 27.02 statement of defence and counterclaim
* 27.03 time – same as statement of defence or subsequently w/ leave
* 27.04 for new party, served on new D not already a party within 30 days or subsequently w/ leave
* 27.05 time for Defence to counterclaim – 20 days
* 27.06 time for reply to defence – 10 days
* 27.07 amending defence to add counterclaim – see rule 26
* 27.08 shall be tried at the trial of main action
	+ Unless it would unduly complicate or delay the trial of the main action or cause prejudice to a party; then the court may order separate trials

# 28- crossclaims

* 28.01 (1) D crossclaim against co-defendant
	+ Who may be liable for all or part of P’s claim or liable to D in a separate action (but related transaction to main action)
	+ (2) contribution through Negligence Act = crossclaim
* See page 1198 for the rest

# 29- third party claims

* Claims by D against any person who is not a party to the action
	+ And liable to D for all/part of P’s claim
	+ Liable to D in independent action arising out of the same/related transaction as the P’s claim
* Page 1202
* **Fourth and subsequent party claims** – 29.11/29.12

# 26- amendment of pleadings

* 26.01 on motion at any stage of action, 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 adjournment
* 26.02 **When amendments can be made**
	+ (a) w/o leave before close of pleadings if amendment does not add/remove any parties
	+ (b) on consent
	+ (c) w/ leave
* 26.03 **how** amendments are made
	+ Underline, double underline, etc. “fresh as amended” after a while advisable
* 26.04 **service** of amended pleadings
	+ Shall be served forthwith
* 26.05 **responding** to amended pleading
	+ Within timeframe of original pleading *or* **10 days** after amended pleading, whichever is longer
* 26.06 amendment at trial on face of trial record

# Interest – CJA ss 127-130

* Pre judgment Interest
	+ S 128 CJA(1) entitled to pre-judgment interest from date cause of action arose to the date of the order
	+ (2) Rate payable on general non-pecuniary losses can be different
	+ (3) Prejudgment interest for past pecuniary loss (special damages) is calculated at the end of each six month period and at the date of the order
	+ (4) Not payable on exemplary or punitive damages, interest, costs, future losses
	+ Note: s 130(2) *Interest awards are ultimately in the discretion of the Judge*
		- **Relevant factors**:
		- Change in market rates
		- Circumstances of the case
		- Advance payments made
		- Circumstances of medical disclosure of the plaintiff
		- Amount claimed and recovered in the proceeding
		- Conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding
		- Any other relevant consideration
* Post judgment interest
	+ S 129 CJA
* Ultimately interest at the discretion of the court! S 130(1) and factors (2) – page 417

# 19- Default Proceedings

* 19.01(1) where **no defence** delivered, P may require registrar to **note D in default**
	+ (2) where defence struck out and didn’t deliver another, P may require registrar to note D in default
	+ (3) noting of default by co-defendant (where P fails to do so)
	+ (4) **under disability**, only note in default **w/ leave**
	+ (5) late delivery of statement of defence before being noted in default permitted
* 19.02 **consequences** of **noting in default**
	+ (1) defendant who has been noted in default, deemed to admit truth of all allegation made in statement of claim, and shall not deliver statement of defence or take any other step in action **except with leave of court**
		- (2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default
		- (3) Despite any other rule, a defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where a party requires the personal attendance of the defendant, and except as provided in,
* 19.03 **setting aside** **noting of default**
	+ (1) The noting of default may be set aside by the court on such terms as are just.
		- If not prejudice, court is likely to set aside noting in default
	+ (2) if D delivers statement of defence w/ consent of P, noting of default deemed to have been set aside
* 19.04 default judgment **by signing default judgment**
	+ (1) **D noted in default**, 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 statement of claim,
		- (b) the recovery of possession of land,
		- (c) the recovery of possession of personal property, OR
		- (d) foreclosure, sale or redemption of a mortgage
	+ (2) requisition for default judgment
		- List of requirements (page 1053)
			* Most important is stating that claim comes within class of cases for which default judgment may properly be signed
		- (3) registrar may decline to sign default judgment if uncertain
			* (3.1) if registrar declines, P may move before judge for judgment under 19.05
	+ (4) if claim partially satisfied, default judgment only for unsatisfied part
	+ (5) post judgment interest
	+ (6) costs
* 19.05 default judgment **by motion for judgment**
	+ (2) shall be supported by affidavit if claim is for unliquidated damages
	+ (3) judge may grant judgment, dismiss action, or proceed to trial
	+ (4) if proceeds to trial, motion for judgment may be made in trial
	+ 19.06 **facts must entitle P to judgment**
* 19.07 effect of default judgment – Doesn’t prevent P from proceeding against D for any other relief
* 19.08 **setting aside default judgment** – may be set aside on terms as are just

# Motions – rules 37/39 (and evidence on application (R39))

* Rule **37**: **procedural** steps
* Rule **39**: addresses **evidence** on motion
* R1.03, CJA s 1(1): “Motion” means a “motion in a proceeding or an intended proceeding”
	+ Attorney General guide says “A motion is a process that is used to make a request to a judge for an order.”
	+ interim (i.e. short of trial) step in a proceeding that requires a formal determination by a court
* **Rule 37 – procedural steps**
	+ 37.01 motion by notice of motion
	+ 37.02 **Jurisdiction – who hears motions**
		- (1) judge can hear any motion
		- (2) master any motion except some – see page 1321
		- (3) registrar limited powers, including power to issue an order on consent of the parties, assuming consent is filed and no one is under disability, and power to amend pleadings, add or delete parties – see page 1321
	+ **Typical steps to a motion**
		- Prepare and serve notice of motion detailing relief
		- Prepare and serve motion record containing evidence (sometimes 1 and 2 combined)
		- Cross-examination of affiants (if any)
		- Prepare and serve factums
		- Argue Motion (in writing or orally)
		- Get Order Issued
	+ 37.03 place of hearing – county where proceeding commenced/transfer
	+ 37.04 motion shall be made to court if within jurisdiction of registrar or master, otherwise to be made to the judge
	+ 37.05 hearing date – practice direction; (2) 2+ hours = need to be obtained from registrar except (3) for urgent motions
	+ 37.06 **Content of motion** – Notice of motion shall state:
		- Relief Sought,
		- Grounds to Be Argued, Including Any Statutory Provision or Rule Relied Upon, AND
		- List documentary evidence to be used at the hearing
	+ 37.07 **service of motion**
		- (1) served on any party affected by order sought, *unless*
			* (2) nature of motion render service of the notice of motion impracticable or unnecessary, may make order w/o notice OR
			* (3) delay necessary to effect service might entail *serious consequences*, court may make interim order w/o notice
		- (4) *order* w/o notice shall be served
		- (5) failure to serve relevant party can result in dismissal or adjournment of motion
		- (6) must be served and filed (37.08) at least **7 days** before date of motion (but practice directions may alter it, i.e. Toronto), unless service not required
	+ 37.09 **abandoned** **motions**
		- (1) may abandon by delivering notice of abandonment
		- (3) responding party **entitled to costs** of motion
	+ 37.10 **material for use on motions**
		- (1) Serve/file motion record **7 days** before hearing
		- (2) motion record – see page 1327 for contents
		- (3) responding party’s motion record – responding party who is of the opinion that it is incomplete may serve/file motion record at least **4 days** before hearing
		- (6) **factum** – serve factum consisting of a concise argument stating the facts and law relied on by the party (note: even though it says “may”, some practice directions require it)
			* Consolidated Practice Direction 3.A: “Factums are required for long civil motions and encouraged for all other motions unless otherwise directed by a judge”
			* Unlike some areas, no specific requirements for a motion on factum (other than 4.07(5), other than 20 page maximum (30 in Toronto)
		- (8) responding party’s factum
		- (10) refusals and undertaking chart
			* Compelling answers/undertakings given on examination
	+ 37.10.1 **confirmation of motion**
		- Shall confer w/o other party AND **shall not later than 2pm 3 days before hearing**, give registrar confirmation
		- (4) failure to confirm = motion **deemed** abandoned
	+ 37.11 **hearing in absence of public** where
		- Motion heard w/o oral argument
		- b/c of urgency
		- heard by telephone or video conference
		- motion in course of pre-trial conference
		- motion before single judge of appellate court
	+ 37.12.1 **hearing without oral argument**
		- (1) Where motion is on consent, unopposed, or without notice, motion may be heard in writing w/o attendance of parties
		- (4) opposed motions may be heard in writing where issues of fact/law are not complex
			* Special rules for this regarding timelines – see page 1330
	+ 37.13 **disposition of motion**
		- Presiding judge or officer may grant the relief sought or dismiss or adjourn the motion and may
			* (a) place action on speedy trial list
			* (b) make application go through quickly
		- (2) judge may convert motion into motion for judgment or order trial of an issue
	+ 37.14 **setting aside, varying or amending orders**
		- A party who:
			* Affected by order obtained on motion without notice
			* Fails to appear on a motion through accident, mistake or insufficient notice
			* Is affected by order of registrar
		- May move to set aside or vary the order
	+ 37.15 motions in complicated proceeding/series of proceedings
		- May designate one judge to hear all motions
	+ 37.16 may **prohibit motions w/o leave** when party **abuses process** (vexatious motions)
	+ 37.17 in **urgent** cases, motions may be made ***before*** commencement of a proceeding
* **Evidence on a motion (and applications) – rule 39**
	+ Critical difference between trials and motions; no live evidence; relaxed standard
	+ 39.01(1) generally **evidence by affidavit**
		- (4) relaxed evidentiary standard for evidence
			* Affidavits can rely on information and belief as long as the source and information and the fact of the belief are specified
		- (2) Served + filed 7 days before hearing
			* (3) affidavits in opposite 4 days before hearing
		- (6) motions/apps **w/o notice** – **full and fair disclosure** (otherwise order set aside)
			* “all material facts are all those that might reasonably affect the outcome (*Fox*)
			* 37.07(2) and (3) – circumstances where notice not required
		- (7) expert affidavits allowed, but must include same information as expert reports at trial
		- 4.06 form of affidavit
			* 4.06(3) exhibits to affidavit allowed
		- What evidence is necessary for a motion?
			* Any evidence required to demonstrate a fact required to justify or negate the relief sought on motion
			* Consider every element of legal test, look at prior cases
			* Consider appropriate source of information
				+ While can provide evidence on information and belief, much more probative if affiant has direct knowledge of facts
				+ Typical approach – pick affiant with best factual knowledge of issues
	+ Evidence by **cross-examination of affidavit**
		- 39.02(1) opposing party may cross-examine deponent of affidavit
			* *Mennes*: though court may limit right to cross-examine (inherent jurisdiction) when in the interests of justice to do so
		- (3) right to cross-examine should be exercised with **reasonable diligence**
		- (4) cost consequences
		- Scope of cross-examination of affidavit (*Rothmans*)
			* *Rothmans*: scope narrower than examination for discovery
			* There must be some “semblance of relevancy”
			* Questions must be relevant to (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent’s evidence.
			* examining party runs the risk associated with cross-examinations that the answer to a question may not help his or her case, and unlike evidence from an examination for discovery, party does not control what use can be made of transcript
		- when refusals by opposing counsel are inappropriate, bring another motion to compel answers and undertaking – special procedure under 37.10
	+ Evidence by **examination of witness**
		- 39.03(1) Person (not necessarily a party) may be examined before hearing (to have transcript for use at the hearing)
		- (2) may be cross and re-examined
		- (3) right to examine shall eb exercised with reasonable diligence
		- (5) summons to witness available (compel them to come)
	+ Evidence *on a motion* by examination for discovery (not common)
		- 39.04 may use evidence in adverse party’s examination for discovery (not own)

# Discovery and inspection of property – rules 29.1/30/31/34/35 & 32

* Generally, purpose: - fact finding, assessment of credibility, obtain admissions, narrow issues, avoid surprise, facilitate resolution
	+ Applies to actions and applications
* Lawyer’s duty RPC (Ethics!) 5-1.3-1
	+ lawyer must explain necessity of making full disclosure of all documents, duty to answer any proper question to best of knowledge (own personal observation), information (hearsay) and belief (inferred with same basis) BUT not required to guess
	+ parties required to make positive efforts to inform themselves
	+ lawyer must assist their clients in doing so
	+ lawyer must not make frivolous requests for documents or evidence
* **Discovery Plans – rule 29.1**
	+ Rule 29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan
		- Rule 30 (Discovery of Documents)
		- Rule 31 (Examination for Discovery)
		- Rule 32 (Inspection of Property)
		- Rule 33 (Medical Examination)
		- Rule 35 (examination for Discovery by Written Questions)
	+ (2) DP shall be agreed to before the earlier of (a) 60 days after the close of pleadings or such longer period as agreed to by the parties, and (b) attempting to obtain the evidence
	+ (3) contents – page 1214
	+ 29.1.04 duty to update plan
	+ 29.1.05 if parties fail to agree to plan, court may refuse tot grant relief or (2) court may impose discovery plan
	+ **29.2 proportionality in discovery**
		- 29.2.03 SEE CONSIDERATIONS PAGE 1216
		- (1) 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
			* (e) The information or the document is readily available to the party requesting it from another source
* **Discovery of documents – rule 30**
	+ “document” has a broad definition (“includes” so not exhaustive)
	+ 30.01(1) 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
	+ **Scope of discovery**
		- 30.02(1) Every document relevant to **any matter in issue** in an action that is or has been or has been in the possession, control or power of a party to the action shall be disclosed (as provided in rules 30.03 to 30.10), whether or not privilege is claimed in respect of the document
		- (2) If requested (as provided in rules 30.03 to 30.10) every document shall be produced for inspection, *unless privilege* is claimed in respect of the document
		- (3) can to produce any relevant insurance policies (but not admissible into evidence)
		- (4) The court may order a party to disclose and/or produce for inspection all relevant documents that are not privileged from the party’s subsidiary or affiliated corporation, or corporations controlled by the party
	+ **Affidavit of documents**
		- 30.03(1) A party to an action must serve on every other party an affidavit of documents (Form 30A or 30B) disclosing the full extent of the party’s knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control or power
		- (2) In separate schedules, must list and describe all documents
			* (a) Documents in the party’s possession, control or power that the party does not object to producing
			* (b) Documents that are or were in the party’s possession, control or power that the party claims privilege with the grounds for the privilege claim
			* (c) Documents that were formerly in the party’s possession, control or power, but are no longer, whether or not privilege is claimed, with a statement of when and how the party lost possession or control of or power over them and their present location
		- (3) Must include a statement that the party has never had in the party’s possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit
		- (4) Must include a lawyer’s certificate (when represented by a lawyer) that they have explained to the deponent the (a) necessity of full disclosure of all documents relevant to any matter in issue and (b) what kinds of documents are likely to be relevant to the allegations
		- (5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial
	+ **Inspection of documents**
		- 30.04(1) entitled to inspect documents that are not privileged and referred to in affidavit setting out schedules
		- (2) request to inspect may *also be used to obtain* inspection of documents in other party’s possession, control or power that were referred to in the originating process, pleadings or an affidavit served by the other party
		- (3) When served with a request to inspect, must **forthwith** inform the party making the request of a **date** within five days after service of request to inspect documents
		- (4) All documents listed in a party’s affidavit of documents that are not privileged and all documents previously produced for inspection **shall be taken to** and produced at the **examination for discovery** and the **trial**
		- (5) court may order production
		- (6) court may inspect to determine claim of privilege
		- (7) entitled to make a copy of it at party’s own expense
	+ 30.05 disclosure for inspection shall ***not*** be taken as admission of its relevance of admissibility
	+ 30.06 **where affidavit incomplete or privilege improperly claimed**
		- provides that a relevant document in a party’s possession, control or power may have been omitted from the affidavit of documents, or a claim of privilege may have been improperly made, the court may,
			* (a) order cross-examination on the affidavit of documents
			* (b) order service of a further and better affidavit of documents
			* (c) order the disclosure or production for inspection of the document, or a party of the document if it is not privileged; and
			* (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege
	+ 30.07 **documents or errors subsequently discovered**
		- If a party, after serving an affidavit of documents (a) comes into possession, control or power over a document that relates to a matter in issue that is not privileged or (b) discovers that the affidavit is inaccurate or incomplete, the party **must** **forthwith** serve a supplementary affidavit
	+ 30.08 **effect of failure to disclose**
		- Where a party fails to disclose or produce a document in the affidavit of documents:
			* 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
			* If the document is not favourable to the party’s case, the court may make such order as is just
	+ 30.09 **privileged document not to be used w/o leave**
		- Claim of privilege **must be abandoned** by giving written notice with a copy of the document or producing for inspection **at least 90 days before trial**
		- Otherwise can only be used to impeach the testimony of a witness or with leave of the trial judge
	+ 30.10 **production from non-parties w/ leave**
		- On a motion by a party, the court may 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 (a) the document is relevant to a material issue in the action, and (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document
		- Notice of motion – made on notice to every other party and served personally or alternative to personal service to the non-party
* **Deemed undertaking – rule 30.1**
	+ 30.1.01(3) All parties and their lawyers 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**
	+ (1) Rule only **applies** to evidence obtained by:
		- documentary discovery (Rule 30)
		- examination for discovery (Rule 31)
		- inspection of property (Rule 32)
		- medical examination (Rule 33)
		- examination for discovery by written question (Rule 35)
		- information obtained from this evidence
	+ **exceptions**:
		- 30.1.01(5) evidence filed or referred to during a hearing (or information obtained from such evidence)
		- (6) Can be used to impeach witness in another proceeding
		- (7) Evidence or information in accordance with subrule 31.11(8) (subsequent action)
		- (8) Interests of justice outweigh prejudice
* **Examination for discovery** – rule 31
	+ **How** – 31.02
		- 31.02(1) form **oral** or **written** (at the option of examining party), but not both w/o leave
			* (2) where more than one party entitled to examine – oral unless all agree otherwise
	+ **Who** – 31.03
		- 31.03(1) party to an action may examine any other person adverse in interest (as determined by pleadings) **once** (except w/ leave)
		- (2) **corporation** – officer, director, employee of choice unless ordered otherwise
			* more than one representative on consent or with leave
		- (3) **partnership** / sole proprietorship – partner or sole proprietor
			* Or employee(s) on consent or with leave
		- (4) **requirements for leave** for (2)/(3)
			* where satisfactory answers cannot be obtained from only one person without undue expense or inconvenience, AND
			* that it will expedite the action
		- (5) **party under disability** – litigation guardian or person under disability if competent to give evidence (at option of examining party)
			* if litigation guardian is the Children’s Lawyer or Public Guardian and Trustee – must have leave
		- (6) assignee – can examine the assignor and assignee
		- (7) trustee in bankruptcy – can examine bankrupt and trustee
		- (8) nominal party – can examine nominal party and beneficial party
		- (9) **Limiting multiple examinations**
			* Where party is entitled to examine for discovery (a) more than one person or (b) multiple parties who are in the same interest, but court is satisfied that multiple examinations would be oppressive, vexatious, or unnecessary, court may impose limits on examinations
		- **Crown** – *Proceedings Against the Crown Act –* as designated by the Deputy Attorney General, do not have to produce formal Affidavit of Documents (just a list) or answer questions that would be injurious to public interest
	+ **When** – 31.04-0.5
		- 31.04(1) examination of **P** - after Statement of Defence and Affidavit of Documents (unless agree otherwise)
		- (2) examination of **D** – after Statement of Defence and Affidavit of Documents (unless agree otherwise) OR after D noted in default
		- (3) party who first serves sworn Affidavit of Documents and Notice of Examination is entitled to examine first
		- 31.05 one examination for all parties – order as agreed upon or in order of title of proceedings
	+ **How Long** – 31.05.1
		- 31.05.1(1) total of 7 hours for each party unless otherwise agreed to or with leave (2 hours for Simplified Rules)
			* time does not include breaks – therefore could go on for two days
		- (2) considerations for leave
			* amount in issue, complexity, reasonable time, financial positions of parties, conduct of parties (failing to answer, answering improperly, evasive answers, unduly lengthy answers), refusal to answer, any other just reason
	+ **Scope of examination** – 31.06
		- 31.06(1) person examined shall answer, to the **best** of his/her *knowledge, information and belief,* any *proper* question relevant to *any* matter in issue in the action or to any matter made discoverable by (2)-(4) AND
			* NO question may be objected to on the ground that Info sought is evidence, question constitutes cross-examination (except for question solely directed at credibility of witness), question constitutes cross-examination on affidavit of documents of party being examined
				+ Aka can include evidence, cross-examination
		- (2) if asked, must advise of names and addresses of persons reasonably expected to have knowledge of transactions/occurrences at issue
		- (3) if asked, must disclose findings, opinion, conclusions of experts and expert’s name and address unless opinion sought only in contemplation of litigation *and* if party undertakes not to call witness at trial – whether written or oral opinion
		- (4) insurance policies – if asked, must disclose existence and contents of insurance policy that may respond to claims and policy limits BUT (5) not otherwise admissible in evidence
		- (6) court may grant leave to allow party to refuse to answer question regarding issue that remains undecided if will cause serious prejudice until after issue is decided by the court
	+ **Failure to answer** – 31.07
		- 31.07(1) party fails to answer a question if
			* Refuses to answer question (including on grounds of privilege)
			* Indicates that the Q will be considered or taken under advisement, but no answer is provided within **60 days**
			* Party undertakes to answer Q but no answer is provided within **60** days
		- (2) consequences of failure to answer – party **may not introduce** at trial any of the information not provided AND (3) sanctions under 34.15!!!
	+ **Responses by counsel** – 31.08
		- Questions on an oral discovery shall be answered by party beign examined, but where there is no objection, Q may be answered by lawyer and answer deemed to be the answer of person being examined unless before conclusion of examination, party repudiates, contradicts or qualifies an answer
	+ **Information Subsequently Obtained & Wrong Answers** – 31.09
		- (1) if party discovers that answer is incorrect or incomplete – party shall forthwith provide information in writing to all parties
		- (2) consequence – may be *treated as original examination*
			* adverse party may require info to be verified by affidavit or further examination
		- (3) consequence of failing to correct answer – if favourable to party’s case, may not introduce it into evidence; if not favourable, any order that the court determines is just
	+ **RPC** 5.4-2 governs communication with a client during testimony – cannot discuss evidence in midst of cross-examination (preparation is key – cannot talk about evidence or testimony to client over days
	+ **Discovery of non-parties with leave** – 31.10
		- 31.10(1) Discovery of non-parties with leave if **reason to believe that the person has information relevant to a *material* issue** in the action, *other than* an expert engaged in/being contemplated for litigation
		- (2) order shall not be made unless,
			* Moving party unable to obtain information from other persons whom the moving party is entitled to examine,
			* It would be unfair to require moving party to proceed to trial w/o having opportunity of examining the person, AND
			* Examination will not
				+ Unduly delay commencement of trial,
				+ Entail unreasonable expense for other parties, AND
				+ Result in unfairness to the person the moving party seeks to examine
		- (3) must serve transcript to person examined at no cost
		- (4) not entitled to recover costs unless court authorizes
		- (5) evidence can’t be read into trial under 31.11(1)
	+ **Use of examination for discovery *at trial***– 31.11
		- 31.11(1) **may read into evidence** against an adverse party any evidence given on examination for discovery of adverse party or person examined on behalf of them, if the evidence is otherwise admissible
		- (2) may be used for **impeachment** of testimony
		- (4) must be fair when reading in evidence; if only party, then adverse party can request that additional info be read in
		- (5) party under disability – only w/ leave
		- (6) unavailability of deponent may read into evidence w/ leave – where
			* Person died
			* Unable to testify b/c of infirmary or illness
			* Refuses to take oath/affirmation
		- (7) In deciding leave for (6), consider (1) extent to which person was cross-examined, (2) importance of evidence, (3) general principle that evidence should be heard orally in court, and (4) any other factor
		- (8) action discontinued then brought – may be read into evidence
* **Procedure for Examinations** – rule 34
	+ 34.02 oral examination held at time and place in notice of examination/summons to a witness
		- (2) may make a motion that it is unsuitable for proper conduct of examination
		- (3) if dismissed, substantial indemnity costs
	+ 34.03 shall be held in county where the person resides
	+ 34.04 service of notice of examination
	+ 34.05 **2+ days notice** for residents of Ontario
	+ 34.06 parties may consent to notice period and time/place of examination
	+ 34.07 where person being examined resides outside Ontario, court determines details
	+ 34.08 sworn testimony
	+ 34.09 interpreter
	+ 34.10 (2) person to be examined must bring all relevant documents that are not privileged
		- (3) notice or summons may require person being examined to produce certain documents
		- (4) if existence of documents disclosed during examination, party must disclose it **forthwith** or in an event within 2 days thereafter
	+ 34.11 party may be re-examined by own layer immediately after main examination but cannot be by way of cross-examination (no leading questions)
	+ 34.12 **objections**
		- (1) where question objected to, objector shall state briefly reason for objection
		- (3) ruling on propriety of question that is objected to may be obtained by motion to the court
	+ 34.14 **improper conduct of examination**
		- (1) May be adjourned for purpose of moving for directions where
			* Right to examine abused by excess of improper questions **or** excess of improper objections
			* Examination made in bad faith, or unreasonable manner so as to annoy, embarrass or oppress person being examined
			* Many answers evasive, unresponsive or unduly lengthy
			* Neglect of improper refusal to produce relevant document
		- (2) sanctions – court may order that person **pay costs personally** and forthwith
			* Lawyer can be sanctioned personally
	+ 34.15 misconduct by party to be examined
		- failure to attend, refusal to take oath or affirmation, refusal to answer proper questions, refusal to produce relevant document, refusal to comply with order under Rule 34.14
		- sanctions – strike out defence/affidavit; contempt order can be issued
	+ 34.16 examination shall be recorded in its entirety to allow for transcript
	+ 34.17 official examiner shall prepare a transcript when requested by a party and provide copies to all who pay
		- transcript shall be certified as correct
	+ 34.18 filing to transcript
	+ 34.19 videotaping of examination
* **Written examination for discovery** – rule 35
	+ 35.01 written questions and answers – list of questions sent to be answered
	+ 35.02 answered in affidavit
	+ 35.03 objections
	+ 35.04(1) when examining party not satisfied, new line of questioning within 10 days of receiving answers, and afterward party being examined has 15 days to respond to answers
		- (2) court order where insufficient answer
		- (3) court order for oral examination
		- (4) additional sanctions for failure to properly answer Q
			* Striking out defence, evidence, etc.
	+ 35.05 improper conduct of examination – court may limit/terminate written examination where
		- Abuse by excess of questions
		- Examination in bad faith or unreasonable manner so as to annoy, embarrass or oppress party being examined
* **Taking evidence before trial** – rule 36
	+ 31.01 (1) party or non-party can be examined under oath before trial for purpose of having testimony available at trial on consent of parties or with leave
	+ (2) test for leave
		- convenience of person being examined
		- possibility that person will not be available at trial due to death, illness
		- possibility that person will be beyond the jurisdiction of the court at time of trial
		- the expense of bringing the person to trial
		- whether the person ought to give evidence at trial
		- any other relevant consideration
	+ Applies to experts so long as expert report served first unless court orders otherwise
	+ court can order costs in advance
	+ 36.03 examinations outside Ontario
	+ **Recall 31.11!!!**
* **Exhibits on Discovery**
	+ Proof of the document or its contents
	+ For identification purposes only
	+ Marking of Exhibits
* **Inspection of Property** – rule 32
	+ 32.01(1) 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 a proceeding
	+ (2) 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
		- (c) *permit the taking of samples*, the making of observations or the conducting of tests or experiments
	+ (3) 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
	+ (4) **No** order for inspection shall be made without notice to the person in possession of the property *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
* Practical tips for topics to cover during examination of discovery
	+ Persons with knowledge
	+ Experts
	+ Insurance policies
	+ Questions of law (to be settled by the courts)
	+ Answers by counsel
	+ Undertakings
	+ Matters taken under advisement
	+ Exhibits – as documents and for identification purposes only
	+ Objections
	+ Admissions
	+ Open examination vs. cross-examination
	+ Assessment of credibility
	+ Fact finding
	+ Narrowing of issues
	+ Privileged documents
	+ Pleadings
	+ Re-examination

# Privilege

* **It is a rule of evidence**
* **Solicitor-Client Privilege**: Documents containing or reflecting confidential professional communications passing between the Plaintiff or their legal advisors directly related to the seeking or receiving of legal advice or legal assistance.
	+ All correspondence, memoranda, statements and documents passing between the clients and their solicitors.
* **Litigation Privilege**: Documents comprised of notes, memoranda, reports, confidential correspondence, and copies thereof, prepared with the dominant purpose of obtaining or providing advice concerning this litigation, of obtaining or providing information and evidence to be used in this litigation and preparing for and prosecuting this litigation.
	+ All correspondence, memoranda, statements and documents prepared for the information, use and advice of the solicitors in relation to proposed or pending litigation.
* **Without Prejudice Communication Privilege**: Documents containing or reflecting confidential professional communications of a without prejudice nature concerning the matters in issue in this litigation or written with a view to settlement of some or all of the outstanding matters between the parties

**Interim Preservation of Rights – rules 40-45**

# Injunctions

* Extraordinary remedy, rooted in equity with *near-endless flexibility*
* **Different Types**
	+ **Prohibitive**: Order that restrains someone from doing a specific act
		- E.g. order preventing parties from producing chickens without a quota (*Chicken Farmers of Ontario v Drost*)
	+ **Mandatory**: Order that requires a defendant to do something positively
		- For example, an injunction to get someone to remove two publications from the Internet (*Upper Canada District School Board v Gilcig*)
* Other Forms of Injunctions
	+ **Anton Piller**: order to search premises and seize evidence without warning (in order to prevent destruction). Rare.
	+ **Mareva**: Order to freeze assets (preventing sales).
	+ **Norwich:** Order to compel third-party to provide information. Typically to identify wrongdoer.
	+ **Anti-Suit:** Order preventing party from litigated in another jurisdiction
* Can be sought at any stage in a proceeding
	+ **Interim Injunction:** Pre-Trial Relief, *Typically Very Brief*
	+ **Interlocutory:**  Also Pre-Trial Relief, But *Often Runs Until Trial*
	+ **Permanent:** After final determination at trial
* Injunctions authorized under **s. 101 *CJA***
	+ An interlocutory injunction or mandatory order can be granted, or a receiver or manager appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so
* **3 step Test for Injunctions** (*RJR-MacDonald*)
	+ Tobacco companies sought injunction delaying tobacco marketing regulations pending determination of constitutional validity of regulations
	+ (1) **Is there a “serious issue” to be tried?**
		- Involves a preliminary assessment of merits. Can’t be vexatious or frivolous
			* Generally courts don’t engage in extensive review of merits on a motion for an interlocutory injunction
		- However, In *R v Canadian Broadcasting Corp* SCC said the test for *mandatory* interlocutory injunction is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. This is a higher standard.
		- In addition, where interlocutory injunction will amount to final determination courts will scrutinize injunction motion further
	+ (2) **Would the person applying for the injunction suffer *irreparable harm* if injunction were not granted?**
		- “irreparable” is about nature of harm, includes situations where one party won’t be able to recover damages at the time of a decision on the merits and **harm that can’t be cured** – Damage must be permanent
	+ (3) **requiring an assessment of the balance of inconvenience to the parties**
		- i.e. which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.
		- consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties
* **Interlocutory injunctions under rules (Rule 40)**
	+ Rule 40 establishes process interlocutory injunctions and mandatory orders
	+ 40.01 **how it is obtained**
		- Must be obtained from a judge (not a master) by a party (not a third party) in a pending or intended proceeding
	+ 40.02 Can be granted on a motion without notice, but only for **10 days**
		- (2) can be **extended** but *only have notice to every party effected* by order (unless they are evading service or other exceptional circumstances)
		- (3) motion w/o notice can get further **extension** of **10** days
	+ 40.03 Moving party undertake to abide by any order concerning damages if court ultimately concludes that injunction has caused damages to responding party (compensate responding party)
	+ 40.04 factums required

# 41- appointment of receiver

* \*\*page 1368
* Receiver = someone appointed by court to recover assets to benefit a third party
* Manager = someone to manage business and affairs of person
* Often combined, and most often used by creditors in circumstances of insolvency (either under the *Companies’ Creditors Arrangement Act* or *Bankruptcy and Insolvency Act*).
* Receivers often appointed to manage sale (see *BDC Venture Capital Inc. v Natural Convergence Inc.*, 2009 ONCA 665)
* 41.02: Appointment of receiver under s 101 CJA may be obtained on motion for judge in a pending or intended proceeding
* 41.03 Form of order – Some special requirements for order appointing receiver:
	+ Must name person appointment, must specify amount of security to be furnished, must state whether they are a manager
* 41.04 + 41.05 = special court jurisdiction
	+ 41.04: can use reference mechanism in Rule 54 to determine conduct of receiver
	+ 41.05: Receiver can get directions from a judge at any time by way motion
* 41.06 must be discharged by judge

# 42- certificates of pending litigation

* Purpose of CPL is to ***notify public***(normally by way of title search) of disputes that exist with respect to a piece of real property (otherwise may lose rights to innocent buyers that didn’t know about it)
	+ S. 103(1) of CJA makes clear that the commencement of an action does not serve as notice to the public of the existence of that dispute
* Rule 42.01(1), (3): says it can be issued by registrar only after an order has been issued by court and can be obtained without notice
	+ (4) Order served forthwith and against any parties that have interest in the land
	+ (2) party seeking CPL must include claim for it in originating process
* Party can move to discharge CPL under the circumstances described in s 103(6) CJA and 42.02
	+ Essentially where can be compensable by damages alternatively, the claim isn’t prosecuted diligently or there is no reasonable claim to the land
	+ See *Ferrier v Wellington* for example of court discharging CPL for lack of full and fair disclosure under rule 39.01(2)
* **Test** for CPL is set out in *Access Self-Storage*
	+ sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts, and on which the plaintiff could succeed at trial

# 43- interpleader

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

# 44- interim recovery of personal property

* occurs where party is seeking recovery of specific personal property in an action where it is alleged property was unlawfully taken or detained by a defendant (*CJA* s 104)
* 44.01(1) Motion needs to be accompanied by an affidavit setting out enumerated details (i.e. description and value of property)
	+ Order must have certain details too – 44.02
* Court can force plaintiff or defendant to pay into court twice as much as value of personal property and can potentially move without notice
* Plaintiff must show “**substantial grounds for its claim**” (*RN Holdings Ltd v Wong*)
	+ This is a *high threshold*

# 45- interim preservation of property

* Easier to convince a court to do this than recovery
	+ In-between option where plaintiff may not be able to convince court to hand property over to a party via rule 44
* not just about property in issue but *also* about ***preserving evidence***.
* Court has very broad range of options
	+ Can authorize entry into any property to preserve (45.01(1), order sale of perishable product (45.01(2), order specific funds into court (45.02), including in circumstances where a party is holding the property as security for a debt (45.03)
* **Test** is
	+ whether there is a **serious issue to be tried regarding the claim** (*BMW Canada Inc. v Autoport Airport*)

Sealing Orders

* S. 135 – open court principal “all court hearings open to the public”
* S. 137(1) of *CJA* says a person is entitled to see any document filed in a civil proceeding in court, unless court or legislation say otherwise
* S. 137(2) says court may order any document filed before it be treated as confidential, sealed and not form part of the public record
* While test is simple, *standard* for obtaining such an order is **high**
* Fairview Conduct v TDL
	+ Court applied test from *Sierra Club*
		- **Necessity:** only seal where necessary to prevent serious risk of important interest, including a commercial interest, in the context of litigation because no alternatives
		- **Proportionality:** Effects of confidentiality order, including the effects on right to fair trial, outweigh its deleterious effects
	+ Tim Hortons tried to seal “highly confidential and competitively sensitive financial and business data such as profit margins and sales information of Tim Hortons franchisees from 2001 to 2009” which would supposedly give competitors useful information that would allow them to increase market penetration
	+ Held: court denied motion. Not satisfied interests affected extended beyond private commercial interests of Tim Hortons. Almost every business relationship has confidential information
	+ Compare to outcome in *City of Niagara Falls v OLG* where interim order granting sealing request was granted due to risk to procurement process
* Sealing orders on consent occur often because often in both sides interest to seal, in order to get full disclosure

# 20- Summary Judgment

* SEE FRAMEWORK BELOW PROVIDED IN THE CASE – ANALYZE IT THAT WAY
* 20.01 **when available**
	+ (1) On motion after delivery of defence or a notice of motion by a defendant
	+ (2) Plaintiff may move, without notice, to serve a notice of motion with the statement of claim; leave required and may be given where special urgency is shown
	+ (3) D may move after delivery of defence
* 20.01(1), (3) **affidavit evidence required**
	+ 20.02(3) Affidavit may be on “*information and belief*” but adverse inferences may be drawn from failure to provide *personal knowledge of contested* facts
		- Adverse inference normally means assumption of a contrary position on the facts by reason of failure to call evidence in support of the party’s position. Here it means discounting evidence, if controversial, or ignoring it if countered with direct evidence
	+ 20.02(2) a responding party may not rest solely on the allegations or denials in the party’s pleadings, but must set out, in affidavit material or other evidence, specific facts showing that **there is a genuine issue requiring a trial**
* 20.03 factums required
	+ 7 days moving party; 4 days responding party
* 20.04 **disposition of motion** (granting summary judgment)
	+ 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; or (see case below to see what this means)
		- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary
	+ (2.1) In determining under clause (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.
	+ (2.2) **Oral evidence allowed** (mini-trial) – (2.2) 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.
	+ (3) where only genuine issue is amount – may order trail for that issue and judgment for the rest
	+ (4) where only genuine issue is question of law – may determine question and grant judgment
* 20.05 **Where trial is necessary**
	+ (1) If 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 20.05(1), the court may give such directions or impose terms as are just, including (page 1091 has all of them)
		- granting the judge expanded authority to convert the motion to a summary trial application for cases appropriate for expeditious trial determination
		- Specifying material facts not in dispute
		- Determining the issues to be tired
		- Imposing discovery plan
		- Use of affidavit evidence
		- Summaries of anticipated evidence
		- Limits on oral examinations
		- Meetings of experts
		- Summary of opening statements
		- Setting down for trial
		- Payments into court and security for costs
* 20.06 **cost sanctions for improper use of rules**
	+ 20.06 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.
* 20.07 Effect of summary judgment – A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.
* 20.08 stay of execution
	+ Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just
* ***Hryniak v Mauldin SCC***
	+ **summary judgment would most often be appropriate when** cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points
	+ **no genuine issue requiring a trial** when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment
		- This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result
	+ **FRAMEWORK**
		- **Is there a genuine issue that requires a trial**? (R20.04)
			* If no 🡪 Summary Judgment appropriate, the judge is able to reach a fair and just determination on the merits (*Hryniak*)
				+ Summary judgment process allows:

The judge to make the necessary findings of fact;

The judge to apply the law to the facts; and,

Is proportionate, more expeditious and less expensive means to achieve a just result

* + - * If yes 🡪 can trial be avoided by using the new powers under Rule 20.04(2.1) and (2.2)?
				+ New powers can be used as long as their use is not against the interest of justice (*Hryniak*)
				+ Use of new is presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution
	+ Partial summary judgment
		- Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice

# 21- determining issue before trial

* **Where available**
	+ 21.01(1) Party may move before a judge
		- (a) for the determination prior to trial of a question of law raised in the pleading **where** determination of the question may dispose all or part of the action, substantially shorten the trial, or result in a substantial saving of costs, OR
		- (b) **strike out a pleading** on ground that it discloses no reasonable clause of action or defence
			* General use is to attack claims with no reasonable cause of action or being “frivolous or vexatious”
	+ (3) for D: defendant may move before a judge to have an action stayed or dismissed on the ground that,
		- (a) the court has no jurisdiction over the subject matter of the action;
		- (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;
		- (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
		- (d) 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.

# 22- special case

* Request to have a judge address a question of law in the form of a special case
* Parties need to concur in stating a question of law to be determined
* May use the rule to apply directly to the Court of Appeal for leave to have a special case determined
* Factums required

# 23- discontinuance and withdrawal

* Discontinuance permits the plaintiff to cease the proceeding but litigate the issues again
* 23.01(1) P may discontinue action
	+ Before close of pleadings by serving all parties
	+ After close of pleadings w/ leave of court, or
	+ At any time by filing consent of all parties
* (2) if party under disability, action can only be discontinued by or against the party w/ leave
* 23.02 counterclaim must deliver notice of election to proceed within 30 days otherwise deemed discontinued w/o costs
* 23.03 effect of discontinuance on crossclaim, TPC
* 23.04 **discontinuance of action is not a defence to a subsequent action**
* 23.05 costs of discontinuance
	+ (1) if action discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action
* 23.06 withdrawal by D (statement of claim)
* 23.07 Rules 23.01 to 23.06 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

# 24- dismissal of action for delay

* 24.01(1) Dismiss the action for delay if P fails to take procedural steps such as serving statement of claim; noted in default any defendants; set the action down for trial within 6 months after the close of pleadings
* (2) Shall dismiss unless P demonstrates that dismissal would be unjust
* 24.02 Disability – no order without confirmation from OCL or PGT
* 24.03 counterclaim needs notice of election to proceed within 30 days otherwise discontinued
	+ 24.04 crossclaim/TPC

# 24.1- mandatory mediation

* 24.1.04(1) **Applies** to actions commenced in Ottawa, Toronto and the County of Essex (Windsor). (or transferred there)
* (2) Does ***not*** apply to: Rule 75.1 actions; *Insurance Act* mediations; Commercial List; Mortgage Actions; *Construction Act*; *Bankruptcy*; *Class Proceedings,* unless certification has been denied, *Crown Proceedings Act* (Crown may elect to mediate but not required to)
* 24.1.05 Court may make an order exemption a party from this rule
* **Who** may mediate
	+ Mediation coordinator shall maintain a list of mediators:
	+ A mediation under this Rule shall be conducted by,
		- (a) a person chosen by the agreement of the parties from the list for a county;
		- (b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or
		- (c) a person who is not named on a list, if the parties consent.
* 24.1.15(1) Mediators report is required
* Mediation session
	+ 24.1.09(1) mediation session *shall* take place within **180 days after first defence** has been filed unless court orders otherwise
		- (2) factors for extension/abridgment of time:
			* # of parties, state of pleadings and complexity of issues
			* Party intends to bring summary judgment motion (20) or rules 21 or 22
			* Whether mediation more likely to be succeed if 180-day period is extended to allow parties to obtain evidence under discovery rules
			* Whether nature of case or circumstances of parties, the mediation would be more likely to be successful if the 180 day period is extended or abridged
* Procedure before mediation process (24.1.10)
* Attendance at mediation session (24.1.11)
* Failure to attend (24.1.12)
* Non-compliance (24.1.13)
* Confidentiality 24.1.14
	+ 24.1.14 All communications at mediation session shall be deemed to be without prejudice settlement discussions
		- *Bombardier*: common law evidentiary rule that applies to settlement negotiations
* Outcome of mediation – file a mediator’s report (24.1.15)

# 47- jury notices

* **RCP 47.01 and CJA s 108**
* S 108(1) in any **action of SCJ** and not small claims court, **party may require that the issues of fact be tried or damages assessed**, or both, **by a jury**
* (2) trials **without** jury (page 378)
* (3) on **motion** court may order that issues of fact be tried or damages assessed without jury
	+ *Rolley v MacDonell*: overriding test is whether the moving party has shown that justice will be better served by the discharge of the jury
	+ Another factor: *Moore*: complexity of the litigation
	+ Courts will not take right to trial by jury away lightly – requires a lot of convincing
* RCP 47.02 striking out jury notice
	+ Not in compliance w/ statute or (2) jury trial inappropriate (see above s 108(3))
	+ (3) trial judge retains ultimate discretion
* **No** **jury trials** where action is against ***municipality***

# 46- place of trial

* 46.01 trial of an action shall be held in the county where the proceeding was commenced or transferred, unless court orders otherwise

# 48- listing for trial

* 48.01 after close of pleadings, any party who is not in default may set the action down the trial
* 48.03 Trial record
	+ Table of contents
	+ Jury notice
	+ Pleadings
	+ Demand or order for particulars
	+ Any orders regarding trial
	+ Supplements: Special damages; pre-trial conference orders and any affidavits to be used
	+ Lawyer’s certificate
* 48.04(1) after setting down for trial, cannot initiate/continue in discovery
	+ (2) exceptions – continued obligation of disclosure – page 1392
* 48.05 undefended actions 🡪 on the trial list on filing the trial record
* 48.06 defended actions 🡪 on the trial list 60 days after the action is set down for trial, or earlier on consent
	+ Multiple trial lists: jury list, non-jury list, speedy trial list (Rule 37.13 or 20.05(2)(n))
* 48.08 separate trial lists for jury and non-jury
* 48.09 separate speedy trial list
* 48.07 where an action placed on trial list, all parties shall be deemed to be ready for trial and the trial shall proceed when the action is reached on the trial list
* 48.11 actions struck off trial list shall not thereafter be placed on a trial list except w/ leave
* 48.12 duty to inform registrar of settlement
* 48.14 **dismissal of action for delay**
	+ (1) Where action has **not** been set down for trial within **5 years** of starting action
		- **Exceptions:**
		- Commercial list actions (Toronto Region)
		- *Class Proceedings Act* actions
		- (4) (1) does not apply if at least 30 days before expiry of applicable period, a party files a timetable (requires consent of all parties)
		- (5) can have a status hearing in order to extend this if parties do not consent
			* (7) P shall show cause why the action should not be dismissed for delay
		- (8) does not apply to party under disability
	+ (1) where action has been struck off trial list and not restored within **2 years**

# 49- offer to settle

* 49.10 Valid rule 49 offer – (3) Burden of proof is on party who makes the offer
* (1) Plaintiff’s offer – where offer
	+ Made min **7 days** before *commencement* of the hearing,
		- In a trial, commencement of hearing is the commencement of calling evidence (*Elbakhiet v Palmer*)
		- In a motion or application, though, it is likely the commencement of argument because there is no other “starting point”
	+ Not withdrawn and does not expire prior to commencement of hearing,
	+ Is not accepted by the D, AND
	+ P obtains a judgment **as favourable or more favourable** than the terms of the offer to settle,
	+ **THEN**
		- P is entitled to **partial indemnity costs to the date** the offer to settle was served and **substantial indemnity costs from that date**
* (2) D’s offer – where offer
	+ Made min **7 days** before *commencement* of the hearing,
	+ Not withdrawn and does not expire prior to commencement of hearing,
	+ Is not accepted by the P, AND
	+ P obtains judgment as favourable or less favourable than the terms of offer,
	+ **THEN**
		- **P** is entitled to **partial indemnity costs to date** of the offer and **D** entitled to **partial indemnity costs from that date**
* **NOTE: for both offers, should address costs otherwise it is very difficult to prove that the offer was as favourable (creates ambiguity)**
* **NOTE 2: *Konig*: You have to take into account Rule 3.01 when time period of *7 days or less* is prescribed holidays are not counted 🡪 might need 12 days to meet this rule**
	+ But if case starts a few days later than anticipated offeror may benefit for extra days
* **NOTE 3**: even if the offer does not fit rule 49 strictly – it can still be a consideration for costs (49.13)
	+ 49.13: **Offers not made in time or those withdrawn may still be considered by the court when awarding costs**
	+ It is an error for court to ignore offers that demonstrate a genuine and continuing effort to settle and determining costs ( *Bifolchi* v Sherar)
	+ Note: also in 49.10 broad residual jurisdiction – “unless court orders otherwise”
* 49.04 May be withdrawn in writing at any time before accepted
	+ If an offer specifies a time in which it may be accepted, it shall be deemed to have been withdrawn when the time expires
* 49.07 acceptance of offer
	+ (1) Offer may **not** be accepted *after* the court disposes of the claim in respect of which the offer is made (special status of counter offers)
	+ (2) may accept original offer after rejecting it (unless withdrawn) – different than regular contract rules
	+ (3)/(4) conditions
	+ (5) An offer that does not provide for costs
		- Plaintiff gets cost assessed on acceptance to the time offer is accepted;
		- Defendant: to the time of service of the offer if made to the Plaintiff
* 49.08 parties under disability 🡪 if require approval 7.08
* 48.05 effect of offer w/o prejudice
* 48.06 disclosure of offer to court that it not accepted cannot be made until hearing of costs
* 49.11 multiple Ds (page 1423)
	+ Different offers can be made to different defendants but if they are alleged to be jointly or severally liable and rights of contribution and indemnity exist between the defendants Rule 49.10 cannot apply unless plaintiff’s offer is made to all defendants to settle against all defendants, and in the case of offer to a plaintiff the offer is to settle claim against all defendants and to pay costs of defendant who has not joined in offer, OR
	+ The offer is made by all defendants and is to settle all claims against defendants, who, by terms of offer, must be jointly and severally liable for the whole amount of the offer

# 50- pre-trial conference

* 50.01 purpose:
	+ discuss settlement of some or all of the issues;
	+ to obtain any necessary orders and directions to ensure that the action is ready for trial.
* 50.02 within **180 days after** action is set down for trial, parties shall schedule pre-trial conference
* Lawyers to appear and parties to participate in person unless ordered otherwise (Rule 50.05(1)(b) – Rule 1.08 telephone and video conference if personal attendance would require undue amounts of travel/expense)
* 50.04 Pre-trial conference **brief** must be filed at least **5 days** before the pre-trial
* 50.06 **List of matters to be considered at the pre-trial** – settlement, simplifications, admissions, liability, damages, duration, experts, witnesses, trial dates, reference and “*any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding*”.
* 50.07 judge to establish timetable and fix date for trial
* 50.08 pre-trial conference report made
	+ (a) stating what steps need to be completed before the action is ready for the trial or hearing, and how much time is needed to complete those steps;
	+ (b) stating the anticipated length of the trial or hearing; and,
	+ (c) setting out any other matter relevant to scheduling the trial or hearing.
* 50.10 pre-trial judge cannot be trial judge w/o consent of parties
	+ 50.09 no disclosure of pre-trial communications other than 50.07/8
* All documents are to be made available (Rule 50.11)
* 50.12 judge may make an order for costs of conference
* 50.13 judge may at any time direct that a case conference be held before a judge

# 51- admissions

* 51.02 party may at *any time* request to admit the truth of a fact or the authenticity of the document by *serving* request to admit
* 51.03 other party shall respond within **20 days** after service
	+ Deemed admission where no response
	+ Shall be deemed to admit truth unless:
		- Specifically denies truth of a fact or authenticity of document, OR
		- Refuses to admit the truth/authenticity and sets out the reason for the refusal
			* Must state reason!! E.g. no knowledge
			* Note: 51.04: will be taken into account for *costs*
* 51.06 where admission made, any party may to make motion to receive any order they are entitled to

# Evidence Act notices

* S. 52 requires at least 10 days notice to be given to all other parties in order to introduce medical reports, which includes reports prepared by treating physicians
	+ Request to Admit
* Section 35(2) provides that business records are admissible as evidence 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
	+ If a business record, it is admissible with at least 7 days notice of an intention to tender the record as evidence is given to all other parties (Notice of Intention)

# 77- civil case management

* **Purpose**: To establish a case management system that provides case management only of those proceedings for which a need for the court’s intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.
* 77.01(2) This Rule shall be construed in accordance with the following principles:
	+ 1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.
	+ 2. The nature and extent of the case management provided by a judge or case management master under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred.
* **Does not apply to**: Commercial list; Estates; Trustees; *SLRA*; *SDA*; Mortgages; Simplified Procedure; Constructions Act; Bankruptcy; Class Proceedings unless certification has been denied.
* **Powers** (Rule 77.04): A judge or case management master may,
	+ (a) extend or abridge a time prescribed by an order or the rules;
	+ (b) adjourn a case conference;
	+ (c) set aside an order made by the registrar;
	+ (d) establish or amend a timetable; and
	+ (e) make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule.
	+ (2) A judge or case management master may, on his or her own initiative, require the parties to appear before him or her or to participate in a conference call to deal with any matter arising in connection with the case management of the proceeding, including a failure to comply with an order or the rules.
* 77.05 (1) A regional senior judge or, subject to the direction of a regional senior judge, any judge or case management master may, with the consent of all parties, assign a proceeding to which this Rule may apply for case management under this Rule.
	+ (4) In considering whether to assign a proceeding for case management, the regional senior judge, other judge or case management master shall have regard to all the relevant circumstances, including any or all of the following:
	+ 1. The purpose set out in [subrule 77.01 (1)](https://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/latest/).
	+ 2. The complexity of the issues of fact or law.
	+ 3. The importance to the public of the issues of fact or law.
	+ 4. The number and type of parties or prospective parties, and whether they are represented.
	+ 5. The number of proceedings involving the same or similar parties or causes of action.
	+ 6. The amount of intervention by the court that the proceeding is likely to require.
	+ 7. The time required for discovery, if applicable, and for preparation for trial or hearing.
	+ 8. In the case of an action, the number of expert witnesses and other witnesses.
	+ 9. The time required for the trial or hearing.
	+ 10. Whether there has been substantial delay in the conduct of the proceeding.

# Expert Witnesses

* **60 days** after action set down for trial, parties to agree on a *schedule for the service of expert reports* (Rule 53.03(2.2))
* Serve expert reports in accordance with *Rules* and *Evidence Act*
	+ Original report- 90 days before pre-trial 53.03.(1)
	+ Responding report 60 days before pre-trial 53.03(2)
	+ Supplemental reports – 30 days before trial Rules 53.03.(3)(b)
* Ontario *Evidence Act*, s. 12
	+ where it is intended by a party to examine as witnesses persons to give *opinion* evidence, not more than **three** such witnesses may be called upon with side without the leave of the judge
	+ Obtain and serve CVs and acknowledgement of experts duty
* Rule 4.1 **duty of expert**
	+ (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
* *Evidence Act* s 52
	+ Definition of “practitioner”
		- Member of a College pursuant to the *Regulated Health Professions Act, 1991*
		- Drugless practitioner pursuant to *Drugless Practitioners Act*
		- Or similar person licensed or registered to practice in Canada
	+ A report by or for a party to an action, signed by a practitioner, relating to the action, with leave of court and after at least ten days notice, admissible in evidence
	+ Party to the action is entitled to a copy of the report with any other report of the practitioner that relates to the action
	+ Except with leave, a practitioner who signs such a report shall not give evidence at the trial unless the report is given to all parties in accordance with the section
	+ Cost consequences if practitioner required to give evidence in person and the court decides that the evidence could have been as effective by report
* Types of Expert Witnesses
	+ Litigation Experts: witnesses retained by a party to the proceedings, who the party intends to call as an expert at trial, must comply with Rule 53.03 before to give expert evidence at trial.
	+ Participant Experts: witnesses whose evidence is derived from their observations or involvement in the underlying facts, including treating doctors and fire marshals, do not have to comply with Rule 53.03 to give expert evidence at trial.
	+ Non-Party Experts: experts hired by a non-party (such as accident benefits insurers), do not have to comply with Rule 53.03 to give expert evidence at trial.
	+ If opinion evidence is to go beyond observations of or participation in events at issue, then must comply with rule 53.03.
* Expert Report Content Rule 53.03(2.1) – every expert report shall contain the following information
	+ The expert’s name, address and area of expertise
	+ The expert’s qualifications and employment and educational experiences in area of expertise
	+ The instructions provided to the expert in relation to the proceeding
	+ The nature of the opinion being sought and each issue in the proceeding to which the opinion relates
	+ The expert’s opinion respecting each issue and, where there is a range of opinion given, a summary of the range and the reasons for the expert’s own opinion within that range
	+ The expert’s reasons for his or her opinion, including
	+ A description of the factual assumptions on which the opinion is based
	+ A description of any research conducted by the expert that led him or her to form the opinion, and
	+ A list of every document, if any relied on by the expert in forming the opinion
	+ An acknowledgement of experts duty (Form 53) signed by the expert

# Productions

* Obligation to ensure that productions are complete
* Check with client for any new documents to be produced
	+ Supplementary affidavit of documents if necessary (Rule 30.07)
* Use sub-files for any original documents to be used at trial (any notations go on the folder)
* Determine if productions are required from non-parties (Rule 30.10)
* Consequences for failing to disclose or produce a document (Rule 30.08)

# 52/53- Trial Preparation, Trial, Evidence at Trial

* Overview:
	+ Review and organize file
	+ Prepare draft theory of case and memorandum of proof
	+ Complete / check tasks based on rules
	+ Legal research (update research, brief of authorities, statement of law)
	+ Transcripts (original copies, corrections to evidence, read-ins)
	+ Undertakings (all answered, summary of responses)
	+ Preparation of witnesses (party, non-expert/lay witnesses, expert)
	+ Productions (ensure complete, supplementary affidavit of documents if necessary)
	+ Document and Trial Briefs
	+ Counsel preparation and trial book
	+ Paperless trial
	+ Logistics (travel, accommodation, supplies, electronics and internet, etc.)
* Document briefs and trial briefs
	+ Organize and prepare briefs:
		- Joint documents brief
		- Pleadings brief
		- Damages brief
		- Liability brief
		- Compendium
		- Undertaking answers
* Counsel Trial book
	+ Contact numbers (client, individuals working on file, including IT, opposing counsel)
	+ Witness list
	+ Opening and closing statements
	+ Examination-in-chief and cross examination questions
	+ Pleadings
	+ Affidavits of documents
	+ Reporting letters
	+ Pre-trial conference memoranda
	+ Requests to admit and responses
	+ Agreed statement of facts
	+ Notices of intention
	+ Offer to settle
	+ Summary of transcripts
	+ Relevant portions of transcripts
	+ Undertakings
	+ Expert reports
	+ List of documents that will be introduced as exhibits
	+ Witness statements
	+ Chronology of relevant events
	+ Memorandum of law
	+ Indices for various document briefs
* Counsel trial preparation
	+ Opening statement
	+ Opening written submissions of law and anticipated evidence
	+ Examination-in-chief
	+ Cross examinations
	+ Argument on anticipated evidentiary and other procedural issues
	+ Anticipated trial motions
	+ Closing statement
	+ Closing written submission of evidence and law
* **Rule 52 – trial procedure**
	+ 52.01 failure to attend – may dismiss action
	+ 52.02 – adjournment of trial
		- Judge may postpone or adjourn a trial to such time and place, and on such terms, as are just
	+ 52.03 court appointed experts
		- On motion of party or on own initiative judge may appoint an independent expert to inquire and report on a question of fact or opinion relevant to the issues in the action
		- Rarely happens – usually parties have their own experts
	+ 52.04 Marking and Numbering Exhibits
		- Consecutively, registrar attending makes a list, giving a description of each exhibit and who put into evidence
	+ 52.05 – View by Judge or Jury
		- may inspect any property concerning which any question arises in the action or the place where the cause of action arose
	+ 52.06 – Order for Exclusion
		- at request of any party, may order that a *witness be excluded* from the courtroom until called to give evidence – not a party or witness essential to instruct the lawyer
	+ **52.07 Order of Presentation in Jury Trials**
		- Plaintiff opening, then evidence; defendant may with leave make an opening address immediately after the opening address of the plaintiff and before the plaintiff’s evidence
		- After plaintiff’s evidence, the defendant may make an opening, unless already done, then evidence
		- After defendant evidence, the plaintiff may adduce any proper reply evidence and the defendant makes a closing, the plaintiff closing
		- Where no defendant evidence after plaintiff evidence, the plaintiff shall make closing, followed by defendant closing
		- If burden of proof lies with defendant in all matters in issue, trial judge may reverse the order
	+ 52.08 **disagreement of the jury**
		- (1) If jury disagrees, makes no finding for judgment, answers some but not all of the questions or conflicting answers so judgment cannot be granted – trial judge may direct that action be retired with another jury at the same or any subsequent sitting, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, judge shall dismiss
		- (2) Where answer sufficient to entitle party to judgment on some but not all claims, judge may grant judgment on sufficient answers and (1) applies to others
	+ 52.09 recording jury verdict – endorsed on trial record
	+ 52.10 failure to prove fact/document
		- When party through accident or mistake or other cause a party fails to prove some fact or document materials to case – judge may proceed with the trial subject to proof of the fact or document afterwards, can direct jury to find a verdict as if fact or document proven, and verdict takes effect on proof of fact or document afterwards and if not proved judgment to other party
* **Rule 53 – Evidence at Trial**
	+ 53.01 **Oral Evidence as General Rule**
		- Unless rules provided otherwise – witnesses examined orally in court with direct examination, cross examination, and re-examination
		- Trial judge exercise reasonable control over *mode of interrogation* of a witness to protect from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant
		- Direct recall for further examination
		- (4) Witness unwilling or unable to give responsive answers, trial judge may permit the party calling the witness to examine him or her by leading questions
		- (5)/(6) An interpreter can be used when needed – competent, independent, and under oath/affirmation – provided by party calling the witnesses
	+ 53.02 **Evidence by Affidavit allowed w/ leave**
	+ 53.08 **Certain** **Evidence Admissible Only With Leave**
		- Leave *shall* be granted on such terms as are just and with an adjournment if necessary, unless to do so would cause prejudice to the opposite party or will cause undue delay in the conduct of the trial, for the following provisions:
			* 30.08(1) – failure to disclose a document
			* 30.09 – failure to abandon claim of privilege
			* 31.07 - failure to answer on discovery
			* 31.09(3) - failure to correct answers on discover
			* 53.03 - failure to serve experts report
			* 76.03(3) - failure to disclose witness
	+ 53.09 calculation of awards for future pecuniary damages
		- (1) Discount Rate
		- (2) Gross Up
		- (3) Transition
	+ 53.10 pre-judgment interest rate for non-pecuniary damages
		- 5% per year – e.g. pain and suffering
* S 118 CJA: In an action for damages for **personal injury**, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages

# Commercial litigation

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

Estate litigation

* Proceedings Involving:
	+ Estates, Trusts and Substitute Decisions Proceedings
	+ Wills (proof of, validity of, interpretation of, rights under)
	+ Administration of estates, with or without a will (intestacy)
	+ Dependent's Relief Claims under *Succession Law Reform Act*
	+ Claims against estate under *Family Law Act*
	+ Proceedings relating to actions of a person acting under Power of Attorney
	+ Proceedings relating to the appointment, removal or replacement of a guardian or the actions of a guardian
	+ Variations of trusts
	+ Proceedings relating to passing the accounts of an estate trustee or an attorney or guardian
* Relevant Legislation may include
	+ *Absentees Act*
	+ *Children’s Law Reform Act*
	+ *Estates Act*
	+ *Estates Administration Act*
	+ *Family Law Act*
	+ *Substitute Decisions Act*
	+ *Succession Law Reform Act*
	+ *Trustee Act*
	+ *Variation of Trusts Act*
	+ *Wills Act*
* Relevant Rules:
	+ *Rules 14.05, 74, 75, 75.1, 75.2*
* GENERALLY
	+ Rule 14.05(3) directs that parties may apply to court for
		- The opinion advice or direction of the court affecting the rights of a person in respect of administration of an estate or execution of a trust
		- An order directing executors, administrators or trustees to do or abstain from doing something in respect of an estate
		- An order to remove or replace an executor administrator or trustee
		- An order to determine rights that depend upon the interpretation of a will or other instrument
	+ Rule 74 provides procedure for dealing with estates in respect of which the validity of the Will is not being contested but other issues must still be dealt with
		- E.g.
			* Issuance of Certificate of appointment to Estate Trustee – with a will, when there is no will, or in cases where there is a foreign trustee
			* Replacement of a trustee who has resigned or is unable to continue to act
			* Appointment of a trustee to administer the estate while a will or appointment is being contested (an “estate trustee during litigation”)
			* court for approval of the “accounts” of a trustee (“passing of accounts”)
	+ Motions for assistance
		- Rule 74 also confers upon parties the right to seek an "order for assistance“ which may
			* direct an estate trustee to accept or refuse an appointment as trustee
			* require an estate trustee to file with the court a statement of the nature and value of estate assets being administered
			* require an estate trustee to pass his or her accounts
	+ Rule 75 deals with “contentious proceedings”
		- where the validity of will is in question or is being challenged
		- revocation of a certificate of appointment of an estate trustee
		- Claims against an estate under ss. 44 and 45 of *Estates Act (*a rarely used means of expediting a claim against an estate on a summary basis)
		- There is some other matter relating to estate administration that is in dispute
		- 75.06 Request for Directions from court on the procedure that will be used to resolve a dispute
* Estate applications must be brought where the deceased resided at the time of death
* Practice Direction mandates matters in the Toronto Regions must be placed on “Estates List”
* These matters are subject to a practice direction dictating how matters are brought before the court, scheduling motions, applications and hearings, engaging in mediation etc.
* Normally, estate litigation takes place in the county or region in which the deceased was residing at the time of death
* Mediation is mandatory in proceedings commenced in Ottawa, Windsor and Toronto
	+ Within 50 days of an estate proceeding being commenced in these locations, the applicant must bring a motion for directions with respect to when or how mediation will be conducted
	+ Mediation prior to commencement may be accepted as meeting the requirement if it dealt with all issues being presented in the application
* Outside of Ottawa, Windsor and Toronto, the court may order mediation under rule 75 or 74 or the parties may voluntarily engage in mediation
	+ For court ordered mediations rule 75.2 applies and provides the procedure to be followed
	+ Costs of a Court ordered mediation are recoverable as costs in a proceeding
	+ Costs of a voluntary mediation are not.
* References – rules 54/55
	+ Extensive examination of documents that cannot be conveniently undertaken at trial
	+ to take accounts related to a substantial issue (e.g. an estate or amount owing under a mortgage);
	+ to oversee the conduct of a sale;
	+ to oversee the conduct of our receivership
	+ An assessment of a lawyer's Bill or of a party's bill of costs is a specialized type of reference dealt with under rule 58 and the *Solicitor’s Act*
	+ A review of a trustee or guardian's accounts is another specialized type of reference governed by Rule 74
	+ Order for reference is directed to another officer of the court or to a person agreed upon by the parties
	+ the order will direct the general terms of the reference
	+ the referee will make a report which may be confirmed by the judge who directed the reference
	+ or the order directing the reference may provide it is confirmed 15 days after delivery if there are no objections filed
	+ procedure is governed under rule 55
	+ the referee may add parties to the proceeding and give directions concerning what evidence is to be received and how documents are to be approved
	+ witnesses shall be examined orally
	+ attendance of witnesses can be compelled by summons

# Proceedings Against the Crown

* *Crown Liability and Proceedings Act* (Federal)
	+ one may commence proceedings against the Crown in the name of the Attorney General of Canada
	+ If suing a Crown agency, one may simply name the agency as a defendant
	+ In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction, the Superior Court of the province in which the claim arises has concurrent jurisdiction and the limitation periods for that province shall apply (can have two options – federal court vs provincial in many cases)
* *Crown Liability and Proceedings Act* (Ontario)
	+ **notice of claim containing sufficient particulars to identify "the location out of which the claim arose" must be served upon the crown at least 60 days before the commencement of the action; or the action is a nullity** – huge problem if there is a limitation period
	+ Actions against the province should describe the defendant as "her Majesty the Queen in right of Ontario" *without reference to the specific ministry* (which can be identified in the body of the statement of claim)
	+ (but often don’t and no one seems to care)
* Judicial Review – Federal
	+ *Federal Courts Act*
		- The federal court of appeal has jurisdiction to hear and determine applications for judicial review of decisions made by federal boards, commissions and tribunals
		- Procedure is governed by that Act, and by the Federal Court Rules
* Judicial review – Ontario
	+ *The Judicial Review Procedure Act*
	+ Rule 68 of the Rules of Civil Procedure: Application to Divisional Court
	+ Rule 68 provides, among other things, a prescribed form of application (Form 68A) as well timelines and procedures for proceeding with judicial review
	+ Provisions of Rule 38 also apply
	+ Attorney General must be served with Notice of Application JRPA s 9
	+ If constitutional question raised, must also serve AG Canada CJA s 109
	+ Divisional court
		- Practice directions for Divisional Court proceedings in Consolidated Practice Direction for Divisional Court Proceedings
		- Additional practice directions may apply on a Region to Region basis
		- Divisional Court sittings 8 locations; permanently in Toronto
		- Divisional Court composition- urgent motions vs. normal panel
		- Interim orders for stay of decision- prima facie case and balancing of interests- jurisdiction for stay is CJA s 106

# Naming Parties

* Government of Ontario: “Her Majesty the Queen in right of Ontario”
* Government of Canada or Ministry: “Attorney General for Canada”
* Municipal government : “The Corporation of the City of Sarnia”
* Crown Agencies : by their names
* Deceased individual with no estate trustee named or appointed: “The estate of XX", (but a motion should be brought to have a litigation administrator or representative appointed under Rule 9 or 10.02 and concurrently amend the title of proceedings under Rule 5)
* Deceased individual with estate trustee: "Jim Brown in his capacity as estate trustee of the estate of Alice Brown"
* Trustee: "Jill Brown in her capacity as trustee for (describe the trust)”
* Incapable person, unrepresented : The person's name, but an application should be brought under Rule 7 to have someone appointed as a litigation guardian to correct irregularity and concurrently amend title of proceedings under Rule 5)
* Incapable or minor person represented by guardian: “Alice Brown, by her litigation Guardian, Jim Brown”
* Party suing in personal and representative capacity: “Jim Brown personally and as litigation Guardian four Alice Brown” (or as estate trustee for the estate of Alice Brown)
* Partnership: - the partnership name, “Siskinds LLP”
* Sole proprietorship or partnership carrying on business under a business name:
* either “Joe’s Coffee Shop”, or “Mary Jones, carrying on business as Joe’s Coffee Shop”
* Company carrying on business under different name: “834261 Ontario Ltd. carrying on business as Joe’s Coffee Shop”
* Unincorporated Association: a member may be authorized to bring a proceeding on behalf of all under rule 12.08; Defendants must individually be named
* Unknown or unascertained party: “Jane Doe” “Jane Doe Corporation” etc. - to be corrected as soon as identity of party is determined by motion under Rule 5;
* *Limitations Act* provides that in an action involving a “misnomer” (i.e. against a “John Doe”) the correct party can be substituted after limitation period has expired, provided the “John Doe” action was brought before the limitation period expired (*Limitations Act*, section 21(2)

# Costs – CJA ss 131, 133(b); Rules 56-58, 1.03

# Costs – Rule 57 (general costs rule)

* Attempts to control costs
	+ Small claims simple procedures for claims of less than $25,000
	+ Simplified Procedure jurisdiction for claims of less than $100,000
	+ Punitive Financial consequences for not using SCC or Simplified Procedure
	+ Rule 49 Offers cost consequences to settle encourage settlement
	+ Increases emphasis on mediation mandated, formal and informal
	+ Case management
	+ Enhancements to Rule 20
	+ Stream line cost determination process
* S 131(1) CJA costs at the discretion of court
	+ *Laval*: determining costs is part of a court’s “inherent jurisdiction to control its processes”
* General principle: **loser indemnifies winner**
	+ Generally the typical question is *extent of indemnification* and the extent to which court might vary that on a case by case basis, using Rule 57
* **Three levels of indemnification (types of costs awarded)**:
	+ Partially (50-60%)
	+ Substantially (80-90%)
	+ Fully (completely)
* **Level of indemnification**
	+ “*partial* indemnity costs” means costs awarded in accordance with Part I of Tariff A
		- Partial indemnity” is something the court thinks, having regard to **Rule 57** and established practice, is “fair and reasonable” in the circumstances
		- it obviously is less than full recovery, and by implication (because “substantial” does not mean “full”), it is also something less than 2/3 recovery
	+ “*substantial* indemnity costs” means costs awarded in an amount that is **1.5 times** what partial indemnity costs
* 57.01(1) **factors to consider** (also use *Anderson* and *Boucher* (state that it is a discretionary decision at the end of the day – up to the judge to decide what is fair and reasonable having regard to the factors in rule 57) on page 1508 for support)
	+ (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, *in addition* to the result in the proceeding and any offer to settle or to contribute made in writing,
	+ (0.a) the *principle of indemnity*, including, where applicable, the *experience of the lawyer* for the party entitled to the costs as well as the *rates charged and the hours spent by that lawyer*;
	+ (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
	+ (a) the amount claimed and the amount recovered in the proceeding;
	+ (b) the apportionment of liability;
	+ (c) the complexity of the proceeding;
	+ (d) the importance of the issues;
	+ (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
	+ (f) whether any step in the proceeding was,
		- (i) improper, vexatious or unnecessary, or
		- (ii) taken through negligence, mistake or excessive caution;
	+ (g) a party’s denial of or refusal to admit anything that should have been admitted;
	+ (h) whether it is appropriate to award any costs or more than one set of costs where a party,
		- (i) commenced separate proceedings for claims that should have been made in one proceeding, or
		- (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
	+ (i) any other matter relevant to the question of costs.
* Keep in mind **1.04 rule of proportionality**
* 57.01(4) **authority of court**
	+ (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act
	+ (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
	+ (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
	+ (c) to award all or part of the costs on a substantial indemnity
	+ (d) to award costs in an amount that represents full indemnity; or
	+ (e) to award costs to a party *acting in person*
* **Which one of the levels will it be?**
	+ Partial: The norm for an action or application
	+ Substantial:
		- Where court wishes to express its disapproval (e.g. *Net Connect*)
			* Dishonesty, fraud, bad faith, malice
			* Unfounded allegations of fraud or dishonesty and not proving it
			* Refusing to cooperate or answer questions
			* Destroying or hiding evidence or assets
			* Prolonging proceeding
			* Abuse of process or scorched earth litigation
			* Contempt of court order
		- Valid rule 49 offer made by P
	+ Full:
		- Contract e.g. Mortgage
		- Court of opinion party should not have to pay anything: Trustees, Litigation
		- guardians, parties under disability, failing to comply with settlement or court
		- order or extraordinarily egregious conduct
* **Motions & Costs**
	+ Contested motion
		- 57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
			* (a) fix the costs of the motion and order them to be paid within 30 days, or
			* (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.
	+ Motion *without notice* – no costs unless court orders otherwise (57.03(3))
	+ *Where no order regarding costs is made*
		- **The classic view:** Judge hearing motion has the exclusive jurisdiction and once the judge’s order is formally “issued and entered” the judge is *functus*. (cannot deal with the issue any further)
		- If order arising from motion to does not refer to costs, that means no costs are recoverable in respect of that motion: *Kerr v. Danier Leather*
			* Remedy: Seek to amend order before it is formally issued
		- **A different view:** If not mentioned, then trial judge fixing costs can allow costs in relation to those motions: *Ledore Investments v Murray* (2002 SCJ)
	+ 57.03(2) Where a party *fails* to pay the costs of a motion, the court may *dismiss* or stay the party’s proceeding, strike out the party’s defence or make such other order as is just.
		- But see cases where court determined it would be unfair to party to grant this remedy
			* Impecunious?
			* Prima facie case or defence?
			* Access to justice may be denied?
* **Disbursements**
	+ 100% recovery unless otherwise ordered
	+ Tariff A indicates what is allowed and the limits
		- Items not listed but reasonably necessary for the litigation yes provided it is fair and reasonable (*Hamfler*)
		- Voluntary procedures outside of litigation e.g. Voluntary mediation no (*Saltsov*)
* **Variations and Deviations in Costs**
	+ Order Denying successful party of costs are “exceptional” (*Georgian Bluffs*)
	+ See cases on page 434
	+ (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
	+ (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
	+ **No costs**
		- Divided Success
		- Unsuccessful Public Interest litigation
		- Novel legal issues on a matter of public importance
		- Impecunious unsuccessful litigant
		- Wrong court or procedure Small Claims Rule 57.05 Simplified
		- Procedure Rule 76.13(3)
		- Misconduct of party who conducted litigation
		- CCAA Insolvency proceeding where no expectation of recovery (*Indalex*)
	+ (2) **Costs against successful party possible**
	+ Costs awarded to or against non party – part of court’s inherent jurisdiction
		- Non party brought in on a motion for discovery, examination or disclosure from non party
		- Motion for or against sealing order
		- Estates
		- Oppression remedies
		- Nominal Plaintiff or “person of straw”
* Costs for **party acting in person** – Unrepresented party or self-represented lawyer
	+ Compensated to the extent that remunerative activity foregone
	+ *Mustang Investigations v Ironside*; *Fong v Chan*
* **Costs Against a Lawyer**
	+ 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
		- (a) *disallowing* costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
		- (b) directing the lawyer to *reimburse* the client for any costs that the client has been ordered to pay to any other party; and
		- (c) requiring the lawyer *personally to pay the costs* of any party
	+ (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a *reasonable opportunity to make representations* to the court.
	+ *Galgano*: not concerned with punishment of lawyer but rather with compensation for conduct which has caused unnecessary and unreasonable costs to be incurred (only when lawyer pursues a goal which is clearly unattainable or clearly derelict in his/her duties as an officer of the court)
		- *Carleton*: costs should not be awarded against a lawyer personally for professional misconduct which does not create *necessary costs*
* Interim/Advance Costs
	+ Rarely exercised; exceptional circumstances:
		- Financial position of parties;
		- Prima facie case
		- Access to justice will be denied
		- Public interest
		- Impact on other parties
* **Multi party costs** (e.g. D collecting from D)
	+ Issue arises where one party may be held responsible in the case of multiple defendants or third parties: to what extent might other parties
	+ Sanderson order
		- Unsuccessful defendant pays costs successful defendant
			* Was it reasonable for the plaintiff to have joined the successful defendant as a party? If so, would a Sanderson order be appropriate in the circumstances (one consideration being whether the successful D will actually be able to collect from unsuccessful D – *Moore v Wienecke*)
	+ Bullock Order
		- Plaintiff may recover costs it is required to pay a successful defendant, from an unsuccessful defendant
		- Was it reasonable for plaintiff to have sued both defendants (either or both may have been liable)
		- Each case is evaluated on its own facts
			* *Rooney v Graham* (2001,OCA)
* **Costs Procedure**
	+ 51.01(6) *Prior* to hearing, parties exchange cost outlines indicating what they are anticipating will be requested in the event that they prevail
		- Encourages reasonableness; will not overreach if you think your client may be the payor
	+ (5) after trial, a party who is awarded costs shall serve a bill of costs
	+ (7) process for fixing costs – court shall devise the simplest, least expensive, and most expeditious process for fixing costs
	+ Assessments – Exception rather than rule
		- Goes to a referee or assessment officer a more formal process affording the opportunity to make submissions, file documents and cross examine or challenge the opposite party’s position, dockets or time spent
		- Results in a certificate of assessment which has the same force and effect as an order or judgment in terms of enforcement options
	+ *Solicitor Act* Assessments
		- A lawyer or his or her client can apply to court to have the lawyer’s bill to the client assessed under the *Solicitors Act*
			* Must be exercised within one year or beyond that, with leave, in exceptional circumstances
			* Procedure involves a hearing with sworn evidence and exhibits and formal submissions
			* Lawyers take this route to turn fees into enforceable certificates (*judgments*)
			* Clients may use to challenge an account and potentially obtain return of money already paid
		- Key considerations:
			* what did the parties agreed to (initial retainer)
			* any agreed changes to retainer
			* Was client kept informed and warned of costs
			* Did the lawyer do anything that was unnecessary or beyond scope of retainer
			* Were the lawyer’s services of some value
			* Is the fee reasonable in light of value and complexity of matters in issue, importance to client, result achieved (none of these being singularly determinative)
			* Did client instruct lawyer to proceed in light of warning regarding costs or risks or value to client (and is this documented)
* Appealing cost orders
	+ S 133 CJA **no appeal** lies **w/o leave** where appeal is (b) *only* as to costs
	+ Standard of reasonableness applies (same standard as judicial review with deference to tribunal’s decision making)
		- Granted in the most unusual cases, very sparingly and in the most obvious cases
		- Judge must have acted on a wrong principle. Misapprehended significant facts or determined the matter in a non judicial manner

# 56- Security for costs

* Available for **defendant/respondent** (not P)
	+ In some cases available for D by counterclaim (i.e. P where the D counterclaimed and thus P is a D to counterclaim) (if counterclaim raises entirely new issues and expands scope of proceeding)
		- E.g. debt collection turns into expensive professional negligence action)
* **When available**: 56.03 After statement of defence or notice of appearance delivered
	+ Can be brought at any time but there are risks in waiting. In 423322 Ont Ltd v Bank of Montreal Motion denied when plaintiff waited for four years
* 56.01(1) **Where available**
	+ plaintiff or respondent ordinarily resident *outside* of Ontario
		- 56.02 anyone served w/ originating process can demand to know whether P is ordinarily resident in Ontario
	+ Plaintiff or respondent has another proceeding for same relief elsewhere
	+ Defendant or respondent *has* unpaid cost order against plaintiff or applicant
	+ Plaintiff or applicant is a corporation or nominal plaintiff and there is *good reason* to believe it has insufficient assets in Ontario to pay costs of defendant or respondent
	+ *Good reason* to believe action or application is frivolous and vexatious **and** plaintiff has insufficient assets etc.
	+ Statute entitles defendant or respondent to security for costs (BIA, Solicitors Act)
* Note: *Reset Electronics*: where P impecunious, court could still not order for security for costs (where D is large corporation and P is impecunious and cannot raise funds – allowed to proceed)
* 56.04 amount and form of security and time determined by court
* 56.05 after order until security given, P cannot proceed with any step of proceeding except w/ leave
* 56.06 default of P – may dismiss action
* **Relief**
	+ If defendant’s alleged wrongful conduct has caused plaintiff’s financial position it
	+ may be denied relief (*Mazzika*)
	+ Proportionality is relevant consideration (*Moosa*)
	+ Shifting onus moving party shows it appears ground established and then responding party must demonstrate grounds to apply e.g. Resides in Ontario or has assets which are available to respond to and will be capable of satisfying adverse costs decision
	+ defence: plaintiff is impecunious but has meritorious case and terms will deny it access to justice (*Rest Electronics*)
		- Corporation can take advantage of impecunious argument, but to do so, it will have to establish it does not have access to funds through shareholders and that it has made unsuccessful attempts to borrow funds
* 56.09 for ANY part (not just D)
	+ Any party may be ordered to provide security as a term of relief in respect of any motion being granted

# Costs – improper use of Rule 20 (summary judgment motion)

* 20.06 Court may order costs on a substantial indemnity basis
	+ (a) if a party acted “unreasonably” in making or responding to a motion or acted in bad faith for the purpose of delay
		- Unreasonable example
		- Party bringing motion should have known that motion had no chance of success
		- Includes motion abandoned before it is argued (if established that motion unreasonably sought)
	+ (b) party acted in bad faith *AND* for the purpose of delay
		- Bringing a motion that will be lost just to delay prosecution of action or to simply cost other side money
	+ Onus on party seeking costs to establish grounds (*Skycharter* v Eaton)

# Cost consequences imposed by other rules

* If action discontinued other parties may bring motion for costs – Rules 23 and 24
* For discontinued actions:
	+ If party never had a bona fide claim, costs may be ordered on substantial indemnity basis (*Enerworks v Glenbarra* (2016, Master))
	+ If action is discontinued, and plaintiff had a bona fide claim but discontinued for other reasons, it may avoid costs (*Golda* Development v Dawe)
* If motion is abandoned, the responding party is entitled to costs of motion unless court orders otherwise (abandoning party must move for relief and bears onus of establishing actions were reasonable) (*Skycharter v Eaton*)
* A party who Cross-examines on affidavit must pay the partial indemnity costs of *every adverse part*y in respect of the cross examination unless court orders otherwise. Rule 39.024(b)
* 50.12 – Cost of Pretrial Conference-court may order-would be a sanction or punitive measure-party did not attend or did not participate or misconduct necessitated further pretrial conference
* Rule 51 –Refusal to admit truth/authenticity of act or document may be taken into account by court in exercising its discretion with respect to costs
	+ Did that refusal or denial prolong trial or inconvenience a non-party witness?
* AND all situations where court is invited to “make such order as is just” –setting aside default or dismissal, extensions or abridgments, permitting step to be taken late, adjournment, status hearings to explain delay etc.

# 76- simplified procedure

* **When mandatory** 76.02
	+ Plaintiff’s claim is *exclusively* for money, or real or personal property (aka not injunction, other relief)
	+ The amount of the monetary claim $100,000 or less (excluding interest or costs) – as of date commenced
	+ Only available for actions
	+ Multiple Ps 🡪 each claim considered separately
	+ Multiple Ds 🡪 each D considered separately
* **How** to bring it 🡪 State in originating process that you’re relying on simplified procedure
* **On consent** – Even if it doesn’t fit into the criteria: Plaintiff may also **elect** to use Rule 76, *unless Defendant objects* under 76.02(5)
* **Consequences for failing to use simplified procedure where mandatory** – 76.13
	+ (2)/(3) If the plaintiff receives **judgment** with a value of *less than* $100,000 exclusive of interests and costs the plaintiff shall not recover any costs **unless**:
		- the action was proceeding under Rule 76 *at the commencement of trial*,
		- the plaintiff satisfies the court that it was reasonable to have commenced and continued action under the ordinary procedure, OR
			* *Hunt v TD Securities*
				+ In light of complexities and unsettled matters of law involved it could not be reasonably known until the conclusion of the matter that the damage award could be within the monetary jurisdiction of Small Claims Court or Rule 76. Cost sanctions were not appropriate.
		- The plaintiff satisfies the court that it was reasonable for the plaintiff to have allowed action to continue under ordinary procedure BY not abandoning claims or parts of claims that do not comply with sub rule (order for declaration, injunctive relief)
	+ (4) Overrides Rule 49.10 – no offer to settle can affect it
	+ (5) Does not apply if taken out of Rule 76 due to counterclaim, cross claim or third party claimPlaintiff may also be ordered to pay defendant’s costs
	+ If claim is for property and defendant objected to proceeding under Rule 76 on the grounds it is worth more than $100,000, and the court finds that value is less than $101,000, defendant shall pay on a substantial indemnity basis, costs that would not have been incurred in the action, if it had proceeded under Rule 76.
	+ Complicated cases may be exempted from cost consequence (i.e. it may be deemed to have been reasonable to keep them in ordinary procedure)
		- Personal injury claims with complicating features–chronic pain, PTSD or head injuries maybe particularly difficult to evaluate
* **What’s different?**
	+ Must provide copies of all Schedule A documents along with AOD
	+ AOD includes schedule - must name and provide contact information for all persons who might reasonably be expected to have knowledge of matters in issue and cannot call anyone outside of that list as witness without court’s permission
	+ No cross-examinations on affidavits permitted
	+ *No written discovery* allowed
	+ Parties’ rights of oral discovery limited to 2 hours, regardless of the number of parties to be examined
	+ Different Notice of Motion form (Form 76(B)
	+ Basic Motions may be made *without supporting material* or motion record
	+ Basic procedural motions that are uncontested or on consent may be dealt with by registrar
	+ No formal order required disposition of motion will be recorded on motion form, unless order is being appealed
	+ Mandatory settlement discussion within 60 days of delivery of first statement of defence or notice of intent to defend to consider whether all documents have been
	+ Matter is set down for trial within 180 days of first notice of intent to defend
	+ Registrar serves notice of pretrial conference
	+ Different filings for pretrial conference (see Rule 76.10)
	+ At pre-trial conference, judge shall determine mode of trial (or parties can agree upon mode)
	+ Summary Trial (76.10)
		- each party puts its case in by affidavit and a 10 minute examination of affiant, and opposite party may cross-examine, with each parties cross-examinations limited to 50 minutes
		- Oral argument for each party limited to 45 minutes
		- Judge is expected to deliver judgment immediately thereafter

# Small claims court

* Has its own set of rules (simpler)
* Has jurisdiction in any action where the amount claimed or the value of property in issue does not exceed the prescribed amount i.e. $25,000, changing to $35,000 on January 1, 2020
* Does not have the right to issue declarations or grant equitable relief (CJA ss 96 and 97)
* All judges of the Superior Court are judges of Small Claims Court
	+ In addition and typically, the court is presided over by deputy judges
* **Appeals**
	+ Appeal lies to Divisional Court (s 31)
	+ But cases with the value of less than $2500 cannot be appealed (Changing to $3500 on January 1, 2020)
* S 25 CJA: court’s mandate: The court is to determine questions of law in fact in a summary way and "make such order as is considered just and agreeable to good conscience
* This section does not abrogate basic principles of procedural fairness, jurisdiction or statutory interpretation (*Princess*)
* S 27 CJA: Unless another statute provides to the contrary, the court may admit as evidence and act upon any oral testimony or any document or other thing, “*whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court”*
	+ However, expert reports should still be prepared in writing and served at least 30 days in advance of trial subject to a deputy judges discretion to admit an expert report and hear testimony from expert in other cases (*Prohaska*)’
	+ Product for counsel to give notices under Evidence Act
* **Cost Recovery Limitations**
	+ CJA s. 29: an award of costs other than disbursements shall not exceed **15% of the amount claimed** (or the value of the property in issue) - currently $3750
	+ **But you can add claim and counterclaim together to get the amount claimed** – *10.1 v 2248951 Ontario Inc.* ( 2018 Div Ct)
	+ A judge may deviate from this if the court "*considers it necessary in the interests of justice to penalize a party* or party’s representative for *unreasonable behaviour* in the proceeding"
* Different procedure
	+ no special rule relating to time periods of seven days or less
	+ Parties are expected to attach relevant documents to their pleadings
	+ If not attached, 14 days before *settlement conference* each party will serve on the other a copy of any document to be relied upon at trial, including an *expert report* and a *list of proposed witnesses and other persons with knowledge of the matters in dispute*
	+ At a settlement conference the deputy judge can direct the production of further documents
* Motions
	+ Parties can bring motions to add parties, amend pleadings, strike out all or part of a document, etc.
* Rule 12: A judge hearing a motion can order that an action be stayed or dismissed
* Deputy judges have interpreted the rules as giving them the ability to grant summary judgement in certain cases
* Rule 14: offers to settle made at least seven days before trial can have cost consequences: the court may award a party an amount not exceeding twice the costs affordable to a successful party from the date the offer was served
	+ This can allow party to circumvent 15% cap *Barrie Trim v Heath* (2010 Div Ct)
* Trials
	+ A document or written statement that has been served on all parties at least 30 days prior to trial shall be received in evidence unless the trial judge orders otherwise
	+ This applies to a signed written statement of any witness and a written expert report to the extent that the statement relates to facts and opinions to which the witness would be permitted to testify in person
	+ If the adverse party wants to cross-examine the witness whose evidence is being adduced in this manner, the onus is upon him or her to summons the witness
* Enforcement
	+ Procedures mirror those of the Rules Of Civil Procedure
	+ S 30 CJA A person can be held in contempt and subject to imprisonment by Small Claims Court judge for up to five days for contempt

# Orders and Judgments – rule 59, CJA 97-121

* “order” includes judgment (1.03)
* “judgment” means 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
* IN addition to *damages, interest and costs*, and *procedural orders*, there are numerous other orders:
	+ Declaratory orders CJA 97
		- 97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.
	+ Injunctive relief
	+ Interlocutory relief s 101
	+ injunctions, mandatory orders, appt of receiver. CPL
	+ Relief against forfeiture and penalties s 98
	+ Vesting orders s 100
	+ Interim recovery of personal property 104
	+ Stay of proceedings 106
	+ Vexatious proceedings s 140
* **Endorsement by judge/officer**
	+ 59.02 (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, unless the circumstances make it impractical to do so.
	+ (2) Where written reasons are delivered, (a) in an appellate court, an endorsement is not required; (b) in any other court, the endorsement may consist of a reference to the reasons (and copy of reasons filed)
* **Formalizing order**
	+ 59.02 endorsement or written reasons
	+ 59.03 Order prepared by either party and sent to other parties for approval of its form
	+ 59.04 submit approved draft to Registrar who reviews and if satisfies approves form but otherwise goes to the judge
	+ 59.05 stamped, issued, and entered
	+ 59.06 amending order that contains error arising from accidental slip or omission on motion
	+ CAN CIRCUMVENT by having a draft order prepared at hearing
	+ 59.07 satisfaction of order (formal acknowledgement that order complied with)
* CJA 121 **Foreign money obligations** – order shall require payment in Canadian currency sufficient to purchase the amount of obligation in the foreign currency at a bank in Ontario
* CJA s 123 *inability* to give decision of a judge – panel of judges – remaining judges can decide
* CJA s 123(4) inability to give decision; judge sitting alone; party may make motion for order that he matter be reheard
* 123(5) *failure* to give decision
	+ Within 6 months in case of judgment
	+ In any other case 3 months
	+ Chief judge may extend time in which decision may be given and I necessary relieve judge of duties until decision is given
	+ (6) continued failure – further extension or report failure to appropriate judicial council (also party can make motion to rehear matter)

# Enforcing Orders rule 60, 34.15, CJA 141

* **4 types of orders that may need enforcement**
	+ Payment of money
		- Standard tools: writ of seizure and sale, seizure and sale of land or property, garnishment, examination in aid of execution, receivership, BIA
	+ Repossession of Land or Property
	+ Directing a judicial or administrative official or enforcement authority to do something
	+ Directing a party or non party to perform an Act or Cease or Refrain from an activity
* 60.07 **Writ of seizure and sale**
	+ (5.1) filing with Sherriff
	+ Immediate effect of filing
	+ (13) Direction to enforce
	+ (17) Sale of land 4 month and 6 month rules
	+ Complications:
		- (1) Change in debtor name
		- (6) Expires within 6 years (renewal allowed)
		- (12.2) Assignment
* 60.08 **Garnishment**
	+ (2) 6 year limit, otherwise w/ leave
	+ Excepted property or entitlements
		- S 2(1) Executions act
			* Cannot take:
				+ 1. Necessary clothing of the debtor and the debtor’s dependants.
				+ 2. Household furnishings and appliances that are of a value not exceeding the prescribed amount.
				+ 3. Tools and other personal property of the debtor, not exceeding the prescribed amount in value, that are used by the debtor to earn income from the debtor’s occupation.
				+ 4. One motor vehicle that is of a value not exceeding the prescribed amount.
				+ 5. Personal property prescribed by the regulations that is of a value not exceeding the prescribed amount.
		- S 7(2) Wages act: 20% of wage allowed to be taken
		- Government pensions
* Repossession of land or property
	+ Writ of delivery
	+ 60.09 Writ of sequestration w/ leave
		- Leave required; must satisfy court that other enforcement measures are likely to be ineffective
	+ 60.10 writ of possession w/ leave
		- For land
		- Court must be satisfied that all person in actual possession of land have received sufficient notice to enable them to apply for relief
		- Lasts for one year, subject to renewal
* Directing a judicial or administrative official or enforcement authority to do something or appointing a court appointed receiver to do something
	+ Court Registrar, Sherriff , lower Court or Judge, Police, court appointed receiver, Director of Land Title or Land Registrar, individuals responsible for administering a government registry
* S 141 (1) CJA Unless an Act provides otherwise, orders of a court arising out of a
* civil proceeding and enforceable in Ontario shall be directed to a sheriff for
* enforcement.
	+ (2) police to assist sheriff
	+ 142 A person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario.
* 60.11 **Contempt orders**
	+ 60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11
	+ Obtained on motion; motion served personally; specific rules required for affidavit
	+ (5) Contents of order
		- In disposing of a motion under sub rule (1), the judge may
		- make such order as is just, and where a finding of contempt is made,
		- the judge may order that the person in contempt,
		- (a) be imprisoned for such period and on such terms as are just;
		- (b) be imprisoned if the person fails to comply with a term of the
		- order;
		- (c) pay a fine;
		- (d) do or refrain from doing an act;
		- (e) pay such costs as are just; and
		- (f) comply with any other order that the judge considers necessary,
		- and may grant leave to issue a writ of sequestration under rule 60.09
		- against the person’s property.
	+ (6) Where a corporation is in contempt, the judge may also make an order under sub rule (5) against *any officer or director* of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 *against his or her property*.
	+ (7) An order under sub rule (5) for imprisonment may be enforced by the issue of a warrant of committal
* 60.18 **examination in aid of execution**
	+ once every twelve months
	+ can require debtor to attend for examination (and move to have debtor held in contempt if fails to attend)
	+ Can ask questions about assets, income, debts
	+ If corporate debtor can choose officer or director of corp to examine
* 60.19 **costs of enforcement**
	+ issuing serving, filing, enforcement and renewals and conducting Examination in Aid of Execution are added to debt
		- Fees paid to court
		- Fees on Partial indemnity basis and/or as prescribed by rule, or fixed by sheriff,
		- subject to right to seek increase from court

# Appeals

* Applicable Rules
	+ Courts of Justice Act
		- Sections 6, 19, 119, 132, 134
	+ Rules of Civil Procedure
		- Rules 61 to 63 (CONTINUES ON NEXT PAGE)



* **Appeal court jurisdiction**
	+ S 6 CJA 6 An appeal lies to the Court of Appeal from
		- (1)(a) order from divisional court on question that is not a question of fact alone, *with leave*
		- (1)(b) a final order of a judge of the Superior Court of Justice, *except* an order for not more than $50,000 (s 19) or order from which an appeal lies to the divisional court
		- (2) combining appeals
	+ CoA standard of review
		- On legal issues, the standard is correctness. Did the judge apply an incorrect legal test?
		- On factual issues, the test is whether the judge committed a “palpable and overriding error.”
* **Divisional court jurisdiction**
	+ S 19 an appeal lies to the divisional court from
		- (1)(a) a final order of a judge of the SCJ of *not* more than $50,000 exclusive of costs, or dismissing a claim for not more than that amount;
		- (b) interlocutory order of judge of SCJ w/ leave as provided in rules
		- (c) final order of *master* (appeal of interlocutory order of master lies to SCJ s 17)
* **Final vs Interlocutory**
	+ If the order finally disposes of the rights of the parties it is final; otherwise it is interlocutory (1932)
	+ An order granting judgment, or dismissing an action, is final.
	+ An order granting summary judgment is final; whereas an order dismissing a motion for summary judgment generally is interlocutory (except if a question of law is decided and is *res judicata*)
	+ An order dismissing a motion to strike a claim is interlocutory.
	+ An order finally determining a limitation issue is final.
	+ An order determining a point of law is final; whereas an order dismissing a motion to determine a point of law is interlocutory.
	+ Procedural or production orders among the parties are interlocutory.
* **Powers/Procedures on Appeal**
	+ S 132 CJA A judge shall not sit as a member of a court hearing an appeal from his or her own decision.
	+ S 133 CJA no appeal lies w/o leave to which the appeal is to be taken from a consent order or discretionary costs order
	+ **Powers** – S 134(1) unless provided otherwise, court to which an appeal is taken may,
		- * (a) make any order that ought to or could have bene made by the court appealed from
			* (b) order a new trial
				+ (6) a court shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred

(7) where substantial wrong, new trial can be ordered only for certain parts / certain parties

* + - * (c) make any other order that is considered just
		- (2) may make an interim order
		- (3) quash appeal
		- (4) a court to which an appeal is taken may,
			* Draw inferences of fact except that no inference shall be drawn that is inconsistent w/ finding that has not been set aside
			* Receive further evidence by affidavit, oral examination, etc.
			* Direct a reference or trial of an issue
* **Divisional Court Appeal** – rules 61/62
	+ 61.03 Notice of Motion for Leave within 15 days *after the making of the order* or decision unless a statute provides otherwise
	+ Rule 62.02(2) The motion for leave to appeal shall be heard in **writing**
	+ Rule 62.02(4) Leave to appeal from an interlocutory order *shall not be granted unless*,
		- (a) there is a conflicting decision…and it is…desirable that leave be granted; or
		- (b) there appears… good reason to doubt the correctness of the order in question *and* the proposed appeal involves matters of such importance that, in the panel’s opinion, leave to appeal should be granted
		- The test for granting leave from an interlocutory order is onerous. Leave will not be granted where decision is well-reasoned and issued are not of general importance
	+ 61.03.1 for court of appeal
* **Commencement of appeal**
	+ 61.04 Notice of appeal **30 days**
	+ 61.08 Notice of cross-appeal 15 days
* 61.05 certificate or agreement respecting evidence
	+ Basically rules regarding only providing select evidence that’s relevant otherwise (8) cost sanctions for unnecessary evidence – see page 1627
* 61.06 Security for costs of appeal
* 61.08 amendment of appeal – may be amended before perfected
* 61.09 perfecting appeals
	+ Where no transcript of evidence, within 30 days
	+ Where transcript of evidence, 60 days
	+ List of procedural steps 61.10
		- Appeal Book and Compendium, includes notice of appeal, order, reasons, and excerpts from transcripts and exhibits referred to in the factum
		- 61.10.1 Exhibit Book
* 61.11/12 factums
* 61.13 dismissal for delay
* 61.14 abandoned appeals – and costs regarding it
* 61.15 cross-appeal where appeal dismissed for delay
* 61.16 motions in appellate court (generally rule 37 applies)
* **Appeal from Interlocutory orders – rule 62**
	+ Nothing too important – CJA most important with regard to these rules. Mostly procedural steps

# Class actions

* The class action is a procedural device for people who have suffered a common wrong
	+ three public policy purposes that underlie the modern class action are: (1) access to justice; (2) behaviour modification; and (3) judicial economy (including avoidance of multiplicity of proceedings)
* **Steps in a class proceeding**
	+ Commencement of action or application – *CPA* s. 2(1); RCP
	+ Appointment of case management judge – s. 34(1)
	+ Motion for certification – *CPA* s. 2(2) to 6; RCP
	+ If successful on certification motion:
		- Notice of certification and opt out – *CPA* s. 9 and 17
		- Discovery: documentary and examinations – *CPA* s. 15, RCP
		- Pretrial conference - RCP
		- Common issues trial – RCP; *CPA* s. 27
		- Individual issues trials (or alternative dispute resolution of individual issues) – *CPA* s. 25; RCP
	+ With settlement:
		- if necessary, consent certification
		- motions for approval of settlement and class counsel fee – *CPA* s. 29, 31, 32, 33
		- administration of the settlement
	+ costs – representative plaintiff (usually indemnified by law firm)
* **Motion for certification**
	+ Burden of proof: “some basis in fact” (*Pro-Sys*) – the class representative must show *some basis in fact* for each of the certification requirements set out
	+ S 5 *CPA*: The court shall certify a class proceeding if:
		- (a) the pleadings disclose a cause of action;
			* Low standard – does not have to be supported by evidence (unlike all other certification requirements)
			* *Pro-Sys*: a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff’s claim cannot succeed
		- (b) there is an identifiable class of two persons that would be represented by the representative plaintiff (or defendant);
			* *Cloud*: proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action
				+ In other words, each class member must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in resolution of the common issues
		- (c) the claims (or defences) of the class members raise common issues;
			* S 1 CPA “common issues” means,
				+ (a) 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
			* S 6 CPA The court shall not refuse to certify a proceeding as a class due to: individualized damages, separate contracts, differing remedies for class members, unknown identity or number of class members, or existence of a subclass
			* *Pro-Sys*
				+ (1) The commonality question should be approached purposively.
				+ (2) An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
				+ (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
				+ (4) It is not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
				+ (5) Success for one class member must be success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.
			* *Cloud*
				+ This requirement has been described by this court as a low bar
				+ In other words, an issue can constitute a substantive ingredient of the claims and satisfy 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution (paragraph 53).
		- (d) a class proceeding would be the preferable procedure for resolution of the common issues; and
			* preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification
		- (e) there is a suitable representative plaintiff (or defendant)
* **Carriage Motions**
	+ Function of when more than one law firm and P is capable of representing the same class (who gets to represent the class?)
	+ Courts developed test – CPA allows them to: s 12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
	+ *Vitapharm*
		- Main criterion “is in the best interests of all putative class members while at the same time fair to the Defendants”
		- Court identified series of **factors** to be considered:
			* Nature of and scope of cause of actions to be advanced
			* *Theories advanced* by counsel as being supportive of the claims advanced
			* The state of each class action, including preparation
			* The state and involvement of the representative plaintiffs
			* Relative priority of commencement
			* *Resources* and *expertise of counsel*
			* Court also considered existence of a conflict between retail purchasers and other purchasers of vitamins
		- Held: Ultimately sided with firm that court felt had the most cohesive and comprehensive theory of the case
			* Though a lot of factors were neutral (e.g. expertise of counsel)
	+ *Valeant*
		- More factors to consider added to Vitapharm factors:
			* State of the action and preparation
			* Fee and consortium arrangements
			* Class Definition
			* Defendant selection
			* Correlation of Plaintiffs and Defendants
			* Class Period
			* Prospects of Success
			* Interrelationship between class actions in different jurisdictions
* **Deviations from standard civil litigation procedures**
	+ S 35 The rules of court apply to class proceedings
	+ S 12 🡪 The court may determine the conduct of the proceeding
		- s. 12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
		- *Mangan*: the court has discretion pursuant to s. 12 of the *CPA* to dispense with the requirement that the defence be filed in advance of the certification motion
			* in the preponderance of cases the statement of defence will not be required for determination of the certification motion
	+ S 13 🡪 the court may stay any other proceeding
		- s. 13 The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it consider appropriate.
	+ *Cannon*: The general principle in class actions is that certification should be the first procedural motion to be heard
		- There is ample authority, however, for the proposition that Rule 21 and Rule 20 (summary judgment) motions and motions to determine evidentiary issues can be brought before certification in appropriate cases
		- The Court held that in this case the Rule 21 motion would be held at the same time as certification
		- Pre-certification motions – factors to consider
			* Whether the motion will dispose of the entire proceeding or substantially narrow the issues to be determined;
			* The likelihood of delays and costs associated with the motion;
			* Whether the outcome of the motion will promote settlement;
			* Whether the motion could give rise to interlocutory appeals that would affect certification;
			* The interests of economy and judicial efficiency; and
			* Generally, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding
* **Multijurisdictional issues in class proceedings**
	+ Result is frequent multijurisdictional issues that courts try to resolve through various ad hoc decisions
	+ *Canada Post Corp v. Lepine*
		- Canada Post sold CD-ROMS across Canada promising lifetime internet service that was discontinued one year after sales began
		- Series of class actions commenced across Canada, including in Quebec and Ontario
		- Ontario court approved a settlement agreement that had been agreed to by plaintiffs in BC and Ontario actions that encompassed Quebec residents
		- Canada Post tried to then get agreement approved in Quebec and have extant Quebec action discontinued
		- Quebec action was certified (“authorized”) the day after the Ontario settlement was approved, over the protestations of Quebec counsel
		- Hope was that these facts would put the SCC in a position to develop a mechanism or rules to resolve interjurisdictional disputes
		- But they mostly punted on the issue, focusing on the intricacies of Quebec civil procedure regarding the recognition of foreign judgments and whether it was appropriate to recognize the judgment of the Ontario court
		- Court basically said, no, Ontario judgment can’t be recognized, notwithstanding the clear connection between Ontario and the Defendant because the notice to class informing them of the existence didn’t make clear the implications for Quebec residents
	+ *Mignacca*
		- Two certified class actions, with overlapping national classes, in two different jurisdictions
		- Defendant attempted to stay Ontario action in favour of Saskatchewan, arguing principle of first certified action trumps all other actions and pointing out that constitution requires mutual recognition of judgment
		- Lower court and Divisional Court rejected that argument and pointed out that certified actions are merely an interlocutory motion
* **Settlement approval process**
	+ 29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only *with the approval* of the court, on such terms as the court considers appropriate
		- (2) A settlement of a class proceeding is not binding unless *approved* by the court.
		- (3) A settlement of a class proceeding that is approved by the court binds all class members
		- (4) in dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
		- (a) an account of the conduct of the proceedings;
		- (b) a statement of the result of the proceedings; and
		- (c) a description of any plan for distributing settlement funds
	+ *Smith v National Money Mart*
		- Relevant factors in assessing the reasonableness of class counsel fees:
			* The factual and legal complexities of the matters dealt with
			* The risk undertaken, including the risk that the matter might not be certified
			* The degree of responsibility assumed by class counsel
			* The monetary value of the matters in issue
			* The importance of the matter to the class
			* The degree of skill and competence demonstrated by class counsel
			* The results achieved
			* The ability of the class to pay
			* The expectations of the class as to the amount of the fees
			* The opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement
	+ *Lesie*: judicial approval of settlements should “viewed with some suspicion” and “seriously scrutinized by judges” given that the parties interests align and there is the potential for conflicts of interests
* **Third Party Funding**
	+ Firms have a finite capacity to bear the risk and at same time, the potential upside to cases are significant and risk/reward proposition is enticing to some types of investors – therefore third party funding exists
	+ Traditionally courts were reluctant due to principles of champerty and maintenance – absolute bar on third parties benefiting from civil litigation
	+ As a result, the *Class Proceedings Act* has created a public entity, the Class Proceedings Fund that offers cost protection in exchange of 10% of settlement
	+ Courts have mostly distinguished champerty and maintenance and have begun to approve funding agreements in class proceedings
	+ *Houle*: Court approved a hybrid retainer that sees lawyer mostly paid hourly rate in exchange for a most of fee upside