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Practice Material
Civil

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CIVIL

CONTENTS

PRELIMINARY MATTERS

DISCOVERY

PREPARATION FOR TRIAL

APPENDICES—*NOT AVAILABLE IN ONLINE VERSION*

TRIAL

COSTS

INTEREST

COLLECTIONS

Chapter 1

Preliminary Matters[1]

[§1.01] Introduction to These Materials

The purpose of the *Practice Material: Civil* is to introduce the law of civil procedure in British Columbia, as well as to provide an introduction to principles of advocacy. These materials do not address subtleties of advocacy, but at the end of this chapter is a list of resources on that and other topics.

These materials provide an overview of the process, starting with meeting the client, determining the procedural options and gathering evidence. The next chapters address dispute resolution, pre-trial procedures, chambers and abbreviated trial processes. The next chapters cover preparing for trial and conducting a full trial. Later chapters address costs and interest, before the final chapter on collections, which deals with collecting debts either before or after judgment.

Practice in the BC Supreme Court, including the procedure for initiating a civil claim, is governed by the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR"). In these *Civil* chapters, rules under the SCCR are referred to using the abbreviation "SCCR" (for example, Rule 1-1 under the SCCR is "SCCR 1-1").

The SCCR came into force in July 2010, replacing the Rules of Court, B.C. Reg. 22/90 (the "former Rules") and introducing significant changes to practice. As such, lawyers must be cautious when relying on case law decided under the former Rules.

Although they take the form of regulations, the SCCR have the force of statute and can alter substantive rights (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] 2 S.C.R. 774 at para. 5). A list of helpful resources dealing with the SCCR can be found at the end of this chapter.

Practice in the Small Claims Court (a branch of the Provincial Court) is governed by the Small Claims Rules, B.C. Reg. 261/93. While the Small Claims Court and procedures in that court are outlined briefly in this chapter, the focus of this chapter is procedures in the Supreme Court. Lawyers who will be appearing in Small Claims Court need to consult the Small Claims Rules and guides that are specific to procedures in that court. Some resources are listed at the end of this chapter.

Due to the COVID-19 pandemic in 2020, the Provincial Court, Supreme Court, and Court of Appeal have all issued practice directives or notices related to matters such as court protocols, scheduling, remote appearances, and deadlines for filing materials. The *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8 provides authority for these measures. It is expected to be repealed December 31, 2022. These *Civil* chapters do not generally cover these or other COVID-19 related measures. For information on these measures, see the court websites.

[§1.02] Effective Advocacy

Advocacy is not confined to the courtroom. Indeed, most disputes never reach the courthouse and very few actions ever go to trial. The successful advocate is one who achieves a favourable result for the client, whether by way of settlement or at trial. Generally, a settlement is preferable to a trial, from a client's perspective—it is quicker, less stressful and less expensive.

The keys to effective advocacy are *preparation* and *organization*. Preparation is necessary at all stages of an action, beginning with the initial client interview. Without properly preparing the facts, counsel will not be effective at the bargaining table, nor will counsel be effective in direct or cross-examination if witnesses and documents are not carefully prepared.

Organization accompanies preparation. If a legal practice is organized logically, using checklists, reminders, and retrieval systems, it becomes much easier to prepare for hearings. Additionally, organization helps to remove much of the stress from trial practice. You do not want to discover a week before trial that a key witness is on an extended vacation and had not been informed of the pending trial date. A list of helpful resources that offer advice on various aspects of advocacy can be found at the end of this chapter.

[§1.03] Meeting the Client

1. Purpose

As plaintiff's counsel, the lawyer's first contact with the prospective client is when they seek legal advice about their claim. As defence counsel, first contact with the client is often not until a claim has been issued and served upon the client.

The first time a lawyer speaks to a client is often by telephone. It is important to conduct a conflict check as early as possible, before the potential client discloses any confidential information. See *Practice Material: Professionalism: Practice Management*, §3.03 for further reading. Once you have checked for conflicts, it is advisable to have the

[1] **Ellen S. Hong** of Hamilton Duncan revised this chapter in December 2020, 2019 and 2018. It was previously updated by Mark W. Mounteer (2016, 2012, and 2011); Adrienne G. Atherton (2004–2008); C. Michelle Tribe-Soiseth (2003); F. Matthew Kirchner (2002); Margaret M. MacKinnon and David R. MacKenzie (2001); Leonard M. Cohen (1996); and Mark M. Skorah, QC (1995).

prospective client send the following in advance of the first meeting:

- a detailed, chronological outline of the facts;
- all relevant documents; and
- a list of all persons involved, including contact particulars.

The purposes of the first meeting are essentially the same for both plaintiff's counsel and defence counsel. You want to interview the client carefully to:

(a) obtain all facts, whether favourable or unfavourable, relative to the claim;

(b) provide the client with initial advice as to the merits of the claim or defence;

(c) establish the basis of a proper solicitor-client relationship;

(d) obtain sources for further investigation, including all relevant documents;

(e) obtain information for the purposes of settlement; and

(f) obtain the facts necessary to draft the pleadings.

Sometimes it may take more than one meeting to accomplish these goals.

2. Matters Covered

Some lawyers specializing in certain types of litigation find it helpful to develop a checklist of the matters to be covered. Sample checklists appear in the following resources:

- The Law Society's *Practice Checklists Manual*, available on the Law Society website (www.lawsociety.bc.ca);
- *British Columbia Motor Vehicle Accident Claims Practice Manual* (Vancouver: CLEBC); and
- *Bender's Forms of Discovery*.

Regardless of the type of litigation, there are certain matters that must be covered:

(a) Discuss the litigation process and the procedures in resolving the claim, unless the client is experienced with litigation.

(b) Discuss the cost of litigation, including legal fees, disbursements and the costs the client will have to pay if they lose.

(c) Discuss settlement. Explain that litigation is an expensive process, and ensure that the client does not have an unrealistic view of the case. No case is a guaranteed winner. While it is not always possible to assess a case at the outset, advise the client of the risks involved. Note the Canons of Legal Ethics in rules 2.1-3(a) and (c) of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

(d) Discuss alternatives to a court action, such as mediation or arbitration. Often clients will be unaware of the benefits these procedures offer.

(e) Find out whether the client has consulted another lawyer on the same matter. If the client was dissatisfied with another lawyer, find out why. It may be that the client does not have a reasonable case, or is a troublesome client who is holding something back. It is also important to know whether an action has already been commenced, if there are fees outstanding, and, in general, what is the present relationship between the client and the former solicitor.

(f) Consider whether the matter is within your realm of competence. It is a disservice to your client as well as to you to take on a case that exceeds your expertise.

(g) Identify the client and, if necessary, verify that identity as required by the Law Society Rules.

(h) Confirm that the client is competent to instruct counsel. If the client is a corporation, ensure that the prosecution or defence of the action is authorized. If the client is under a disability, then the client requires a litigation guardian.

3. Record

It is important to keep a detailed record of the first client interview. This record will not only help you throughout the file, but also protect you if something happens to the relationship with the client and there is a dispute about what was said at the first meeting. The record may be in the form of written notes or an audio recording. If it is an audio recording, tell the client beforehand that the meeting is being recorded. In either case, send a typed copy of the record to the client for any comments, additions or deletions. Ultimately, you may well want this record, or parts of it, to be part of the retainer letter or to form an appendix to the retainer letter.

[§1.04] The Retainer

1. General

Retainers, retainer letters, and fee arrangements are discussed in the *Practice Material: Professionalism: Practice Management*, §5.05. Avoid giving clients unrealistic expectations about how long the case will take and how much money it will cost them. Give clients a realistic picture of how litigation and negotiation works. Although you cannot estimate the exact fees involved, you can approxi-

mate certain expenses, such as what it will cost to prepare a claim or defence, or to take the case through examinations for discovery.

Certain types of actions—for example, class actions—have additional requirements that must be included in the retainer agreement (*Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 38).

2. Obtain Instructions

The need for the lawyer to obtain proper instructions is discussed in the *Practice Material: Professionalism: Ethics*, §6.03 (Authority of a Lawyer to Act on a Client's Behalf) and §6.04 (Authority to Settle). Confirming these instructions is critical, particularly when the lawyer has instructions to perform limited or particular services only (as in a limited scope retainer).

3. Getting Off the Record

There may come a time when it is necessary for you and your client to part ways. If your client will not sign a notice of intention to act in person or to appoint another solicitor, you must obtain the court's permission to withdraw in the face of your client's opposition. Withdrawing as counsel becomes more difficult the closer you are to trial. The procedure for and conditions surrounding this are dealt with in SCCR 22-6 and section 3.7 in the *BC Code*.

If you have a contingency agreement with your client that does not address withdrawal, you may be unable to withdraw (*Edwards v. Barwell-Clarke* (1980), 22 B.C.L.R. 6 (S.C.)). Consequently, it is wise to always include a term entitling you to withdraw. Always review the fee agreement—this aspect in particular—with the client.

Note that in the case where an infant makes a claim in Supreme Court, you cannot remove yourself from the record and leave the infant unrepresented, as SCCR 20-2(4) requires that a litigation guardian shall act by lawyer unless the litigation guardian is the Public Guardian and Trustee.

[§1.05] Limitation Periods[2]

The limitation period is the time period specified by a statute and within which an action must be brought or a complaint filed.

It is *crucial* that you determine the applicable limitation period at the outset of any claim. The client may not have retained you until near, on, or after the date on which the limitation period expires.

When the client is vague about the date, or if there is any risk that the limitation period is about to expire or may have already expired, you should issue a notice of civil claim as soon as possible to stop the clock running. Remember that you can issue a notice of civil claim on one date and serve it on a later date. You may later decide that the case is not worth pursuing. However, issuing a notice of civil claim is good insurance.

You must be familiar with the various statutory time limits. In some cases, limitation periods might be subject to variation:

(a) depending on the status of the plaintiff—for example, the plaintiff is an infant, a person who is mentally incompetent, or a "worker" under the *Workers Compensation Act*;

(b) depending on the status of the defendant—for example, the identity is unknown, or the defendant is deceased or is a municipal corporation or other government body;

(c) depending on the nature of the cause of action—for example, if the injury was discovered long after the act that caused it occurred; or

(d) depending on conflicts of law considerations, including choice of law clauses in contracts.

Unless you are certain of the limitation period, always review the appropriate statute. A great starting place is the Lawyers Indemnity Fund publication "Beat the Clock: Timely Lessons from 1600 Lawyers." A quick reference list of the most common limitations and deadlines appears in the *Practice Material: Professionalism: Ethics*, Chapter 5, Appendix B. This chart is also available on the Law Society website (www.lawsociety.bc.ca).

[2] These materials do not generally address temporary measures introduced during the COVID-19 pandemic. Lawyers should be aware that in response to the COVID-19 pandemic, the provincial government temporarily suspended limitation periods for commencing court proceedings. The suspension was in effect from March 26, 2020 until March 25, 2021. In calculating the end date of a limitation period, do not count the days on which the limitation dates were suspended (from the beginning of the day on March 26, 2020 until the end of the day on March 25, 2021). See the Law Society's *Guidelines for calculating BC limitation periods*, available on the Law Society website.

In most cases, the applicable limitation period will be found in the *Limitation Act*, S.B.C. 2012, c. 13. The current *Limitation Act* was brought into effect June 1, 2013, and represented a significant change in the limitations regime in BC. Take care to look at the history of the file if the claim may have originated before June 1, 2013, as the former limitations legislation may apply.

You must be familiar with the current *Limitation Act* and its basic provisions. Under the *Limitation Act*, a single two-year basic limitation period applies to most civil claims. Exceptions to this are civil claims that enforce a monetary judgment, exempted claims and actions that have limitation periods set by other statutes. You must also be aware of the rules about when a claim is "discovered" for the purposes of starting the clock on the limitation period.

The general discovery rule, under s. 8 of the *Limitation Act*, is that a claim is "discovered" by a person on the first day on which the person knew or reasonably ought to have known all of the following:

(a) that injury, loss or damage had occurred;

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

(c) that the act or omission was that of the person against whom the claim is or may be made; and

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Special discovery rules apply in specific situations, such as when the claimant is a minor or a person under a disability, or when the claim is for fraud or recovery of trust property (ss. 12–20).

Section 21 of the *Limitation Act* imposes a 15-year ultimate limitation period within which a claim must be brought. Note that the date when the 15-year limitation period begins to run is not when the claim is *discovered*, but when the act or omission that caused an injury, loss or damage *took place*. Section 21(2) specifies when an act or omission is considered to have taken place for certain claims.

Section 24 sets out circumstances in which a limitation period for a claim will be extended because a person acknowledges liability for the claim.

If the limitation period appears to have expired when the client consults you, you may need to determine if there are facts that suggest the running of time was postponed. In any event, you should issue the notice of claim promptly, whether to save a limitation date or to lay the basis for a postponement argument. However, postponement is subject to the ultimate limitation period of 15 years (*Limitation Act*, s. 21).

Be especially alert to the limitation periods that apply to local governments or municipal corporations. This is a complex area (see Johnson, *Annotated British Columbia Local Government Act and Community Charter* (Canada Law Book, loose-leaf). You must consider the *Limitation Act* and the *Local Government Act*, R.S.B.C. 2015, c. 1 (note that the City of Vancouver is governed by the *Vancouver Charter*, S.B.C. 1953, c. 55, not the *Local Government Act*). Under s. 735 of the *Local Government Act,* a **6-month limitation period** applies to claims against a municipality for actions taken by the municipality that are beyond the powers (*ultra vires*) of the municipality.

Under some statutes, a municipality is authorized to take actions that may affect someone's rights. The municipality may take the action only if the municipality does so in a lawful way. The municipality will become liable for this same action if the municipality carries out the action in an unlawful way. For example, the 6-month limitation period will apply to an unlawful expropriation or an unlawful demolition. Common law claims against a municipality, such as damages arising from a negligent building inspection (for an inherent construction defect) or failure to warn, are subject to the longer limitation period under the *Limitation Act* (*Meade v. Armstrong (City)*, 2010 BCCA 87).

The ultimate limitation period of 15 years (*Limitation Act*, s. 21) also applies to actions against municipalities and governments (*Armstrong v. West Vancouver (District)* 2003 BCCA 73).

Suing a municipality (or any level of government) involves specialized skill, knowledge and experience. Consult reference material if necessary, or refer the client elsewhere, but do so quickly. **Remember that in addition to the limitation periods, special notice requirements apply to claims against governments** (see §1.06).

Be aware that by commencing an action the plaintiff may revive a defendant's cause of action that had been time-barred. The expiry of a limitation period is not a bar to proceedings by counterclaim, third party proceedings, claims by way of set off, or adding or substituting a new party as plaintiff or defendant, although a court may consider the expiry of a limitation period as a relevant factor in considering whether to order the adding of a party (*Limitation Act*, s. 22).

Under ss. 150(2) and (5) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, an action may be commenced by or against the estate of a deceased within the time otherwise limited for the action, as if the deceased were living.

Each province has its own statute(s) setting out limitation periods. If your client has a claim in another jurisdiction, you should immediately determine the applicable limitation period with reference to the appropriate law. You may also need to obtain advice

from legal counsel licensed to practice in that jurisdiction.

The Lawyers Indemnity Fund regularly receives claims relating to missed limitation periods. Remember that you must report as soon as you realize the error. See *Practice Material*: *Professionalism: Ethics*, Chapter 5.

For matters within federal jurisdiction, see the *Federal Limitations Manual*, loose-leaf, 2nd ed. (Markham: LexisNexis, 2006) and Graeme Mew, *The Law of Limitations*, 3rd ed. (Markham: LexisNexis, 2016).

For limitation periods related to collections, see §9.04.

[§1.06] Notice/Conditions Precedent

The requirements for giving notice or filing proof of loss are as important as the limitation period.

When you propose to sue a government body, you *must* check the appropriate statute to see if notice is required and how and to whom it is to be given.

When the action is against a municipal corporation, the notice requirements apply *regardless of the cause of action and the limitation period that applies*. Under s. 736 of the *Local Government Act*, notice of a claim against a municipality must be delivered to the municipality **within two months from the date on which the damage was sustained**. The notice must be in writing and must describe the time, place and manner in which the damage was sustained.

Pursuant to s. 736 of the *Local Government Act,* failure to give proper notice can be saved if there is a reasonable excuse **and** there is no prejudice to the municipality. Courts have often ruled that ignorance of a notice period is not a reasonable excuse: see e.g. *Ordog v. Mission District* (1980), 31 B.C.L.R. 371 (S.C.). However, in *Teller v. Sunshine Coast (Regional District of)* (1990), 43 B.C.L.R. (2d) 376 (C.A.), the Court of Appeal said that while ignorance of the law alone may not be a reasonable excuse, it may be taken into consideration as one factor.

If a person is being sued under a contract, the contract must be checked for any condition precedent to commencing an action.

When you are suing on behalf of a strata corporation, a resolution passed by a 3/4 vote at an annual or a special general meeting must authorize the action prior to commencement of the litigation. An exception exists for an action that is brought under the *Small Claims Act* against an owner or another person to collect money owing to the strata corporation, including money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization, and the terms and conditions of that bylaw are met (see ss. 171 and 172 of the *Strata Property Act*, S.B.C. 1998, c. 43). Actions brought on behalf of a strata corporation are purely statutory, representative actions that give the plaintiffs the capacity to sue or the right to action, which they would not otherwise have. Under section 173.1 of the *Strata Property Act*, failure to obtain the proper authorization does not affect the validity of an action, and cannot be used as a defence in an action commenced by a strata corporation.

If the claim arises under an insurance policy, s. 23 of the *Insurance Act*, R.S.B.C. 2012, c. 1 sets out the applicable limitation period.

[§1.07] Investigating the Facts

The trial lawyer is responsible for finding and presenting the facts of the case. A lawyer cannot simply take the information provided by the client, join it with what counsel from the other side reveals on discovery, and call that "the facts." Investigating the facts can be one of the great joys of practice.

An investigator is only as good as their sources. Your primary source is the client. The client will provide the names of witnesses and perhaps the names of investigative bodies, as well as documents. You should follow up on those leads and make sure that you have all relevant documents, including general documents that may touch upon issues in the litigation, such as policy manuals or protocols. If your client is a company or government organization, make sure you understand all departments that may have had involvement and may have relevant documents. Your own client *must* produce a list of all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, whether they are helpful or harmful to the client's case (SCCR 7-1(1)). Moreover, it is counsel's obligation to ensure that this is done.

Failure to interview a material witness can constitute negligence (*Fawell v. Atkins* (1981), 28 B.C.L.R. 32 (S.C.)). If a material witness refuses to be responsive, a party may seek a court order under SCCR 7-5(1) requiring the witness to be examined under oath.

A second source of information is the opposing side. The lawyer who ensures that all relevant documents have been produced, examines the documents carefully, and conducts a careful examination for discovery, will find further avenues of investigation; these avenues should not be ignored.

Apart from the parties themselves, there are a number of other good sources of information. Additional sources are professional and government bodies. For example, lawyers, doctors, and accountants are all subject to investigation by professional bodies. Similarly, a fire chief often investigates fires under the *Fire Services Act*, R.S.B.C. 1996, c. 144. Public companies may have been investigated by the BC Securities Commission or by a stock exchange. A more familiar example is the requirement of wage earners to file an income tax return.

Some careful thought and a little digging should reveal these sources, and they often prove to be valuable.

It is good practice to visit the scene of an accident or event. This helps to put the facts into place. Often a lawyer may notice something that the client has missed. If not, it still assists when questioning and preparing.

It is good practice to take statements from all witnesses, even those who claim they have no knowledge of the events. This is preferable to being surprised at trial by a witness whose memory has changed. Also, as witnesses for the other side come to light, you should learn about them. For example, you may find that the architect retained by the other counsel to criticize the design of the stairs has designed similar stairs in the past.

In the early years of your litigation career, you should conduct an independent investigation of the facts rather than leave it to others. Once you have first-hand experience, you then will be able to delegate the task and know whether or not a good job has been done.

[§1.08] Jurisdiction

1. Court Jurisdiction Generally

There are two levels of provincially-administered courts of first instance (or trial courts) in BC: the Supreme Court and the Provincial Court. The Civil Resolution Tribunal (see §1.23) shares jurisdiction over some strata and motor vehicle accident matters with the Supreme Court, and shares jurisdiction over some small-claims matters with the Provincial Court. There is also the federally administered Federal Court (Trial Division).

2. Supreme Court

The jurisdiction and powers and privileges of the BC Supreme Court are set out in ss. 3 and 9(1) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443:

> 3(1) The Chief Justice, Associate Chief Justice and judges have all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities that on March 29, 1870, were vested in the Chief Justice and other justices of the court.
>
> (2) The court may be held before the Chief Justice or before any one of the judges.
>
> …
>
> 9(1) The court continues to be a court of original jurisdiction and has jurisdiction in all cases, civil and criminal, arising in BC.

As a superior court, the BC Supreme Court possesses jurisdiction over all matters, unless the matter in issue has been specifically excluded from its jurisdiction (*Board v. Board*, [1919] 2 W.W.R. 940 (U.K. J.C.P.C.)). To proceed in an inferior court, it must be clear on the face of the proceedings that a matter is within the jurisdiction of that tribunal (*Beaton v. Sjolander* (1903), 9 B.C.R. 439 (S.C.)).

The jurisdiction conferred upon the BC Supreme Court by s. 9(1) of the *Supreme Court Act* is sometimes referred to as its "inherent jurisdiction." The BC Supreme Court has inherited the jurisdiction originally possessed by the Superior Courts in England (*Attorney General of British Columbia v. Esquimalt and Nanaimo Railways* (1899), 7 B.C.R. 221 (S.C.); *British Columbia Ferry Corporation v. British Columbia Ferry & Marine Workers Union* (1979), 12 B.C.L.R. 20 (C.A.)). The inherent jurisdiction of superior courts flows from the Crown (Coke's *Institutes*).

The inherent jurisdiction of the Supreme Court can be distinguished from the jurisdiction possessed by all courts, whether superior or inferior, to regulate their own procedure (*R. v. Rourke*, 1975 CanLII 926 (B.C.C.A.); *Twinriver Timber Ltd. v. International Woodworkers of America*, 1970 CanLII 773 (B.C.C.A.)).

The Supreme Court has the jurisdiction to entertain all civil actions regardless of the amount of money involved. In addition, there are statutes that explicitly confer jurisdiction on the Supreme Court in other matters.

Some civil matters cannot be brought in the Supreme Court. For example, s. 122 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 gives certain exclusive powers to the Workers' Compensation Board (which operates as WorkSafe BC).

Similarly, when claims are governed by an arbitration clause, the Supreme Court must (on application of a party) stay its jurisdiction: *Arbitration Act*, S.B.C. 2020, c. 2, s. 7.

3. Provincial Court (Civil)—Small Claims Court

The powers and jurisdiction of the Small Claims Court are established by ss. 2 and 3 of the *Small Claims Act*, R.S.B.C. 1996, c. 430.

Section 3 of the *Small Claims Act* provides:

> 3(1) The Provincial Court has jurisdiction in a claim for
>
> (a) debt or damages,
>
> (b) recovery of personal property,
>
> (c) specific performance of an agreement relating to personal property or services, or
>
> (d) relief from opposing claims to personal property
>
> if the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by regulation, excluding interest and costs.

(2) The Provincial Court does not have jurisdiction in a claim for libel, slander or malicious prosecution.

(3) This section is subject to sections 16.4 and 56.3 of the *Civil Resolution Tribunal Act*.

The Small Claims Court has jurisdiction in matters involving $35,000 or less. (This monetary limit came into effect on June 1, 2017, and is an increase from the previous monetary limit of $25,000.)

The monetary limit on the jurisdiction of the Small Claims Court is exclusive of interest and costs (*Small Claims Act*, s. 3). "Interest" here means court-ordered interest, not contractual interest (see *Telus Services Inc. v. Hussey*, 2016 BCPC 41). A claimant who has a claim amounting to more than the monetary limit may abandon part of the claim so that the balance may be heard in Small Claims Court (Small Claims Rule 1(4)). Claims may be transferred to the Supreme Court if the monetary outcome of the claim may exceed the monetary limit of Small Claims Court (see Rule 7.1).

The rules and forms regulating practice and procedure in Small Claims are set out in the Small Claims Rules (prescribed under the *Court Rules Act*). The SCCR are specifically excluded from the proceedings and should not be used in Small Claims Court, with the exception of those set out in Rule 17(18) of the Small Claims Rules.

The procedure for advancing a claim in Small Claims Court is set out in §1.22.

Note that as of June 1, 2017, most small claims matters involving amounts up to $5,000 are resolved in the Civil Resolution Tribunal instead of in Small Claims Court (see §1.23).

4. Federal Court

The Federal Court possesses exclusive jurisdiction in certain types of cases. In certain other cases, the Federal Court and the BC Supreme Court have concurrent jurisdiction.

The jurisdiction of the Federal Court will not be considered in these materials. For information concerning the jurisdiction of the Federal Court, consult the materials listed at the end of this chapter.

5. Where to File

The territorial jurisdiction of the Small Claims Court is the entire province. However, under Small Claims Rule 1(2), the claimant must file the notice of claim at the Small Claims Registry nearest to where:

(a) the defendant lives or carries on business; or

(b) the transaction or event that resulted in the claim took place.

In the Supreme Court, it is not necessary to commence proceedings in the registry nearest to where the plaintiff or defendant resides or to where the cause of action arose. Any claim that may be brought in the Supreme Court may be commenced in any Supreme Court Registry in the province.

6. Transfer

Small Claims Rule 7.1 allows the transfer of a small claims action from Provincial Court to the Supreme Court. Section 15 of the *Supreme Court Act* authorizes a transfer from Supreme Court to Provincial Court. The transfer from Supreme Court to Provincial Court is available even when a defendant has issued a jury notice (SCCR 12-6(4)).

The Supreme Court may order that only disbursements are to be recovered in a Supreme Court action if the action properly fell within the jurisdiction of the Small Claims Court (SCCR 14-1(10)).

[§1.09] Parties to a Civil Case in Supreme Court

You must ensure that the appropriate parties are named in the pleading and that they are named correctly. Individuals should be identified by their full names. Nicknames should be avoided. SCCR 20-1 to 20-3 governs how parties are to be named when there are partnerships, multiple parties, or parties under legal disability.

1. First Nations

First Nations and Indian Bands have the capacity to sue and be sued in British Columbia: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 at para. 75.

2. Corporations and Partnerships

When the plaintiff or defendant is a corporation, you should always do a corporate search to find the proper corporate name.

If a partnership is a party, it may sue or be sued under its firm name (SCCR 20-1(1)). It is not necessary to name each of the individual partners as a party. However, the notice of civil claim should state that the firm is a partnership and should set out the names of any known partners. SCCR 20-1(4) provides that a party may require the partnership to deliver an affidavit setting out the names and addresses of all persons who were partners when the alleged right or liability arose. Consequently, there is no excuse for not naming the partners.

3. Parties Under Legal Disability

Special provisions apply if one or more of the parties is under legal disability. SCCR 20-2 is a complete code for the commencement, conduct and

settlement of proceedings for persons under legal disability. Persons are considered to be under legal disability for the purpose of SCCR 20-2 if they are infants (under the age of 19, as defined by the *Age of Majority Act*, R.S.B.C. 1996, c. 7) or if they are adults who are incapable of managing themselves or their affairs (*Gengenbacher v. Smith*, 2016 BCSC 1164; *Walker v. Manufacturers Life Insurance Company.*, 2015 BCCA 143).

A person under a legal disability must commence or defend proceedings by a litigation guardian (SCCR 20-2(2)). The litigation guardian (often an adult family member) assumes all the normal duties of the party, including instructing counsel and paying costs if they are ordered against that party. In special circumstances where no one else is able to serve as a litigation guardian, and where the Public Guardian and Trustee is asked in advance, it may consent to act as a litigation guardian in appropriate litigation cases.

The litigation guardian (unless it is the Public Guardian and Trustee) must act through a lawyer (SCCR 20-2(4)). To act as a litigation guardian, the litigation guardian must file forms in court with the pleadings. The first form is the "Consent of Litigation Guardian" (SCCR 20-2(7)), which indicates that the litigation guardian consents to act in the proceeding. This form must be filed before the litigation guardian can act in the proceeding, unless the litigation guardian was appointed by the court or is a litigation guardian of a party to that proceeding under s. 35(1) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405.

The second form that must be filed in court is the "Certificate of Fitness" (SCCR 20-2(8)). The Certificate of Fitness states that the plaintiff is either an infant or is mentally incompetent and that the proposed litigation guardian has no interest in the proceeding adverse to that person. A Certificate of Fitness must be filed unless (in the case of an adult under a legal disability) a committee or representative has been appointed.

When the defendant is under a disability and does not appoint a litigation guardian to defend the matter, the plaintiff cannot take any further steps in the proceeding before obtaining an order from the court appointing a litigation guardian for the defendant (SCCR 20-2(16)).

4. Change in Status

If a party becomes mentally incompetent, a litigation guardian should be appointed. If one is not appointed, the court will appoint one (SCCR 20-2(10)). If a party dies or becomes bankrupt or a corporation is wound up, then the action should be continued against the person to whom the estate, interest, title, or liability has transferred (SCCR 6-2(3) and 6-2(4)).

When a child turns 19 they can no longer act through a litigation guardian: *Holland (Guardian ad litem of) v. Marshall*, 2008 BCSC 333. Assuming that child has not become an adult under a legal disability, then that child will have to take over the proceeding on their own behalf by filing an affidavit confirming the attainment of the age of majority (SCCR 20-2(12)).

When the status of parties changes, the style of proceeding must be amended to reflect that change.

5. Unrepresented Parties

It is becoming increasingly common to see litigants trying to represent themselves in Supreme Court. Perhaps they retained counsel at the start of the litigation then decided to proceed on their own. Dealing with unrepresented litigants can be challenging for both counsel and the judge. Always remember to be courteous to all parties.

If you are dealing with an unrepresented litigant, inform them clearly at the outset that you are not representing them, and recommend they seek counsel. If you will require strict compliance with the Rules, inform them. Notably, in a 2021 decision, the Supreme Court set aside a default judgment obtained against an unrepresented litigant by a lawyer who had advised the unrepresented party to seek counsel, but had not made it clear that the lawyer would be seeking default if the unrepresented party did not file a response in time. The court ordered special costs against the lawyer (*Albo v. Haines*, 2021 BCSC 2200). For more on default judgment, see §4.02.

If you are litigating against an unrepresented party, there may be times when you can assist both parties by drafting an agreement. Recommend that the unrepresented party seek legal advice. If a judge makes an order in the matter, likely you will draft it, but an unrepresented litigant need not approve it (SCCR-13-1(1)).

Unrepresented litigants complain to the Law Society about the conduct of lawyers. The Law Society has developed some practice tips for lawyers dealing with self-represented litigants. These tips include such things as take complete written notes of all interactions with the self-represented litigant, including phone calls. For more on ethical concerns in dealing with self-represented parties, see the *Practice Material: Professionalism: Ethics*.

[§1.10] How to Start a Proceeding in Supreme Court

Commence proceedings in Supreme Court by filing a notice of civil claim (SCCR 2-1(1)), petition (SCCR 2-1(2)), or a requisition (SCCR 2-1(2) and 17-1).

Under SCCR 1-1, an "action" means a proceeding started by a notice of civil claim, a "petition proceeding" means a proceeding started by a petition, and a "requisition proceeding" means a proceeding started by a requisition.

If a statute or regulation does not specify the procedure to be followed, a proceeding must be started by filing a notice of civil claim (SCCR 2-1(1)).

As set out in SCCR 2-1(2), a petition or requisition **must** be used to start a proceeding when:

(a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;

(b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

(c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;

(d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;

(e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;

(f) the relief sought is for payment of funds into or out of court;

(g) the relief sought relates to land and is for

(i) a declaration of a beneficial interest in or a charge on land, as to the character and extent of the interest or charge,

(ii) a declaration that settles the priority between interests or charges,

(iii) an order that cancels a certificate of title or makes a title subject to an interest or charge, or

(iv) an order of partition or sale;

(h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

The procedure for advancing a claim using a petition or requisition is set out in §1.19 and §1.20.

[§1.11] Pleadings in Supreme Court[3]

1. General Purpose of Pleadings

The discussion below focuses on drafting a notice of civil claim, but the same general principles also apply to other pleadings.

The fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, to give the opposing parties fair notice of the case to be met, and to enable all parties to take effective steps for pre-trial preparation: *Mayer v. Mayer*, 2012 BCCA 77 at para. 215.

This is described by Madam Justice Saunders in *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 59–61:

> The purpose of pleadings was described by Smith J. in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.):
>
> > [5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39.
>
> The history of pleadings is well described by Parrett J. in Keene v. British Columbia (Ministry of Children and Family Development), 2003 BCSC 1544. The rules on pleading are not overly technical. Pleadings prevent expansion of the issues, give notice of the case required to be met, and provide certainty of the issues for purposes of appeal. Complexity and confusion that can be created by a moving target is avoided by pleadings correctly drawn, as are subsequent quarrels in this Court as to the issues before the trial court. Pleadings are an elegant solution to issue definition and notice and are well-serving of the ultimate purpose of efficient resolution of a dispute on its merits (Rule 1(5) of the Rules of Court). Ideally, they avoid the "loose thinking" decried by Lord Denning in his forward to I.H. Jacob, Bullen and Leake and Jacob's Precedents of Pleadings, 12th ed. (London: Sweet & Maxwell, 1975).

Commence an action by filing a notice of civil claim in Form 1 (SCCR 3-1(1)). A notice of civil claim must:

(a) set out a concise statement of the material facts giving rise to the claim;

[3] Based on excerpts from materials prepared by Mr. Justice John Spencer for the CLE publication, *Preparing and Presenting a Civil Case* (September 1984).

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

(d) set out the proposed place of trial;

(e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;

(f) provide the data collection information required in the appendix to the form; and

(g) otherwise comply with SCCR 3-7.

2. Importance

In practice, pleading the case properly is critical. Pleadings come at an early stage of the litigation, often before all the facts are known. Some counsel fail to craft pleadings carefully, perhaps expecting to clean them up later, if necessary, through amendments. This is poor practice: pleadings are the foundation upon which a case is constructed. If you take care and exercise diligence in framing the pleadings, the rest of the case will fall into line. The pleadings will also determine what is relevant at the discovery stage, so proper pleadings at an early stage will assist the party to compel the appropriate documents and answers at examinations for discovery for the case.

Note the following comments by Madam Justice Southin of the Court of Appeal in "Pleadings in Commercial Cases" in *The Commercial Case—1991* (Vancouver: CLE, November 1991):

> If the profession pleaded properly … and if it drew all motions, affidavits, judgments, and notices of appeal properly, the business of both the Supreme Court and the Court of Appeal not only would be done more expeditiously but also would be of better quality …
>
> Good pleading will not, in my opinion, give a litigant with a bad case a victory. But bad pleading may very well deprive a litigant with a good case of a victory that ought to be his.

The immediate benefit of careful pleading is that it focuses your attention from the outset of litigation on the issues you must address in order to succeed at trial. It directs you to the evidence you must produce, so you prepare strategically in advance, and are not scrambling for a witness two days before the trial. You understand and develop the case in a timely fashion. Spending the energy to produce a careful pleading from the outset will also help you to decide whether your client has a case at all. If it does not plead well, that is a warning to re-think and perhaps recast the cause of action.

A party must plead the facts that are necessary to establish the cause of action. In addition to those necessary facts, a party is also entitled to plead material facts, and is entitled to prove them at trial, whether or not they are essential to the cause of action or the defence. The ability to plead material facts in addition to necessary facts allows for more expansive—and persuasive and convincing—pleadings. You cannot, however, plead evidence.

Good pleadings will help you during the interlocutory stages. The pleadings should be broad enough to permit you to examine fully into the nature of your opponent's case but not so broad as to permit your opponent to examine interminably and at great expense into your client's affairs.

You will rely upon the pleadings at trial to permit you to lead the evidence you want in, and to exclude irrelevant matters. The issues are framed by the pleadings and when you raise an objection at trial, the trial judge should exclude any evidence not relevant to an issue. Quite often, relevance cannot be determined until the end of the trial and evidence will be admitted either generally or conditionally. The clearer your pleadings are, the more likely you are to be able to exclude your opponent's irrelevancies and to demonstrate the cogency of your evidence against your opponent's objection.

Whether you are acting for the plaintiff or the defendant, you should have a thorough understanding of the applicable law before drafting the pleadings; otherwise, it will be difficult to appreciate the importance of what is in the pleadings and what has been left out. If you follow this practice, the issues will be properly defined at the outset of the litigation. Not only does this facilitate settlement, it also helps to ensure that the matter proceeds expeditiously to trial, without the time and expense wasted by applications to amend pleadings and to adjourn the trial date.

3. Preparation

It cannot be stressed enough—you must have a *thorough* appreciation of the law before pleading. There may be a cause of action or defence available to the client that you may not know about. Some admissions that affect the client's rights may be made in the pleadings. For example, a party has a right not to elect until judgment whether to take a remedy of specific performance or damages. However, in *Saunders v. Multibuilders Ltd. and Haywood* (1981), 30 B.C.L.R. 236 (S.C.), this right was lost because of an allegation in the notice of civil claim that the defendant's anticipatory breach "is accepted by the plaintiff as ending the contract." The court held that by these words the plaintiffs had elected to seek damages rather than specific per-

formance. This statement in their pleading bound the plaintiffs, because an election, once made, cannot be retracted.

Listen to your client's story. What happened? What went wrong? Has the client suffered some wrong that the law says, or may be persuaded to say, should be recompensed by another person? If so, decide what type of action the client has. Is it in contract, inducing a breach of contract, negligence, nuisance, breach of trust, or defamation? You may decide that there is more than one potential claim.

The next step is to refresh yourself, if necessary, on the particular causes of action that seem appropriate. For each cause of action, what needs to be proved, and what are the pitfalls and defences? You must know these things in order to be sure to raise all the facts that are necessary, or helpful, in order to succeed at trial. For example, in an action on a promissory note, you must plead that it was made, for consideration, that it is due, and that it has been presented and dishonoured. If presentment was waived, that should be pleaded. Look at the forms in Atkin's *Encyclopedia of Court Forms and Precedents* and you will be reminded of the essential points a particular pleading must raise.

In any pleading you should seek the most logical sequence in which to set out the material facts. Generally, that will be in a chronological order, but in some complex actions where there are a number of different issues, there may be a better way to do it. For instance, in a complicated construction case there may be a number of different areas of construction, each of which should be hived off into its own set of paragraphs, even though some of the events having to do with the concrete pouring occurred before the events having to do with structural steel and some occurred after. Remember, the object of the pleadings is to expose the material facts in as simple a way as possible so that the issues are clear.

In lengthy pleadings, it will be useful to use subheadings so that the reader can see at once to what issue certain facts relate. When you are considering various sets of facts to be raised in a notice of civil claim, suitable headings will suggest themselves. A response to civil claim should make use of these headings in referring back to the notice of civil claim, to admit, deny, or take issue with each fact. So far as possible it should follow the same sequence as the notice of civil claim. In a complex case, the request for relief should also refer back to the subsections of the notice of civil claim and summarize the relief sought, and each subsection of the claim itself should show a total of the monetary amounts claimed if that is known. For example, the subsection dealing with concrete pouring in your construction case should show a separate total for each part of the work, and so on. You can then summarize in your request for relief by restating the totals claimed and referring to the various subsections.

A properly drawn defence will serve as an opening for the defendant in a simple trial, just as a notice of civil claim serves for the plaintiff. Remember that in the ideal world the trial judge receives the record on the morning of the trial and before the court session. The judge generally reads it to find out what the case is about and whether there is anything to watch for. A response to civil claim that simply denies everything the plaintiff says is not very illuminating. Before drafting it, you should sit down and review the instructions and decide exactly where the client wants to be at the end of the trial. Does the client really expect to defeat the claim entirely? Do you and the client expect to have liability apportioned partially to the plaintiff and partially to the defendant? Is the client's real expectation only to minimize the claim by proving the plaintiff failed to mitigate any loss? Is the client reduced to relying on a technical defence of law, such as a limitation or other statutory bar? This is not to suggest that you should roll over and play dead before you have had a chance to test the plaintiff's claim by discovery and investigation. By all means, defend on every ground that contains promise, but be sure to include in trenchant paragraphs the heart and soul of your counter-attack so that the trial judge has it firmly in mind from a reading of the pleadings before the hearing or trial begins. "Counter-attack" should be the main thrust of your defence. It is not effective simply to deny liability. It is much better to say what it was the plaintiff did; in other words, say why your defendant is not liable or is only partially liable.

4. General Drafting Guidelines

When drafting pleadings, your goal should be to define the issues between the parties clearly. At the same time, and without sacrificing accuracy, you should strive to keep the pleadings as brief as the circumstances will permit.

The reasons for judgment of Madam Justice Southin in *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.) at 379 demonstrate the importance of complying with the SCCR and in otherwise drafting a proper notice of civil claim:

> This statement of claim *[former name for a notice of civil claim]* does not disclose a cause of action. What the plaintiffs have pleaded in para. 7 was not a contract but a *nudum pactum* for there is no plea of consideration moving from the plaintiffs to the defendant. Indeed, the plaintiffs have not pleaded that they are parties to the agreement and, contrary to Rule 19(11) *[now SCCR 3-7(1)],* the plaintiffs do not give the necessary particulars of the alleged

> agreement. I can only assume the draftsperson (not Mr. Bowman) either does not possess a book on pleading or, if he or she does, has never read it.
>
> …
>
> When a case goes to trial, as this one did, on a hopelessly inadequate statement of claim, there is nothing upon which the trial judge can concentrate his or her mind. The course of litigation would be much improved if trial judges in stating their findings of fact would address the pleadings and say which pleas are established and which are not. But how can a trial judge address the pleadings when the pleadings do not address anything? In the case at bar, had the learned trial judge grasped the import of para. 7, he might have expressed the opinion at the outset that, on the statement of claim as it stood, the plaintiffs must fail or, in the old phrase, be non-suited on the pleadings. That might have induced counsel for the plaintiffs to apply to amend to put the plaintiffs' tackle in order. If the plaintiffs' tackle had been in order, the judge might have addressed the issues of fact fully and this Court, if an appeal had been brought, could then have addressed itself to the issues of law arising on the findings of fact.

5. Pleading the Facts

Plead a "concise statement of the material facts giving rise to the claim": SCCR 3-1(2)(a).

The "material facts" are those facts that are essential to forming a complete cause of action or defence, as the case may be: *Young v. Borzoni*, 2007 BCCA 16 at para. 20. The *evidence* that tends to prove those facts should not be pleaded (SCCR 3-7(1)). Suppose the issue is whether X has authority to make a certain contract on behalf of the defendant. It is sufficient for the plaintiff to plead that "the defendant employed X as agent to make the contract on his behalf" or that "the defendant held out X as having authority to make the contract on his behalf." It will be unnecessary and improper to plead that "X has been employed by the defendant for many years to execute contracts of this type on his behalf" or that "the defendant informed the plaintiff that X was the defendant's agent."

The material facts part of the pleadings should not include matters of law. However, if a particular statute is relied upon as the foundation of a claim or defence, you must plead the facts necessary to bring the case within the statute.

When pleading the material facts, you should be clear and brief. All facts should be stated with precision. There should be no ambiguity in the allegations. Each separate allegation of fact should be set out in a separate paragraph so that the person responding to the pleading is forced to consider each of the allegations individually. The chances are that defence counsel, once they are denying any part of a paragraph in the notice of civil claim, will deny it all.

In drafting allegations of fact, you should try to avoid colouring them. For example, in a motor vehicle action, it is good practice to set out the fact of a collision and then in a separate paragraph set out the allegations of negligence of the defendant. In that fashion, the defendant's lawyer will be forced either to deny that a collision occurred at all or else to deny that it occurred in the fashion described in the notice of civil claim. However, if it is stated, for example, that the client (the plaintiff) was "driving in a lawful manner south on Granville Street," there is no doubt that defence counsel will deny the entire allegation.

When drafting pleadings, it is often helpful to refer to a precedent as a guideline. However, a precedent should never be followed without knowing why it is being followed. Furthermore, you must adapt a precedent to fit the circumstances of the particular case. For example, some plaintiffs' counsel make it their practice to allege in every case that the defendant driver's ability to drive was impaired by alcohol or a drug. If the plaintiff is a passenger in the defendant's motor vehicle, such a pleading opens the door to the defence to plead that the plaintiff was contributory negligent or accepted the risk of riding with an impaired driver. Furthermore, if the defendant was impaired, that fact might affect their insurance coverage. You should consider these types of matters carefully.

6. Pleading the Relief Sought

The plaintiff must set out the relief sought against each named defendant: SCCR 3-1(2)(b). This section of the pleadings tells the court what your client wants: for example, an injunction, a declaration, or damages.

There are two common, broad types of damages: general and special.

General damages are intended to cover injuries for which an exact dollar amount cannot be calculated. General damages are usually composed of pain and suffering (physical or emotional distress resulting from an injury for which a plaintiff can seek monetary compensation) but can also include compensation for such things as a shortened life expectancy, loss of the companionship of a loved one and, in defamation cases (libel and slander), loss of reputation.

Special damages are monetary compensation for the party's out-of-pocket expenses or for actual economic loss, such as medical costs and expenses, loss of income, etc. For example, in a motor vehicle accident, special damages typically include medical expenses, car-repair costs, rental-car fees, and lost

wages, but the pain and suffering would be claimed as general damages.

In special circumstances other types of damages may be claimed. For example, punitive damages (sometimes called "exemplary damages") are awarded over and above special and general damages to punish a losing party's wilful or malicious misconduct. Statutory damages are those damages required by statutory law. For example, in some provinces, if a landlord fails to return a tenant's security deposit quickly or give a reason why it is being withheld, the statute gives the judge authority to order the landlord to pay damages of double or triple the amount of the deposit.

7. Pleading the Law

The notice of civil claim must contain "a concise summary of the legal basis for relief sought": SCCR 3-1(2)(c). This requirement to plead the legal basis for a claim was not required in the statement of claim under the former Rules. As such, use precedents created before July 1, 2010 with extreme caution.

Some guidance is provided by SCCR 3-7. A party must not plead conclusions of law unless the party also pleads the material facts supporting them (SCCR 3-7(9)). Examples of pleading the legal basis for the relief sought would be, for example, that the terms of a transaction breach the provisions of the *Business Practices and Consumer Protection Act* or that, as a result of the defendant's conduct, the defendant is estopped from relying on a term of the contract.

It is necessary to plead a statute even if the material facts giving rise to the relief have been pleaded: *Sahyoun v. Ho*, 2013 BCSC 1143.

[§1.12] Service—Supreme Court

A notice of civil claim must be served on all defendants within 12 months of being filed (SCCR 3-2(1)). The court has discretion to renew the notice of civil claim for an additional 12 months if a defendant has not been served (SCCR 3-2(1)), although you typically serve the notice of civil claim immediately. If for some reason you cannot, diarize its expiry date.

Defendants must file and serve a response to civil claim in Form 2, within time limits that depend on where and when they were served with the notice of civil claim:

- 21 days of service, if served in Canada;
- 35 days of service, if served in the United States; or
- 49 days of service, if served anywhere else (SCCR 3-3(3)).

1. Ordinary or Personal Service—SCCR 4-2, 4-3

Most service procedures in Supreme Court civil cases are governed by Part 4 of the SCCR. Documents listed in SCCR 4-3 must be served personally. These documents include originating pleadings, such as notices of civil claim and petitions, as well as subpoenas. Documents that do not require personal service under the SCCR may be served by "ordinary" service (SCCR 4-2), which includes postal mail or email.

Personal service is effected as follows:

(a) on an individual, by leaving a copy of the document with the individual (SCCR 4-3(2)(a));

(b) on a partnership, by leaving a copy of the document with a person who is or was a partner at the relevant time, or with a person who appears to manage or control the partnership business at the partnership's office or place of business (SCCR 20-1(2));

(c) on a corporation, including a municipal corporation, by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation, or with the city or municipal clerk, or with the manager, cashier, superintendent, treasurer, secretary, clerk or agent of the corporation or of any branch or agency of the corporation in the province, or as provided by the *Business Corporations Act* (i.e. for a BC company, by delivering the documents to the delivery address, or by mailing by registered mail to the company's mailing address, which is the registered office of the company in the corporate register) or any enactment relating to the service of process (SCCR 4-3(2)(b) and *Business Corporations Act*, s. 9(1)); and

(d) on a person who is mentally incompetent, by leaving a copy of the document with the following (SCCR 4-3(2)(f)):

- the mentally incompetent person's committee, or the person with whom the mentally incompetent person resides or whose care they are in, or the person appointed by the court to be served; and
- the Public Guardian and Trustee.

An Indian Band may be personally served by serving the elected Chief or a councillor of the Band. At least one court has held that a Band is not properly served by leaving the documents with the receptionist at a Band office (*William v. Lake Babine Indian Band* (1999), 30 C.P.C. (4th) 156 (B.C.S.C.)).

Special statutory provisions govern personal service to some other parties, including:

(a) the Provincial Crown (*Crown Proceeding Act*, s. 8);

(b) the Attorney General of BC (SCCR 4-3(6));

(c) an extraprovincial corporation (*Business Corporations Act*, s. 9(2)); and

(d) a society (s. 32 of the *Societies Act*).

Although there are different methods of personal service, lawyers often use a private process server.

SCCR 4-1(1) requires that each party of record to a proceeding must have an address for service. If a party is represented by a lawyer, the party's address for service will be the office of that lawyer. If the party is unrepresented, the party must have an accessible address for service within 30 km of the registry; or, if the party's accessible address is not within 30 km of the registry, that party must also have an additional address for service, which can be a postal address in British Columbia, a fax number, or an email address.

Any party may provide additional addresses for service, which can include a postal address, a fax number, or an email address (SCCR 4-1(2)).

If personal service is not required, ordinary service can be effected to the address given for service as set out in SCCR 4-2 by:

(a) leaving the document at that address,

(b) mailing the document by ordinary mail to that address,

(c) faxing the document to a fax number provided for service (together with a fax cover sheet and following restrictions as to page count and time under SCCR 4-2(5)); or

(d) emailing the document to an email address provided for service.

Documents served after 4:00 p.m. are deemed to have been served on the following day. Documents served on a weekend or holiday are deemed to be served on the next day that is not a Saturday or a holiday (SCCR 4-2(3)).

When a party is unrepresented or has failed to provide an address for service as required under SCCR 4-1, ordinary service may be effected by mailing a copy of the document by ordinary mail to the person's last known address (SCCR 4-2(7)).

2. Alternative Methods of Service—SCCR 4-4

If for any reason it is impracticable to personally serve a document (as when a party is evading service), a party can apply to the court for an order for substituted service, to allow the document to be served in some other way (SCCR 4-4(1)). Examples of substituted service might include service of the document on a person with whom the party is thought to have contact, delivery to an address that the party is thought to frequent, or publication in a newspaper. The court requires clear, cogent evidence of attempts to serve or of evasion before it will issue such an order.

3. Service Outside British Columbia—SCCR 4-5

SCCR 4-5(1) provides that an originating pleading, petition or any other document may be served on a person outside British Columbia without leave in any of the circumstances listed in s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. If the proceeding falls within one of the enumerated circumstances in s. 10, the document may be served outside of British Columbia without a court order. The originating pleading or petition must be specifically endorsed (using Form 11) with the claim of right to serve outside of British Columbia on one or more of the grounds set out in s. 10 (SCCR 4-5(2)).

If the proceeding does not fall within one of the enumerated circumstances in s. 10, leave of the court is required to serve the document (SCCR 4-5(3)).

4. Proof of Service and Relief—SCCR 4-6, 4-7

SCCR 4-6 sets out the requirements to prove service, including an affidavit of service in Form 15 and a response to a pleading.

Under SCCR 4-7, a person may apply to show that the document did not come to the person's attention, or came to the person's attention later than when it was effectively served or delivered.

This application may be for an order to set aside the consequences of default, an order to extend time, or a request to adjourn.

[§1.13] Responding to a Civil Claim in Supreme Court

1. Submitting to the Court's Jurisdiction

Before responding to a notice of civil claim, it is critical to consider whether the court has jurisdiction over the claim. Once a response has been filed, the opportunity to dispute jurisdiction may be lost. A defendant who disputes the jurisdiction of the court or the validity of the service must file a jurisdictional response in Form 108 (SCCR 21-8).

A party who disputes the jurisdiction of the court may apply to strike out a pleading or petition or to dismiss or stay a proceeding on the ground that the originating pleading does not set out facts that, if true, would establish that the court has jurisdiction over the party (SCCR 21-8(1)(a)). A party may also

apply to dismiss or stay a proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against the party (SCCR 21-8(1)(b)). A party may also allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding (SCCR 21-8(1)(c)). In addition to, or in the alternative, a party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against the party in the proceeding (SCCR 21-8(2)).

A party of record does not submit to the jurisdiction of the court if, within 30 days after filing a jurisdictional response (Form 108) in a proceeding, the party serves other parties of record a notice of application under SCCR 21-8(1)(a) or (b), or 21-8(3), or files a pleading under SCCR 21-8(1)(c) alleging the court does not have jurisdiction (SCCR 21-8(5)).

2. Response to Civil Claim and Counterclaim

If a response to civil claim is not filed within the period prescribed by SCCR 3-3(3), the plaintiff can apply for default judgment (SCCR 3-8).

Under SCCR 3-3, a response to civil claim must be in Form 2 and must comply with SCCR 3-7 on pleadings. A response will address facts:

(a) for each fact set out in Part 1 of the notice of civil claim, the response must address whether that fact is

  (i) admitted,

  (ii) denied, or

  (iii) outside the defendant's knowledge;

(b) for any fact set out in Part 1 of the notice of civil claim that is denied, the response must set out the defendant's version; and

(c) for any relevant facts that are missing from the notice of civil claim, the response must concisely set out the defendant's version.

The response to civil claim also addresses relief:

(a) indicating whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim; and

(b) indicating the legal basis for any opposition to the relief sought.

As with a notice of civil claim, a response to civil claim should set out the material facts upon which the defendant relies. If there are any allegations of a scandalous and embarrassing nature, counsel should take steps to have them struck out under SCCR 9-5.

Before admitting any allegation in a notice of civil claim, counsel should make certain that it is true. Once an admission has been made, it can only be withdrawn by agreement or with leave of the court, which is not easily obtained. For instance, when representing corporate clients, conduct a corporate search to ensure the plaintiff has named the correct corporate entity and provided correct particulars about your client.

When a defendant is pursuing a counterclaim against the plaintiff, the counterclaim must be filed within the same time limits as the response to civil claim. See SCCR 3-4 and Form 3 for the form that counterclaims should take.

When the counterclaim is filed against the plaintiff, the plaintiff becomes, in effect, a defendant in relation to the counterclaim, with the same rights and obligations as any other defendant (SCCR 3-4(6)). Accordingly, the plaintiff must file a response to the counterclaim.

You do not refer to the defendant as "plaintiff by counterclaim." The defendant simply remains the "defendant" (SCCR 3-4(3)).

Remember that by commencing an action, the plaintiff may revive the defendant's cause of action, which otherwise was time-barred.

[§1.14] Clarifying the Issues

1. Reply—SCCR 3-6

Under SCCR 3-6, a plaintiff may file a reply to a response to civil claim. A reply is seldom necessary since SCCR 3-6(3) provides that, in the absence of a reply, a joinder of issue on the defence is implied (that is, a denial of the facts alleged in the response to civil claim). A reply is needed if counsel wants to raise some new facts in answer to the response to civil claim. An example is in dealing with a limitation defence (for example, to raise the issue of postponement of the limitation) or a defence of satisfaction and release. See Southin J.A.'s decision in *Lavoie v. Musey* (1993), 77 B.C.L.R. (2d) 152 (C.A.).

When the plaintiff chooses to file a reply, it must be filed (in Form 7) and delivered within 7 days after the response to civil claim has been delivered (SCCR 3-6(1)).

2. Particulars—SCCR 3-7(18) to (24)

If a notice of civil claim does not properly set out the material facts, defence counsel may request particulars. SCCR 3-7(18) provides as follows:

> If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be nec-

> essary, full particulars, with dates and items if applicable, must be stated in the pleading.

If the particulars required under SCCR 3-7(18) of debt, expenses or damages are lengthy, SCCR 3-7(19) states: "… the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in a separate document either before or with the pleading."

There are many reasons why a party might ask for particulars. In *Cansulex Ltd. v. Perry,* [1982] B.C.J. No. 369 (C.A.), the court lists six functions of particulars (at para. 15):

1. to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
2. to prevent the other side from being taken by surprise at trial;
3. to enable the other side to determine what evidence they ought to be prepared with and to prepare for trial;
4. to limit the generality of the pleadings;
5. to limit and decide the issues to be tried, and as to which discovery is required; and
6. to tie the hands of the party, preventing the party from going into matters not included.

See also *Andrus v. Sihata*, 2012 BCSC 12 at para. 13.

Before applying to the court for particulars, a party must first demand them in writing from the other party (SCCR 3-7(23)). The demand may be in the form of a letter. However, the general practice is to prepare a formal demand using the style of the proceeding.

A defendant often seeks particulars in order to answer a claim fully. However, a demand for particulars does not operate as a stay of proceedings or give an extension of time in which to file a response to civil claim (SCCR 3-7(24)). If the other side does not agree to an extension, it is up to defence counsel to apply to the court for an extension on the ground that the defence cannot be given until particulars are provided. If as defence counsel you require particulars to a notice of civil claim in order to plead to it, request both the particulars and an extension of time in which to file a response to civil claim.

If appropriate, you can obtain particulars after the filing of a response to civil claim. For example, if the plaintiff is unable to provide particulars until after their examination for discovery of the defendant, the defence may seek particulars after the examination for discovery (*Cominco Ltd. v. Westinghouse Canada Ltd.* (1978), 6 B.C.L.R. 25 (S.C.); *Nesbitt v. Wintemute* (1978), 8 B.C.L.R. 286 (S.C.)).

The requirement to provide particulars is ongoing. Under SCCR 3-7(20):

> Particulars need only be pleaded to the extent that they are known at the date of pleading, but further particulars:
>
> (a) may be served after they become known, and
>
> (b) must be served within 10 days of a demand is made in writing.

As counsel for the plaintiff you should also not hesitate to demand particulars of a response to civil claim; the same rules apply. For example, you may need to find out the particulars of an allegation of the plaintiff's contributory negligence or failure to mitigate.

3. Applications to Strike Out Pleadings—SCCR 9-5

Pleadings must state material facts only and must be as brief as the nature of the case permits. If pleadings do not set out allegations of fact which if true would in law give rise to the relief sought, they are liable to be struck out.

A court may order any part of a pleading that discloses no reasonable claim or defence to be struck out (SCCR 9-5(1)(a)). It can also order the proceeding to be stayed or dismissed or may grant judgment. No evidence is admissible on this type of application (SCCR 9-5(2)). The application is considered solely on the merits of the pleading standing alone. The court will not strike out the pleading unless it is plain and obvious that the pleading discloses no cause of action known to the law. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in SCCR 9-5(1), should the relevant portions of the pleadings be struck (see *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959). If there is some realistic chance the cause of action could be saved by a future development in the law, the court should allow the action to proceed: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 41.

The court may strike out pleadings or portions of pleadings if they are unnecessary, scandalous, frivolous or vexatious, prejudicial, embarrassing, may delay the fair trial, or constitute an abuse of the process of the court (SCCR 9-5(b), (c) and (d)). A party can present evidence on these applications.

4. Amending Pleadings and Changing Parties—SCCR 6-1 and SCCR 6-2

SCCR 6-1 deals with amendments to pleadings, except for amendments to change parties or withdraw admissions. SCCR 6-2 deals with amendments to change the parties to the action.

(a) Amending Pleadings

Under SCCR 6-1(1), a party may amend a filed pleading once without leave of the court at any time before the notice of trial has been served (SCCR 6-1(1)(a)). After the notice of trial has been served, a party may amend a pleading only with leave of the court, or with written consent of the opposing parties (SCCR 6-1(1)(b)). Note that SCCR 6-1(1) *does not* apply when a party seeks to amend a pleading to change parties or to withdraw an admission (SCCR 6-1)—amendments to change parties are dealt with under SCCR 6-2(7), and admissions in pleadings can be withdrawn only with leave of the court or by consent (SCCR 7-7(5)).

When you realize that an amendment is needed, you should check to see whether the other side will agree to a consent order, because it may well save a trip to chambers.

Applications for leave to amend pleadings are considered on the same basis as applications to strike pleadings, with the question being whether it is plain and obvious that the proposed amendments are bound to fail. In assessing that question, it is not determinative that the law has not yet recognized a particular claim. In its analysis, the court must be generous and err on the side of permitting an arguable claim to proceed to trial.

There are general principles that arise on an application to amend pleadings:

(i) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence.

(ii) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to a party's ability to defend an action.

(iii) The party resisting an amendment must prove prejudice to preclude an amendment. Potential prejudice is insufficient to preclude an amendment.

(iv) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.

(v) Courts should only disallow an amendment as a last resort.

See *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para 41.

Additional considerations apply where an amendment raises a new cause of action: see *Limitation Act*, s. 22. Factors a court will consider on an application to amend after the expiration of a limitation period are set out in *Stautlo Fisheries Ltd. v. Sthakwy Fishing Co. Ltd.*, 2016 BCSC 585 at para. 10.

(b) Changing Parties

When the amendment seeks to change (i.e. add, remove, or substitute) the parties to the action, SCCR 6-2 applies.

Under SCCR 6-2(7), the court, on application by any person, may add, remove, or substitute parties. On an application to add a person as a party, there must be evidence that there exists between that person and any party to the action a question or issue connected with the subject matter or the relief claimed in the original action. Once this threshold has been met, the court will consider whether it would be just and convenient to add the party, considering such factors as the extent of and reasons for the delay, prejudice caused by the delay, and the nature of the connection between the existing claims and the proposed action involving the new party.

If a limitation period has expired, that does not preclude the addition of parties (s. 22 of the *Limitation Act*). If a court weighs the reasons for adding a party, despite a limitation defence, and orders the party to be added, that party loses its right to raise the limitation defence again in the proceeding: *Mullett (Litigation Guardian of) v. Gentles*, 2016 BCSC 802.

5. Third Party Proceedings—SCCR 3-5

A party of record who is not a plaintiff may commence a third party proceeding against any person, whether or not that person is a party to the action, if the party alleges one or more of the matters set out in SCCR 3-5(1):

(a) the party is entitled to contribution or indemnity from the third party;

(b) the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action; or

(c) a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially the same question or issue as between the party and the third party and should properly be determined in the action.

A party pursues a third party proceeding by filing a third party notice in Form 5. Leave is not required if the party files it within 42 days of being served with the notice of civil claim or counterclaim (SCCR

3-5(4)). The third party notice, together with a copy of all pleadings to date (if the third party was not a party of record), must be served on the third party (SCCR 3-5(7)). The third party must then file a response to third party notice (Form 6), in accordance with SCCR 3-5(9)(a), within the applicable time limits for a response as set out in Form 5.

A third party who has filed a response to third party notice may file and deliver a response to civil claim to the plaintiff's notice of civil claim, raising any defence open to a defendant (SCCR 3-5(12)).

Under SCCR 3-5(13), any party affected by the third party procedure may apply for directions. Usually these directions are agreed to between the parties. It is customary to agree that the third party action is to be tried at the same time or immediately after the trial of the main action. If counsel cannot agree, one or more of the parties will have to apply in chambers for directions.

SCCR 3-5(10) outlines the circumstances in which a response to a third party notice is not required.

The third party procedure under SCCR 3-5 is different from, and should not be confused with, the right of ICBC under the *Insurance (Vehicle) Act*, or another insurer, under the *Insurance Act*, to join themselves as third parties to an action in certain circumstances.

[§1.15] Case Planning Conference

1. General

A case planning conference (a "CPC") can be initiated by a party or on direction of the court (SCCR 5-1). After the pleading period has expired, a party of record to an action may request a case planning conference by filing a notice of case planning conference in Form 19 (SCCR 5-1(1)). Also, the court may direct that a CPC take place at any stage of an action after the pleading period has expired and, in that case, the court must direct that a party request one (SCCR 5-1(2)).

A CPC must be conducted by a judge or master (SCCR 5-2(1)), and the proceedings must be recorded (SCCR 5-2(7)).

2. Content

Whether a CPC is requested or directed by the court, the parties of record must, before the first CPC, file case plan proposals in Form 20 (SCCR 5-1(6)). These proposals indicate each party's proposal with respect to:

(a) discovery of documents;

(b) examinations for discovery;

(c) dispute resolution procedures;

(d) expert witnesses;

(e) witness lists; and

(f) trial type, estimated trial length and preferred periods for the trial date.

Unless the court otherwise orders, the first CPC must be face-to-face, but subsequent meetings can be held by phone or video (SCCR 5-2(3)). Unless the court otherwise orders, each lawyer representing a party of record, and each party of record who is not represented, or who is ordered to attend, must attend a CPC (SCCR 5-2(2)).

3. Orders

At a CPC a judge or master may make any of the following orders (paraphrased but using the numbering from SCCR 5-3(1)):

(a) setting a timetable for the steps to be taken;

(b) amending a previous case plan order;

(c) any order referred to in Rule 22-4 (2);

(d) requiring amendment of a pleading to provide details of (i) the facts, (ii) the relief sought, or (iii) the legal basis on which relief is sought or opposed;

(e) respecting the length and content of pleadings;

(f) respecting discovery, listing, production, preservation, exchange or examination of documents or exhibits;

(g) respecting discovery of parties or the examination or inspection of persons or property;

(h) respecting interrogatories;

(i) respecting third party claims;

(j) respecting witness lists;

(k) respecting experts;

(l) respecting admissions;

(m) respecting offers to settle;

(n) respecting the conduct of any application;

(o) requiring the parties of record to attend a dispute resolution process;

(p) authorizing or directing the parties to try one or more issues in the action separately;

(q) fixing the length of trial;

(r) respecting the place at which any step in the action is to be conducted;

(s) setting the action for trial on a particular date or on a particular trial list;

(s.1) striking out a counterclaim or directing that a counterclaim be tried separately;

(t) adjourning the case planning conference;

(u) directing the parties to attend a further case planning conference; or

(v) any orders the judge or master considers will further the object of the SCCR.

A judge or master at a CPC must not hear any application supported by affidavit evidence or make an order for final judgment, except on consent (SCCR 5-3(2)).

[§1.16] Setting Action Down for Trial in Supreme Court

1. General

A party may set a matter down for trial by filing a notice of trial in Form 40 (SCCR 12-1(2)).

In setting a trial date, there are certain considerations:

(a) the length of time required for the trial;

(b) the form of the trial, either judge and jury or judge alone; and

(c) the availability of the parties, counsel, and witnesses.

The proper practice is to consult with all counsel involved when estimating the length of the trial. If there is a difference in estimate, it is safest to choose the lengthier estimate. While the shortest estimate may allow counsel to get an earlier trial date, it will also lead to an adjournment if a pre-trial judge thinks that the time required for the matter has been underestimated.

After deciding on the length of trial, the matter can then be set down. Some counsel prefer to have their trials heard as quickly as possible.

In some cases, it may be necessary to choose a trial date further away. Accordingly, before setting the matter for trial, consult with all witnesses to determine whether there are any dates on which they *will not* be available.

When setting the trial, leave enough time to conduct the examinations for discovery. If there is deposition evidence that may delay your preparation for the trial, allow enough time to complete it.

Also leave enough time to obtain expert evidence. Expert reports must be served at least 84 days before the scheduled trial date (SCCR 11-6(3)).

SCCR 12-2(1) provides that, unless the court otherwise orders, a trial management conference must take place at least 28 days and not more than 120 days before the scheduled trial date. The objective of a trial management conference is to provide increased judicial supervision of pre-trial steps in the litigation and the conduct of the trial: *Landis v. Witmar Holdings Ltd.*, 2012 BCSC 762. SCCR 12-2(3) and 12-2(3.1) impose deadlines for filing and serving trial briefs (Form 41) before the date set for the trial management conference. Unless the court otherwise orders, the plaintiff must file a trial brief and serve a copy of the filed trial brief on all other parties of record (SCCR 12-2(3)) at least 28 days before the date set for the trial management conference, and each party of record other than the plaintiff must file a trial brief and serve a copy of the filed trial brief on the other parties of record no later than 21 days before the date set for the trial management conference. If no trial brief is filed, the trial will be removed from the trial list, unless the court orders otherwise.

At a trial management conference, a judge or master may make orders on any of the following matters (paraphrased but using the numbering from SCCR 12-2(9)):

(a) conduct of the trial;

(b) whether the trial or any part of it will be heard without a jury;

(c) amending pleadings;

(d) admissions of fact at trial;

(e) admission of documents at trial;

(f) time limits for witness examinations, opening statements and final submissions;

(g) directions for providing summaries of the evidence that witnesses will give at trial;

(h) witness evidence to be by way of affidavit;

(i) experts and expert reports, including orders that the parties' experts confer;

(j) directions for opening statements and final submissions in writing;

(k) third party matters that may depart from the main action;

(l) adjournment of the trial;

(m) the number of days set for the trial;

(n) directions for a settlement conference;

(o) a further trial management conference;

(p) anything that may make the trial more efficient;

(q) anything that may assist resolution; and

(r) anything the judge or master considers will further the object of the SCCR.

The party who files a notice of trial must file a trial record not more than 28 days and not fewer than 14 days before the trial date and promptly serve a copy of the file trial record on the other parties (SCCR 12-3(3)). The trial record contains the pleadings; particulars delivered under a demand, together with the demand made; the case plan orders, if any; any order made governing the conduct of the trial; and any document required by a registrar under SCCR 12-3(2). Pursuant to Administrative Notice 13 (AN-13), copies of trial briefs must also be included in the trial record.

SCCR 12-4 requires each party to file a trial certificate in Form 42 not more than 28 days and not less than 14 days before trial. The trial certificate must show that the party is ready to proceed, estimate the length of trial, certify that discoveries are completed, and state that the TMC has been conducted (SCCR 12-4(3)). If the parties fail to file a trial certificate by the deadline, the trial will be removed from the list (SCCR 12-4(5)). It is important to diarize deadlines so that you do not inadvertently adjourn your trial.

2. Jury or Judge—SCCR 12-6

One final consideration is the question of whether to choose a jury.[4] This is not an option in all cases. Trials relating to certain types of matters must be heard by a judge alone; these cases are set out in SCCR 12-6(2) and include cases concerning the administration of estates and the redemption or foreclosure of a mortgage. Fast track litigation must also be heard by a judge alone (SCCR 15-1(10)). In all other cases, SCCR 12-6(3) permits a party to issue a notice requiring a trial by jury.

The notice requiring a trial by jury must be filed and delivered to all parties of record within 21 days after delivery of the notice of trial and not later than 45 days before trial. In addition, the requiring party must pay to the sheriff, not less than 45 days before trial, a sum sufficient to pay for the jury and the jury process (SCCR 12-6(3)).

It is difficult to set out the considerations involved in choosing whether to have a trial with a jury. However, it is probably safe to say that a jury requires a sacrifice of some element of predictability, both as to liability and as to quantum of damages. Thus, while many plaintiffs' counsel will always choose a jury, some feel that a plaintiff who is of dubious credibility may have a greater chance with a judge alone. If the case depends mainly on law and it is in your favour, it may be preferable to choose a judge.

In all cases, the choice is something that you must discuss with the client. You should also explain to the client that a jury trial will require jury fees to be paid to empanel the jury, and this will have to be done before the trial begins (pursuant to s. 17 of the *Jury Act*, R.S.B.C. 1996, c. 242). A party who delivers a jury notice may choose to relinquish its entitlement to a jury trial, without notice to the other parties, by failing to pay the jury fees (*Conlin v. Struve* (1997), 28 B.C.L.R. (3d) 327 (C.A.)). According to *Folk v. Halcrow*, 2004 BCSC 1623, the proper construction of former Rule 39(26) [now SCCR 12-6(3)] is that only the party that issued the jury notice is entitled to pay the jury fees associated with the notice. Therefore, it is best to decide whether to choose a trial by jury independent of whether another party has issued a jury notice. If a party wishes to proceed with a trial by jury, it should issue its own jury notice regardless of whether another party has issued one. Be sure to diarize the deadline for paying the jury fees so that you do not inadvertently abandon your election for a trial by jury.

SCCR 12-6(5) applies to counsel receiving notice requiring a trial by jury. Within 7 days of receipt of that notice, counsel must apply if they want to argue that the trial should be heard without a jury. Since 7 days is a very short time in which to put together all the supporting material necessary to set out grounds for striking the jury notice, one practice is to file the notice with or without some material, but to set a date well in the future, or seek the consent of the other parties to extend the time to deliver the materials. This will allow counsel time to have experts review the material and provide information that can be put into affidavit form to oppose the jury if counsel decides to do so.

The ground on which a jury is opposed is almost always one of those within SCCR 12-6(5)(a), which provides—except in cases of defamation, false imprisonment, and malicious prosecution—that a party may apply:

(a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
    (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
    (ii) the issues are of an intricate or complex character, or
    (iii) the extra time and cost involved in requiring that the trial be heard by the

[4] Note that due to the COVID-19 pandemic, from September 28, 2020 to October 3, 2022, civil jury trials are not permitted.

court with a jury would be disproportionate to the amount involved in the action.

As SCCR 12-6(5)(a)(i) indicates, it is not enough to argue that the issues require scientific investigation—that investigation must be such that it "cannot be made conveniently with a jury." The ground that "the issues are of an intricate or complex character" does not include that secondary requirement.

Also note that SCCR 12-1(9) and SCCR 12-5(68) allow a trial to be divided so that one portion of the trial is heard with a jury and another portion is heard by judge alone. While this is not common, it can be done so that liability will be divided from quantum and each dealt with in a different form of trial (*Foote v. Royal Columbian Hospital* (1982), 37 B.C.L.R. 225 (S.C.)).

One other consideration is the place of trial. While a trial is commonly set in the registry in which the action has been commenced, it is possible to obtain a trial date in a different registry. You may obtain a fixed date for a trial of three days or more in certain registries outside Vancouver that normally deal with matters on assize, if the request is made either in Vancouver or in the registry where the action has been commenced. This involves a pre-trial conference and reference to the Chief Justice of the Supreme Court.

[§1.17] Class Proceedings

A class proceeding (also known as class action) is a form of action that can be used where a group of two or more persons have claims that raise common questions that will need to be determined by the court. A class proceeding is commenced using a notice of civil claim with an endorsement in the style of clause indicating that the action is brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. A notice of application is then filed asking the court to certify that action as a class proceeding. Pursuant to s. 4 of the *Class Proceedings Act*, in order for an action to be certified as a class action, the plaintiff must demonstrate that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

If certification is granted, a common issues trial is held to determine the common issues. Unless the common issues trial determines all of the issues in the litigation (which is very unusual), then additional individual inquiries will need to be made to determine the issues individual to each class member, for example, the amount of damage they suffered.

Before commencing a class proceeding, seek the advice of experienced class action counsel. Many class actions fail, often with the plaintiff being responsible for significant costs. For example, in *The Consumers' Association of Canada et al v. Coca-Cola Bottling Company et al*, 2006 BCSC 1233, costs (reported to be as much as $400,000) were awarded against the plaintiff.

[§1.18] Fast Track Litigation

Before preparing your notice of civil claim or response to civil claim, you should consider whether the case falls under the fast track litigation rule—SCCR 15-1.

The object of SCCR 15-1 is to provide a speedier and less expensive determination of the action. The focus of the rule is to resolve proceedings sooner rather than later (*Christen v. McKenzie*, 2013 BCSC 1317).

An action can be fast-tracked as long as one or more of the following four criteria in SCCR 15-1(1) are met (*Hemani v. Hillard*, 2011 BCSC 1381 at paras. 10-17):

(a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property, and the total amount of damages sought is $100,000 or less, exclusive of interest and costs;

(b) the trial of the action can be completed within 3 days;

(c) the parties to the action consent; or

(d) the court so orders.

If one of these criteria is met, a party can file a notice of fast track action in Form 61 (SCCR 15-1(2)) to have the action proceed under the fast track rule.

Note that even if an action qualifies as a fast track action, a court may order under SCCR 15-1(6) that the action proceed as a regular action. The court will consider such factors as the time required for trial, whether all parties consented or acquiesced to using fast track procedures, the risk of prejudice to a party, whether a party is using the application of fast track procedures for an improper purpose (such as to strike a jury notice), and

the interests of justice and the purpose of SCCR 15-1 (see *Connatty v. Bone*, 2018 BCSC 2336, citing *Bagri v. Bagri*, 2015 BCSC 2132).

When proceeding under SCCR 15-1, a party must add the words "Subject to Rule 15-1" to the style of proceeding in the notice of civil claim or response to civil claim (SCCR 15-1(2)(b)).

SCCR 15-1 does not apply to a class action within the meaning of the *Class Proceedings Act* (SCCR 15-1(4)).

While actions under SCCR 15-1 may be quicker and less expensive, there are limits to the discovery process. For example, examinations for discovery in a fast track action must be completed within 2 hours and must be completed at least 14 days before the scheduled trial date, unless the parties consent or a court otherwise orders (see SCCR 15-1(11) and (12)).

Further, in a fast track litigation proceeding, a case planning conference or a trial management conference is required before any contested application may be filed (SCCR 15-1(7)). However, SCCR 15-1(8) provides for exceptions. A case planning conference does not need to be held prior to the following:

- an application for an order under SCCR 15-1(6) that the fast track litigation rule cease to apply to the action;
- an application to obtain leave to bring an application referred to in SCCR 15-1(9);
- an application under SCCR 9-5 (striking pleadings), 9-6 (summary judgment) or 9-7 (summary trial);
- an application to add, remove or substitute a party; or
- an application by consent.

SCCR 15-1(9) states that on application by a party, a judge or master may relieve a party from the requirements of SCCR 15-1(7) if it is impracticable or unfair to hold a conference or if the application is urgent. In *Totol Vision Enterprises Inc. v. 689720 B.C. Ltd.*, 2006 BCSC 639, the court exercised its discretion under former subrule 68(12) (now SCCR 15-1(9)) and allowed a date to be set for the hearing of an application to set aside a prejudgment garnishing order, without holding a case management conference beforehand.

Under SCCR 8-5(3), urgent applications can be brought without the requirements of SCCR 15-1(7) having been met.

SCCR 15-1(6) provides that the rule may cease to apply, by order of the court or by application by a party.

SCCR 15-1(10) prohibits a jury trial in a fast track action. A party wishing to proceed with a jury trial should immediately take steps to obtain the consent of the opposing party to remove the action from fast track, or barring consent, bring an application to remove the action from fast track.

SCCR 15-1(15) provides for a fixed amount of costs (exclusive of disbursements) to be awarded, unless the court orders otherwise or the parties consent.

Parties to a fast track action that includes a claim for vehicle injury damages are limited to one expert report each on the issue of vehicle injury damages, unless the parties consent to additional expert reports (*Evidence Act*, R.S.B.C. 1996, c. 124, ss. 12.1). This limit does not apply if the expert report was served before February 6, 2020 (*Evidence Act*, s. 12.2). These provisions of the *Evidence Act* will not apply to most claims involving motor vehicle accidents occurring on or after May 1, 2021, when BC's motor vehicle insurance system changes to a "no-fault" or "care-based" model. (Under the new system, people will be directly compensated by ICBC for injuries from motor vehicle accidents according to amounts set by regulation and policy, regardless of who is at fault, and in most cases will not be able to sue the person responsible for the accident for damages.)

Review SCCR 15-1 carefully for all deadlines for pretrial steps that are unique to this Rule.

[§1.19] Petition Proceedings

Generally, a petition is used for proceedings concerning estates, trusts, interests in property or construction of documents. See SCCR 2-1(2) for proceedings that must be started by petition.

A party starts a petition proceeding by filing and serving a petition to the court in Form 66, along with all supporting affidavits (SCCR 16-1(2)). Among other things, Form 66 requires that the petitioner set out, in numbered paragraphs, the material facts upon which the petition is based. The petition respondent must file and serve a response to petition in Form 67 along with all supporting affidavits within:

- 21 days of service, if served in Canada;
- 35 days of service, if served in the United States; or
- 49 days of service, if served anywhere else (SCCR 16-1(4)(c)).

These deadlines are the same as for a response to a civil claim. The response to petition must set out the factual and legal bases on which the petition is opposed.

While a petition proceeding is generally quicker than an action, SCCR 22-1(7)(d) provides that the court can transfer the petition to the trial list. SCCR 16-1(18) also provides that the court may apply any of the rules governing actions to a petition proceeding (such as having cross-examination on an affidavit). Note also that a summary trial (SCCR 9-7) takes an action that was started by notice of civil claim and decides it in

chambers, in a manner similar to how a petition proceeding is normally decided.

[§1.20] Requisition Proceedings

SCCR 2-1(2) identifies proceedings that must be started by petition or, in certain cases, requisition. A proceeding listed in SCCR 2-1(2) can be started by requisition when either all parties involved consent, or the proceeding is one that does not require notice (SCCR 17-1(1)).

[§1.21] Communications With the Supreme Court

In most cases, communicating with the court is not appropriate and is discouraged. However, there are limited situations in which it is proper to correspond with the court. In those exceptional circumstances, counsel should follow the procedures set out in Practice Direction PD-27—*Corresponding with the Court*.

The Practice Direction states (in part) that if it is necessary to write a letter to the court, the letter should be addressed to the Manager, Supreme Court Scheduling and *not* to a particular judge, master or registrar, even if that judge, master or registrar is seized of the matter. Counsel should first consult with other counsel or interested parties, and the correspondence should state the views of opposing counsel if they are different from the writer's view. The letter should not include argument or submissions since, in general, counsel is not entitled to submit written argument subsequent to the completion of oral argument. See PD-27 for more information.

[§1.22] Small Claims Court Procedures

The Small Claims Rules outline the procedures in Small Claims Court. Counsel who represent clients in Small Claims Court need to become familiar with these Rules. A *very simplified* overview follows. Please consult the *Small Claims Handbook* (CLEBC) for details. Note that on June 1, 2017, the monetary jurisdiction of the Small Claims Court increased from $25,000 to $35,000. In addition, most small claims matters involving amounts up to $5,000 are now resolved in the Civil Resolution Tribunal instead of in Small Claims Court (see §1.23).

The Small Claims Rules are designed to make the Small Claims Court accessible and understandable to the non-lawyer litigant. Recent amendments to the Small Claims Rules provide for some pre-trial procedures in certain registries, such as Robson Square and Richmond. In general, the Small Claims Rules encourage frank discussion early in the process at a settlement conference (Small Claims Rule 7), mediation (Small Claims Rule 7.3) or trial conference (available in some registries, see Small Claims Rule 7.5).

A claimant starts an action by filing a notice of claim (Form 1), which identifies the nature of the claim and the relief sought. The notice of claim is then filed in the registry. The claimant then has 12 months to serve the claim and blank reply form (Form 2) on all the defendants (Rule 2(7)).

Small Claims Rules 2 and 18 govern most service procedures. The Small Claims Rules permit service of a notice of claim on a defendant who is an *individual* by mailing a copy of it by registered mail to the defendant. Separate rules exist for other categories of defendant.

When the defendant receives the claim, the defendant has options:

(a) pay the amount claimed directly to the claimant and ask the claimant to withdraw the claim;

(b) admit all or part of the claim and propose a payment scheme;

(c) dispute all or part of the claim by explaining why and what parts of the claim the defendant disputes; and/or

(d) file a counterclaim (Small Claims Rule 3(1)).

The defendant can also commence an action against a third party if the defendant believes that someone other than the defendant is responsible for the claim (Small Claims Rule 5(1)).

The defendant must file a reply within 14 days after the date the defendant was served (if within BC) and 30 days (if served outside BC) (Small Claims Rule 3(4)). The defendant does not serve the reply, the registry does (Small Claims Rule 3(5)).

All registries accept e-filing (Small Claims Rule 22). E-filing works in much the same way as under SCCR 23-3, so that documents can be received and sent from an email address once the party follows the appropriate procedures.

What happens after the claim is made depends on the response to the claim, the nature of the claim (e.g. debt, personal injury, property damage only in a motor vehicle action, etc.), the amounts claimed, and the registry in which the action starts. All of these details are beyond the scope of this brief overview.

Some further practice points of note follow.

(a) The Civil Resolution Tribunal (instead of Small Claims Court) deals with most small claims involving amounts of up to $5,000 (see §1.23).

Small Claims Court still deals with claims of $5,000 or less where:

- the Civil Resolution Tribunal does not have the authority to deal with the subject matter of the claim;
- a judge orders that the matter proceed in Provincial Court instead of the Civil Resolution Tribunal;

- one of the parties files a notice of objection to a decision of the Civil Resolution Tribunal; or
- no objection to an order of the Civil Resolution Tribunal is filed, and a party asks to have the order enforced in Provincial Court.

(b) Pursuant to Small Claims Rule 9.1, when the claim is for an amount between $5,001 and $10,000 in the Robson Square and Richmond registries, a simplified one-hour trial is scheduled before an adjudicator who is a judge or a justice of the peace and is called a Justice of the Peace Adjudicator. The court will hear a claim for under $5,001 only if the claim is outside of the jurisdiction of the Civil Resolution Tribunal or if a notice of objection to the decision of the Civil Resolution Tribunal has been filed.

At Robson Square this simplified trial procedure does not apply to financial debt claims under Small Claims Rule 9.2 (see (c) below) or personal injury claims, and these trials are scheduled during evening hours. At Richmond, the simplified trial process does not apply to personal injury claims and the trials are scheduled during normal business hours.

(c) When the claimant is "in the business of lending money or extending credit," the claim is for financial debt (for a debt arising from a loan or extension of credit in the course of the claimant's business), and the claim is filed at Robson Square, a 30-minute summary trial is scheduled (Small Claims Rule 9.2).

(d) When the claim is for an amount greater than $10,000 and less than $35,000, a party may initiate mediation, unless the claim is for financial debt under Small Claims Rule 9.2, involves a protection order under the *FLA* or a peace bond under the *Criminal Code*, or the parties are the same as those for an action brought in Supreme Court (Small Claims Rule 7.3).

(e) After pleadings are closed, the registry at Robson Court schedules a settlement conference before a judge (if the case is not one that proceeds to default judgment, is referred directly to mediation, or scheduled for a summary or simplified trial).

(f) If a case is not resolved at mediation (and is not one under Small Claims Rule 7.5, 9.1 or 9.2 nor a claim for property damage only in a motor vehicle accident claim), the court registry will send a notice of settlement conference to the parties and a settlement conference will be held pursuant to Rule 7 of the Small Claims Rules.

(g) The parties' attendance at the conference, in most circumstances, is mandatory. The parties must bring all relevant documents and reports to the conference (Small Claims Rule 7(5)). The powers of the judge at a settlement conference are outlined in Small Claims Rule 7(14). Small Claims Rule 10.1 provides for formal offers to settle (Form 18) to be served within 30 days following the settlement conference. A trial will be scheduled only if no settlement is reached.

(h) Small Claims Rule 10 allows expert reports from qualified individuals to be used as evidence. A summary of the expert's evidence must be served on the opposing party at least 30 days prior to the expert's testimony. The Rules also permit expert reports to be entered into evidence without having to call the expert to testify, if the report is served on all parties 30 days before the report is introduced. If a party wishes to cross-examine the opposing party's expert, notice requiring the expert to attend trial for the purpose of cross-examination must be served on the opposing party at least 14 days before the trial date.

(i) The court must make a payment order following any monetary judgment (Small Claims Rule 11). If the unsuccessful party does not need time to pay, the judgment must be paid immediately. If time is required, the court may order a payment schedule or order a payment hearing. In a payment hearing (Small Claims Rule 12), the debtor gives evidence, under oath, of their assets and financial status. After hearing evidence and submissions, the court may order a payment schedule. The court has significant powers to order arrest and imprisonment.

(j) Lawyers' fees are not recoverable in Small Claims Court, though filing fees and certain disbursements are recoverable. The judge may order a penalty against the losing party if the judgment against the defendant was greater than the plaintiff's offer to settle, or if the award to the plaintiff was less than the defendant's offer to settle (Small Claims Rule 10.1). The penalty may be up to 20% of the amount of the offer to settle. In order to be eligible for the penalty, a settlement offer should be made as early as possible (see Rule 10.1(8)(c)) and cannot be made later than "30 days after the conclusion of the settlement conference or the conclusion of a trial conference, whichever happens first" (Rule 10.1(2)).

(k) In addition, the judge has discretion to order one party to pay the other up to 10% of the amount claimed or the value of the claim or counterclaim if the party made a claim, counterclaim, or reply and proceeded through trial with no reasonable basis for success (Small Claims Rule 20(5)).

(l) Decisions on the merits of a claim may be appealed to the BC Supreme Court (*Small Claims Act*, s. 5; SCCR 18-3). The appeal is based on the

record from the Provincial Court trial on questions of both law and fact (*Small Claims Act*, s. 12). The procedure is set out in the Supreme Court Practice Direction, PD-21. Under s. 5 of the *Small Claims Act*, there is no right of appeal from interlocutory decisions made by a judge, although there is an avenue for the appeal of interlocutory matters through the *Judicial Review Procedure Act*, R.S.B.C. 199, c. 241. An order not finally disposing of a claim that was made by a registrar, however, may be appealed to a Small Claims Court judge.

(m) Certain types of applications may be made without a hearing before a registrar of the court (Small Claims Rule 16(2) and (3)).

See Chapter 9 for information on collections procedures in Small Claims Court.

The provincial government publishes a Small Claims Court Manual, which explains the system and provides direction to registry staff. Each registry also has free booklets explaining the process. See also the *Small Claims Handbook* and *Small Claims Act and Rules Annotated* (Vancouver: CLE), as well as the chapter on Small Claims Court in CLE's *Annual Review of Law and Practice*. Further information about Small Claims Court is available at these websites:

- the website of the BC Attorney General, www2.gov.bc.ca/gov/content/justice/courthouse-services/small-claims;
- the website of the Provincial Court of BC, www.provincialcourt.bc.ca; and
- the Small Claims BC Online Help Guide, www.smallclaimsbc.ca.

[§1.23] Tribunals

1. Civil Resolution Tribunal

British Columbia's new Civil Resolution Tribunal, established under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, has the authority to decide most strata property disputes, society disputes, minor civil claims, and certain motor vehicle accident claims for accidents which occurred on or after April 1, 2019. It is one of the first tribunals in Canada for resolving disputes online, although it also has the jurisdiction to hold hearings.

The jurisdiction of the Civil Resolution Tribunal is set out in the *Civil Resolution Tribunal Act*, s. 2.1. The Tribunal does not have the jurisdiction to order the sale of strata lots or deal with claims of builders' liens. It also cannot resolve certain claims, including claims for defamation or malicious prosecution, constitutional claims or claims against the government.

Proceedings are governed by the *Civil Resolution Tribunal Rules*, which are published on the Civil Resolution Tribunal website.

The Civil Resolution Tribunal began accepting strata property disputes in July 2016. It can address a wide variety of disputes between owners of strata properties and strata corporations, including disputes about common property, non-payment of strata fees or fines, and interpretation of strata bylaws.

Since June 1, 2017, most small claims up to $5,000 go to the Civil Resolution Tribunal rather than Small Claims Court. The Civil Resolution Tribunal now has jurisdiction over the same types of claims as the Small Claims Court (debt, damages, claims concerning personal property, and performance of agreements about personal property or services). Claims filed in Small Claims Court before June 1, 2017 continue to be dealt with by that court.

As of April 1, 2019, the Civil Resolution Tribunal has jurisdiction to decide claims for up to $50,000 for injuries that arise from motor vehicle accidents, to decide whether an injury is a "minor injury," and to resolve disputes about the entitlement to receive motor vehicle accident benefits. On March 2, 2021, the BC Supreme Court ruled that the Civil Resolution Tribunal's jurisdiction over minor injury determinations and motor vehicle injury claims up to $50,000 was unconstitutional. That decision has been appealed and the BC Court of Appeal has ordered (on April 8, 2021) that until the appeal is decided, the Civil Resolution Tribunal can continue to make minor injury determinations and resolve motor vehicle injury claims up to $50,000.

The Civil Resolution Tribunal will have expanded jurisdiction over motor vehicle accident benefit disputes, effective May 1, 2021, when BC's motor vehicle insurance system changes to a "no-fault" model.

As of April 1, 2019, the Civil Resolution Tribunal also handles certain disputes under the *Societies Act*, S.B.C. 2015, c. 18 and the *Cooperative Association Act,* S.B.C. 1999, c. 28.

A dispute at the Civil Resolution Tribunal begins when an applicant files a dispute notice. Once a response is filed, the parties are encouraged to negotiate with each other. If negotiation does not result in a resolution, a facilitator is assigned to assist the parties to reach a resolution. If the dispute remains unresolved, it proceeds to adjudication by an independent Civil Resolution Tribunal member. A decision of a Civil Resolution Tribunal member is binding on the parties and enforceable as a court order.

The general rule at the Civil Resolution Tribunal is that parties represent themselves, unless they fall

within an exception in s. 20(2) of the *Civil Resolution Tribunal Act* or they obtain the Tribunal's permission to be represented by counsel. Parties to a motor vehicle accident claim may be represented by a lawyer as of right.

Counsel representing a party before the Civil Resolution Tribunal, or assisting a party to prepare for self-representation before the Tribunal, should clearly communicate the limits of their retainer with the client prior to being retained. Fees may be recoverable in some cases.

For more information, visit the Civil Resolution Tribunal's website (www.civilresolutionbc.ca).

2. Other Tribunals

Other tribunals, boards and commissions make decisions in a wide range of legal areas. The duties and powers of these administrative bodies are governed by legislation. Some, like the BC Securities Commission or the BC Human Rights Tribunal, are large bodies with detailed rules and practice directions. Others can be quite informal. For example, the Residential Tenancy Branch now accepts online applications for dispute resolution.

Depending on your practice area, you might deal with any of these provincial administrative bodies: the Health Professions Review Board, the Workers' Compensation Appeal Tribunal, the Employment Standards Tribunal, the Labour Relations Board, the Property Assessment Appeal Board, the Agricultural Land Commission, the BC Utilities Commission, or the Surface Rights Board, among many others. There are also numerous federal administrative bodies: the Competition Tribunal, the Immigration and Refugee Board, the National Energy Board, the Canadian Radio-Television and Telecommunications Commission and the Patent Appeal Board of Canada, among many others.

Some practice areas involve both federal and provincial jurisdiction. For example, there is an Information and Privacy Commissioner of BC and also a Privacy Commissioner of Canada. Similarly, there is a BC Human Rights Tribunal as well as a Canadian Human Rights Tribunal.

[§1.24] Further Reading

1. Supreme Court Civil Rules Annotations

Dillon, J. and G. Turriff. *British Columbia Annual Practice* (the "White Book"). Toronto: Thomson Reuters.

McLachlin & Taylor. *British Columbia Practice*, with supplemental volume *British Columbia Court Forms*. Toronto: LexisNexis.

Seckel, A. and J. MacInnis. *British Columbia Supreme Court Rules—Annotated.* Toronto: Thomson Reuters.

2. Practice in Supreme Court

Fraser & Horn. *The Conduct of Civil Litigation in British Columbia*. 2nd ed. Toronto: LexisNexis.

Macaulay, M. *Aboriginal & Treaty Rights Practice*. Toronto: Thomson Reuters.

British Columbia Civil Trial Handbook. Continuing Legal Education Society of BC.

Civil Jury Instructions (CIVJI). Continuing Legal Education Society of BC.

Civil Litigation Basics. Continuing Legal Education Society of BC (conference proceedings, 2018).

Discovery Practice in British Columbia. Continuing Legal Education Society of BC.

Practice Before the Registrar. Continuing Legal Education Society of BC.

Supreme Court Chambers Orders—Annotated. Continuing Legal Education Society of BC.

3. Advocacy

Bracken, Keith, *et al*. *British Columbia Courtroom Procedure*. 2nd ed. Toronto: LexisNexis, 2018.

Clifford, W., *et al., Cross-Examination: The Art of the Advocate*. 4th ed. Toronto: LexisNexis, 2016.

Indigenous Laws. Continuing Legal Education Society of BC (conference proceedings, 2018).

Introducing Evidence at Trial: A BC Handbook. Continuing Legal Education Society of BC.

4. Small Claims Court

Provincial Court Small Claims Handbook. Continuing Legal Education Society of BC.

Small Claims Act & Rules—Annotated. Continuing Legal Education Society of BC.

5. Civil Resolution Tribunal

Provincial Court Small Claims Handbook, Ch. 12. Continuing Legal Education Society of BC.

6. Federal Court

Canadian Federal Courts Practice. Toronto: LexisNexis.

Federal Courts Practice. Toronto: Thomson Reuters.

Federal Court and Federal Court of Appeal Practice. Continuing Legal Education Society of BC (conference proceedings, 2016).

Chapter 2

Discovery[1]

[§2.01] General

"Discovery" is the pre-trial legal process by which each party is able to find out about the other party's (or parties') case, by obtaining documents, information and admissions that may be used at trial. Discovery procedures range from the production and examination of documents to oral examinations of the parties and potential witnesses held outside court and under oath.

Practice in the Supreme Court of British Columbia, including discovery, is governed by the SCCR. The rules for discovery come under Part 7—Procedures for Ascertaining Facts. The SCCR came into effect on July 1, 2010, and introduced a number of significant changes to discovery practice for proceedings in the Supreme Court, including modifications to the scope of document discovery and examinations for discovery, and to the use of interrogatories. These changes are intended to further the express object of the SCCR "to secure the just, speedy and inexpensive determination of every proceeding on its merits" including by "so far as is practicable, conducting the proceeding in ways that are proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in dispute, and (c) the complexity of the proceeding" (SCCR 1-3(1) and (2)).

This chapter refers to the previous Rules of Court as "the former Rules." Although the former Rules were replaced more than a decade ago, the courts still refer to cases decided under that scheme.

In British Columbia, the parties to a civil action are required to:

(a) prepare a list of all documents in their possession or control that could be used by any party of record to prove or disprove a material fact (with some exceptions and qualifications, see §2.02 and §2.03);

(b) attend and be cross-examined orally, under oath, as to the matters in issue (see §2.04);

(c) answer written interrogatories concerning the matters in issue, where the other party has obtained leave of the court to serve interrogatories or the party receiving them has consented (§2.05); and

(d) submit to a medical examination, where the physical or mental condition of a person is in issue (see §2.06).

See also the discussion of particulars in §1.14, and admissions in §2.08.

The issues between the parties, as defined by the pleadings, will define the scope of the discovery process. However, there are many discovery options, and counsel must consider what they want to accomplish in the discovery process and which options best accomplish that.

[§2.02] Discovery of Documents

The discovery of documents is one of the most useful pre-trial procedures available in civil litigation. This procedure is fundamentally important to the proper preparation of a case. Documents can be used to prepare to examine opposing parties on examination for discovery and at trial. Documents may be used to impeach witnesses whose evidence is mistaken or untrue. Finally, documents may also be admissible evidence at trial in their own right.

A properly prepared list of documents should provide the other party with the foundation for an initial analysis of the case. If properly used, a list will not only shorten the time that would otherwise be taken in an examination for discovery, but will result in a much better understanding of the case at the conclusion of the examinations for discovery.

SCCR 7-1 governs the discovery of documents. Also, the inherent jurisdiction of the court includes the power to control the process of disclosing evidence and to set conditions for and limits on disclosure (*Jacques v. Pétroles Irving Inc.*, 2014 SCC 66).

1. Requirements Under the SCCR

SCCR 7-1 sets out the requirements for the discovery of documents. A "document" is defined in SCCR 1-1(1) as follows:

> "[D]ocument" has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device.

Information recorded or stored on social media may constitute a "document" that must be listed (*Fric v. Gershman*, 2012 BCSC 614). Metadata—information stored within a digital file that contains

[1] **Brian Duong**, **Trevor Bant** and **Julia Roos** of Hunter Litigation Chambers revised this chapter in January 2021 and September 2019. Previously updated by Mathew P. Good (2018, 2016 and 2012); Christopher M. Rusnak (2001–2011); Jeremy E. Shragge (2011); and Kenneth N. Affleck, QC (as he then was) (1997–1999). Comments about proceedings involving Aboriginal claims were contributed in June 2002 by F. Matthew Kirchner. Portions of this chapter appearing in §2.02 and §2.03 were originally prepared by John T. Steeves, QC, for the CLE publication, *Managing Commercial Litigation* (March 1983) and revised for PLTC; subsequently revised by Leonard M. Cohen (1996) and the other reviewers of this chapter.

information about that file, such the dates it has been accessed—may also be producible (*Sonepar Canada Inc. v. Thompson*, 2016 BCSC 1195). Even the physical hardware on which digital information is stored may be producible in exceptional circumstances, including where there is evidence that a party is deliberately thwarting the discovery process (*Sonepar*; *Bishop (Litigation Guardian of) v. Minichello*, 2009 BCSC 358).

SCCR 7-1 provides:

> (1) Unless all parties consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a) prepare a list of documents in Form 22 that lists:
>
> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.

Note that this rule reflects a different scope of relevance for the purposes of document disclosure than under the former Rules. Under the former Rules, a very broad relevancy test was applied for document disclosure, based on the standard established in *Compagnie Financiere du Pacifique v. Peruvian Guano Co*. (1882), 11 Q.B.D. 55 (Eng. C.A.). The *Peruvian Guano* standard required initial disclosure of all documents that could fairly have led to a "train of inquiry" that either advanced the adversary's case or damaged one's own. This standard is frequently referred to in the case law and by senior judges or practitioners, but care should be taken when using the old cases (*MacKinnon v. Rabeco Holdings (1989) Ltd.*, 2014 BCSC 1703). The *Peruvian Guano* test no longer applies to the initial production of a list of documents, as the language of SCCR 7-1 restricts the scope of relevance to the standard set out in SCCR 7-1(1)(a) that is, to documents that are or have been in a party's possession or control and could be used by any party of record at trial to prove or disprove a material fact, or to which a party intends to refer at trial (*Este v. Blackburn*, 2016 BCCA 496). A "material" fact refers to a fact that is in dispute on the pleadings, the resolution of which will have legal consequences between the parties to the litigation.

The requirement to list documents is ongoing. If a party comes into the possession of a new document that could be used by any party of record to prove or disprove a material fact, or if it comes to the party's attention that the list is inaccurate or incomplete, SCCR 7-1(9) requires the party to promptly amend the list of documents and serve the amended list (*Walker v. John Doe,* 2012 BCSC 1091).

If the receiving party believes there is a document (or a class of documents) that must be listed pursuant to SCCR 7-1(1)(a) or (9) that has not been listed, that party may, by written demand under SCCR 7-1(10), require the party who prepared the list to amend the list to include the document (or class of documents). If a party who receives a demand under subrule (10) does not comply within 35 days of receiving the demand, the demanding party may apply for an order (SCCR 7-1(13)).

Alternatively, the receiving party may apply under SCCR 7-1(8) for an order requiring the listing party to verify its list of documents by affidavit. The party seeking the affidavit must establish the foundation for the order by showing that production has been clearly inadequate or the other party has displayed a casual or dilatory attitude towards production (*Copithorne v. Benoit*, 2010 BCSC 130). This is a serious remedy not suitable to minor deficiencies in document production (*NMH Holdings Ltd. v. Crestmark Developments Limited Partnership*, 2012 BCSC 2215). In practice, before considering an application under SCCR 7-1(8) for an affidavit verifying the list of documents, make a demand under SCCR 7-1(10) for the listing party to amend its list of documents.

In addition to the mandatory disclosure under SCCR 7-1(a)(i) and (9) of all documents that could be used by any party of record at trial to prove or disprove a material fact, the court may order a broader scope of disclosure pursuant to SCCR 7-1(11) to (14), that is, disclosure of a document or class of documents that "relate to any or all matters in question in the action" (SCCR 7-1(11)(b)). This "two-tier" process of document disclosure reflects the principle of proportionality, which governs how the SCCR achieves its objectives (SCCR 1-3(2)).

Prior to applying to the court for such an order, the party seeking further disclosure must make a written demand for the document(s) under SCCR 7-1(11) (*Dhugha v. Ukardi*, 2014 BCSC 387). If a party who receives a demand under SCCR 7-1 (11) does not, within 35 days of receipt, comply with the demand, the demanding party may apply for an order requiring compliance (SCCR 7-1(13)).

A party seeking disclosure of documents under SCCR 7-1(11), or opposing such a request under SCCR 7-1(12), must explain with reasonable specificity why the additional documents or classes of documents should or should not be disclosed (*Przybysz v. Crowe*, 2011 BCSC 731). The party seeking production must also have evidence that the documents sought actually exist (*More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166).

If a party is asserting that a document is privileged from production, the party must still list the document in the list of documents and state the grounds for privilege (SCCR 7-1(6)). (The topic of claiming privilege is discussed in the next subsection.)

Each party that serves a list of documents must allow the other party to inspect and copy those listed documents that are within their possession or control (SCCR 7-1(15)). Form 22 also specifies the location where the documents may be inspected and copied during normal business hours. The usual custom, outside personal injury cases, is for counsel to deliver to the other side electronic copies of the listed documents along with the service of the list, rather than engaging in a two-step process. This is, however, only a usual practice, and not required by the SCCR. There is no payment requirement in the SCCR with respect to document discovery other than for reimbursement in advance for copying of requested documents (SCCR 7-1(16)). In particular, there is no requirement that a party pay before receiving a list of documents and inspecting the documents (*Hickey v. Roman Catholic Archdiocese of Vancouver*, 2016 BCSC 1044).

If a party does not provide a list of documents within 35 days after the end of the pleading period, an opposing party is entitled to bring an application under SCCR 22-7(5) to have that party's pleading dismissed and judgment entered accordingly (see *Schwarzinger v. Bramwell*, 2011 BCSC 304). In the past, the court has rarely struck pleadings on this basis but has more regularly set a time limit in which a list of documents must be provided.

When producing documents, the entire document is relevant and producible if any of its contents are relevant. It is not open to the lawyer to redact out those portions that the lawyer feels are irrelevant (*0878357 B.C. Ltd v. Tse*, 2012 BCSC 516). However, documents that contain privileged material or that engage the privacy interests of litigants or third parties may be redacted, following the procedures outlined in *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (S.C.) per Lowry J. (as he then was). Any redactions made on these grounds must be noted in the list of documents. The opposing party may then challenge the redaction under SCCR 7-1(14)(a) (*Este v. Blackburn*, 2016 BCCA 496).

Counsel who receive documents through the discovery process do so subject to an implied undertaking to keep those documents in confidence. The documents may not be used for a purpose outside of the litigation in which they were produced, unless the owner of the documents gives permission or the court, on application, releases a party or counsel from the implied undertaking (*Petitioner No. 1 v. A Lawyer*, 2011 BCSC 921). The documents may be shown to potential witnesses (including experts) to permit them to prepare their evidence. They may also be shown to the client to obtain instructions. Finally, they can be used on oral discovery or at trial if they meet the test of relevance (see *Hunt v. T&N plc* (1995), 4 B.C.L.R. (3d) 110 (C.A.)). Some counsel place an assertion of confidentiality on lists of documents, but this is not necessary: the implied undertaking applies regardless.

In addition to providing for discovery of documents from parties to the action, the SCCR provide that documents may be obtained from third parties. Under SCCR 7-1(18), an application in chambers can be made against the third party from whom documents are sought for an order for production and inspection of the document or a certified copy. As a matter of practice, the application must be supported by affidavit evidence that the documents exist and are in the possession of the non-party, and that they are not available from another source (*Kaladjian v. Jose*, 2012 BCSC 357; *Moukhine v. Collins*, 2010 BCSC 621).

SCCR 7-1(18) is intended to enable a party to obtain a specific document or class of documents that is not available from another party. Orders sought under SCCR 7-1(18) should be narrowly framed. Orders will not be made, for example, requiring a non-party to list every document in that non-party's possession that could be used to prove or disprove a material fact in the action (*Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673)

Records created by a doctor or hospital are not considered to be within the patient's possession or control and do not need to be listed by the patient under SCCR 7-1(1) (*Cook v. Kang*, 2019 BCSC 12 at para. 67). A party seeking such documents should apply for third party disclosure under SCCR 7-1(18).

Protection of privacy of a non-party can be an important limiting factor in an application for discovery of documents under SCCR 7-1(18). In *Pereira v. Rodrigue*, 2005 BCSC 1778, the Supreme Court refused to order production of documents by a non-party after weighing the relevance of the documents sought against the privacy interest that attached to the documents. The court held that where the probative value of the documents sought is minimal and the intrusion on privacy is great, the application (under former Rule 26(11)) should be denied. Like former Rule 26(11), SCCR 7-1(18) is a complete code for the production of documents in the possession or control of persons who are not parties to the action (*British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation & Festival Property Ltd.*, 2011 BCSC 198).

When the non-party's documents include some that potentially are privileged, the court may order that copies first be sent for vetting to counsel for the party to whom the privilege belongs (*Halliday v. McCullough* (1986), 1 B.C.L.R. (2d) 194 (C.A.)). This order is called a "*Halliday* order." A *Halliday* order will be made when there is a likelihood that direct production will lead to disclosure of irrelevant, private information, or documents properly subject to litigation privilege (see *Gorse v. Straker*, 2010 BCSC 119).

A consent order with respect to documents in possession of a non-party may also be made under SCCR 7-1(19) if the consent order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

Under SCCR 7-1(22), if a party objects to the discovery, inspection or copying of a document that is sought by an opposing party, a court may order that an issue or question in dispute be determined before deciding on the right to discovery, inspection or copying. The appropriate procedure is outlined in *Kwantlen University College Student Association v. Canadian Federation of Students Association – British Columbia*, 2017 BCSC 163.

2. Claims of Privilege

A party who asserts privilege pursuant to SCCR 7-1(6) need not produce or make the document available for inspection; nevertheless, the document must be included in the list of documents (*Cominco Ltd. v. Westinghouse Canada Ltd.* (1978), 9 B.C.L.R. 100 (S.C.), decided under former Rule 26(10)). The party must state the grounds upon which privilege is claimed in the list of documents (SCCR 7-1(6) and (7); *Garder v. Viridis Energy Inc.*, 2013 BCSC 580).

A party must list a privileged document it receives from another party pursuant to the common interest exception to waiver of privilege, even if that other party has already listed the document (*Brundige v. Bolton*, 2017 BCSC 2664 at paras. 20-21). Where that common interest privilege document is an agreement between parties to cooperate in litigation, it must be listed and produced when necessary to ensure a fair trial, particularly where the agreement contains arrangements about evidence, or releases, covenants, or reservations of rights, or where the agreement makes the parties' true adversarial positions different than what might be expected from the pleadings (*Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2014 BCSC 1560).

The party against whom privilege is claimed may apply to the court for an order for production (SCCR 7-1(17)). On such an application, the court may inspect the document for the purpose of deciding whether the objection is valid (SCCR 7-1(20)), but this should be done only where the affidavit evidence in support of the claim for privilege raises concerns for the court (*Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCSC 813). In making an order for production the court may impose terms and conditions (*Noland v. Organo Gold Enterprises Inc.*, 2012 BCSC 493).

SCCR 7-1(2), (6) and (7), together with Form 22, provide the basic requirements for claiming privilege over a document. In the list of documents, the party must provide a statement of the grounds of privilege respecting each document over which privilege is claimed, and each document must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege. Blanket statements such as "all documents made or obtained in contemplation of litigation … for the purpose of inclusion in counsel's brief" have been held to be inadequate. Nevertheless, lawyers must be careful to describe the document in a way that does not disclose any privileged aspect of the document (*Leung v. Hanna* (1999), 68 B.C.L.R. (3d) 360 (S.C.)).

There are two main categories of privilege—"class" privilege and "case-by-case" privilege—and different degrees of protection attach to each category.

"Class" privileges benefit from a *prima facie* presumption of inadmissibility. In other words, once it is established that the relationship fits within the class, the communications are inadmissible unless the party urging admission can show the communications should not be privileged because "the justice of the case requires it" (*R. v. Gruenke*, [1991] 3 S.C.R. 263; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37). Such communications are excluded not because they are irrelevant, but because there are overriding policy reasons to exclude them despite their relevance. Solicitor-client privilege, litigation privilege and settlement privilege are all class privileges that protect communications as follows:

- Solicitor-client privilege protects communications between lawyer and client relating to the giving or seeking of legal advice, because the relationship and the communications between solicitor and client are essential to the effective operation of the legal system (*Canada (Attorney General) v. Federation of Law Societies in Canada*, 2015 SCC 7).
- Litigation privilege, sometimes known as "solicitor's brief privilege," protects documents

created for the dominant purpose of litigation that is either underway or "in reasonable prospect" (*Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44* (1981), 29 B.C.L.R. 114 (C.A.)). After some uncertainty, it is now established that litigation privilege is a class privilege (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52). Unlike legal advice privilege, litigation privilege generally ends with the litigation (*Blank v. Canada,* 2006 SCC 39).

- Settlement privilege protects communications made in the course of settlement, including settlement offers and settlement agreements (*British Columbia Children's Hospital v. Air Products Canada Ltd*., 2003 BCCA 177; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 3). Settlement privilege promotes settlement by ensuring that communications made in the course of settlement negotiations are inadmissible, whether or not an agreement is ultimately reached.

The second main category of privilege is referred to as "case-by-case" privilege. Under this category of privilege, there is no *prima facie* presumption that the communications are privileged and exempt from disclosure. The party asserting the privilege must establish, on a case-by-case basis, that the communication should be protected. Unlike class privileges, which are presumptively protected in every case, case-by-case privileges are subject to a discretionary balancing test. The test for establishing a case-by-case privilege is the "Wigmore test" which contains the following four criteria (see e.g. *R. v. McClure*, [2001] 1 S.C.R. 445):

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

(3) The relationship must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Privilege will also extend in appropriate cases to "without prejudice" documents (*Middlekamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.)), but that privilege is not absolute (*Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301). Refer to the discussion of "without prejudice" communications in *Practice Material: Professionalism: Ethics*, §6.20.

A full discussion of the effects of privilege on the compelled production of documents is beyond the scope of the *Practice Material*. The main point to remember is that a claim for privilege must be made very carefully; the lawyer must know beforehand the kind of privilege being claimed.

3. Consequences of Failure to Properly List and Disclose Documents

When a party neglects to list a document, SCCR 7-1(21) provides that the party will be prevented from putting the document in evidence in the proceeding or using it for the purpose of examination or cross-examination, without leave of the court.

Failure to list documents may also lead to an order adjourning a scheduled trial (*Muscroft et al v. Eurocopter*, 2002 BCSC 1680, aff'd 2003 BCCA 229).

A party can be prevented from putting unlisted documents to a witness at an examination for discovery (*Cominco Ltd. v. Westinghouse Canada* (1978), 9 B.C.L.R. 100 (S.C.)). In *Cominco*, the court also held that it was proper to challenge the other party's list of documents at an examination for discovery.

As noted earlier, if a party does not provide a list of documents within 35 days of the end of the pleading period, an opposing party is entitled to bring an application under SCCR 22-7(5) to have that party's pleading struck out and judgment entered accordingly (see *Schwarzinger v. Bramwell*, 2011 BCSC 304). In practice, that draconian remedy will almost never be available. The court will instead set a deadline for the party to prepare and serve its list of documents.

As well, a party who fails to disclose critical documents may attract an award of special costs (*Laface v. McWilliams*, 2005 BCSC 1766; *North Pender Island Local Trust Committee v. Conconi*, 2009 BCSC 1017).

[§2.03] Discovery of Documents and Duty of Counsel

Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents (*Boxer v. Reesor* (1983), 43 B.C.L.R. 352 (S.C.) at 357-58, quoting *The Conduct of Civil Litigation in British Columbia*).

It is the responsibility of counsel to ensure that proper document disclosure has taken place (*Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2017 BCSC 19). The lawyer's legal and ethical responsibilities in relation to the production of documents are comprehensive and continue through to the end of the litigation.

When preparing a list of documents, it is the lawyer's duty to impress upon the client the importance of listing all documents, whether they help the client's case or not. The lawyer will usually understand much better than the client what documents could be used to prove or disprove a material fact. Also, the client may be reluctant to disclose documents that could harm their case. As an officer of the court, a lawyer must ensure that the client discloses documents required by the SCCR.

It can be a breach of a lawyer's ethical responsibilities to tell the client to produce a list of "relevant" documents without overseeing and aiding the client in selecting the documents. In *Myers v. Elman*, [1940] A.C. 283 (H.L.), a lawyer had entrusted a managing clerk with the responsibility of preparing an affidavit of documents, which turned out to be incorrect and inadequate. The client had determined the relevant documents without the lawyer inspecting them. The House of Lords held that the lawyer was guilty of professional misconduct in allowing the inadequate affidavit of documents to be made and delivered, and made an order against the lawyer for costs. Every litigator should be familiar with the statements made by Lord Wright in *Myers* at 322:

> The order of discovery requires the client to give information in writing (and on oath) of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility for careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.

Commentary [1] to rule 5.1-1 of the *BC Code* provides as follows:

> In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

Rule 5.1-2 of the *BC Code* provides as follows:

> When acting as an advocate, a lawyer must not …
>
> (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;
>
> …
>
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct.

These excerpts cast a positive duty on a lawyer to ensure disclosure of every document in the possession or control of the client that could be used by any party of record at trial to prove or disprove a material fact. This duty requires the lawyer not only to investigate, obtain, and examine all documents in the client's possession but also to determine all documents that have been, but are no longer, in the client's possession.

If a party discloses a document that appears to be privileged, the other party's lawyer has an ethical duty to inquire as to whether the disclosure was inadvertent and, if so, return the document, unread and uncopied, to the party to whom it belongs (*BC Code*, rule 7.2-10(a)). If the document is an electronic document, the lawyer must delete it, unread and uncopied, and advise the person to whom it belongs that this was done. If the document was read before the mistake was recognized, the lawyer must advise the other party of the extent to which the lawyer is aware of the contents, and of how the lawyer intends to use them (rule 7.2-10(c)).

[§2.04] Examination for Discovery

Perhaps the most important step in an action, short of the trial itself, is the examination for discovery. Under SCCR 7-2, a party is permitted to cross-examine every adverse party to the action, under oath (which includes a solemn promise to tell the truth), on the issues between them. It is normally an essential step in the preparation of every case.

An effective examination for discovery allows counsel to obtain key things:

(a) details of the case to be met (which will help counsel prepare their own case for trial);

(b) admissions of facts and documents, which are necessary for the case and which would otherwise have to be proved at trial; and

(c) admissions that may be used against the adverse party at trial.

Examination for discovery also provides an opportunity to see how one's own client fares under cross-examination. The information gained at the discovery gives the parties a better base for evaluating the strengths and weaknesses of each party's case, and frequently leads to more meaningful and successful negotiation (*No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1121).

1. Who May Be Examined

A party to an action may examine for discovery any party of record who is adverse in interest (SCCR 7-2(1)). "Adverse interest" has been interpreted as a flexible term meaning a direct pecuniary or other legal interest in the matters and in the results involved in the litigation, as distinguished from a moral interest (*Liverside v. Wang,* 2012 BCSC 1974).

Parties may conduct discovery only on the issues on which the parties are adverse in interest, as disclosed by the pleadings (*Whieldon v. Morrison* (1934), 48 B.C.R. 492 (C.A.); *Lougheed v. Filgate* (1995), 5 B.C.L.R. (3d) 101 (S.C.)). Co-defendants are considered adverse in interest if the pleadings of one of the defendants allege the other defendant contributed to or was responsible for the damage (*Karsten v. Young*, 1999 CanLII 4804).

Where there exists a commonality of interest between co-parties, their rights to conduct and be subjected to multiple examinations may be restricted (*Soprema Inc. v. Wolridge Mahon LLP*, 2014 BCCA 366, but see *Kovacevic Consult Inc. v. Coastal Contacts Inc.*, [2015] B.C.J. No. 719).

There are occasions on which a plaintiff may want to examine a third party or vice versa. The rule remains that an examination of a party of record may take place only if there is an issue between them (SCCR 7-2(1)). However, the authorities suggest that the party wishing to examine may be able to assert that right if the issue between the parties is apparent in some manner beyond the pleadings (*Manzke v. Thompson*, [1969] 70 W.W.R. 766 (B.C.S.C.); *Sisters of St. Joseph v. Hilsen & Co.*, [1976] 3 W.W.R. 220 (Sask. Q.B)).

In representative actions, the representative plaintiff or defendant is subject to examination for discovery (SCCR 7-2(5)). Since actions by and against First Nations are often brought as representative actions, counsel to a Band or Nation should select a representative plaintiff who is knowledgeable to give discovery evidence on behalf of the Band or Nation.

When a party has a right to examine a corporation for discovery, the party is entitled to examine a past or present director, officer, employee, agent or external auditor. Under SCCR 7-2(5), the corporation must disclose the name of the person to be examined who is knowledgeable concerning the matters in question to the action. Counsel is not required to examine the person named by the corporation and may examine any other person the examining party considers appropriate (*B.C. Lightweight Aggregate v. Canada Cement LaFarge* (1978), 7 B.C.L.R. 108 (C.A.)). Where a former agent is selected, the corporate party must take all steps necessary to secure the attendance of the agent. Compliance with that obligation will be determined later, should the witness not appear (see *White v. Starnet Communications Canada*, [2005] B.C.J. No. 2890).

SCCR 7-2(5) applies to partnerships as well. For example, if the party to be examined is a partnership, one of the partners may be examined. However, SCCR 7-2(5) does not apply when the federal Crown or an agency is a party; instead, the designation of the Crown representative is governed by legislation with respect to Crown liability and proceedings (*Lindgren (Litigation Guardian of) v. Parks Canada Agency*, 2016 BCCA 459).

Unless the court otherwise orders, when the party to be examined is an infant, counsel is entitled to examine the infant, the infant's guardian, and the infant's litigation guardian (SCCR 7-2(8)).

In a class proceeding, the parties are entitled to examine the representative plaintiff(s) as of right in the ordinary course, but must seek leave of the court to discover other class members: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 17–18.

Prior to an examination, the person examined for discovery must inform themselves as to matters within their knowledge (or means of knowledge) regarding the issues in the action (SCCR 7-2(22)). The witness's obligation under the SCCR is not limited to information within the witness's personal possession. Accordingly, at discovery the witness may be asked for information that requires the witness to ask third parties for the information (*Saunders v. Nelson* (1994), 35 C.P.C. (3d) 168 at 173)). Pursuant to SCCR 7-2(23), a party may be asked to respond to outstanding requests from a discovery by letter; if so, the questions and answers set out in the letter are deemed to be questions asked and answers given under oath in the examination for discovery (SCCR 7-2(24)).

2. Where Examination Takes Place

Unless the court otherwise orders, or the parties to the examination consent, an examination for discovery must take place at a location within 30 kilometers of the registry that is nearest to the place where the person to be examined resides

(SCCR 7-2(11)). In practice, an examination for discovery is held at a mutually agreeable location, usually the office of a court reporter.

A person residing outside British Columbia is subject to being examined for discovery at the place and in the manner the court considers appropriate (SCCR 7-2(27); *Huang v. Silvercorp Metals Inc.*, 2016 BCSC 778). As a general rule, a party is entitled to be examined at the party's place of residence. However, the court will balance what is just and convenient for both parties (*Bronson v. Hewitt*, 2008 BCSC 1269).

3. Arranging the Examination

An examination for discovery is arranged by taking out an appointment in Form 23. The appointment, along with witness fees (unless waived) are served on the party to be examined, or their counsel, and notice is given to all other parties to the action (SCCR 7-2(13)). The date for the examination is arranged with a court reporter and, customarily, also with counsel for the other side.

The order of examinations does not require the plaintiff to examine first (*Torok (litigation guardian of) v. Sekhon*, 2006 BCSC 1940).

4. Who May Attend

Unless the court otherwise orders, all parties to the action and their lawyers are entitled to attend at an examination for discovery of any of the other parties, and any person who is not a party to the action is not entitled to attend (*Rogers v. Bank of Montreal* (1985), 64 B.C.L.R. 389 (S.C.)). A corporate litigant is only permitted to have its one proposed representative in attendance (*Buskell v. Bethesda Christian Assn.*, 2014 BCSC 950). If counsel is concerned that credibility is crucial and that the examination of one party will cause a co-party to change their evidence, then counsel should apply to court for an exclusion order (*O'Neal v. Murphy* (1964), 50 W.W.R. 252 (B.C.S.C.)); however, a party's right to be present at an examination for discovery at which that party's interests may be affected is fundamental and not easily abrogated (*Sissons and Simmons v. Olson*, [1951] 1 W.W.R. (NS) 507 (C.A.); *Bronson v. Hewitt*, 2007 BCSC 1477). There is a heavy onus upon a party seeking to exclude another from attending (*Saltman v. Sharples Contracting Ltd.,* 2018 BCSC 883).

5. Scope of Examination

Under SCCR 7-2(18), the scope of examination for discovery remains unchanged compared to under the former Rules, and is very broad: the person being examined is required to answer any questions within their knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action (*Kendall v. Sun Life Assurance Company of Canada*, 2010 BCSC 1556).

Unless otherwise ordered by the court, examinations for discovery must not exceed, in total, 7 hours or any greater period to which the person examined consents (SCCR 7-2(2)). This limit places even greater importance on ensuring document discovery is complete before proceeding to examination for discovery (*Sysco Victoria Inc. v. Wilfert Holdings Corporation*, 2011 BCSC 1359). Additional time may be sought from the court, taking into account the requirement of proportionality (*Mainstream Canada v. Staniford*, 2012 BCSC 1692). An order for the extension of the duration of an examination can occur before the examination has begun (*Huang v. Silvercorp Metals Inc.*, 2016 BCSC 778). That said, counsel should not waste time on marginal matters during the examination (*Henneberry v. Humber*, 2014 BCSC 1133).

The matters in question in an action are defined by the pleadings as they stand at the time of the examination (*Jackson v. Belzberg* (1981), 31 B.C.L.R. 140 (C.A.); *Rogers v. Hunter* (1982), 37 B.C.L.R. 321 (C.A.)). Any question is permissible on a discovery if the answer might be relevant to those issues (*Hopper v. Dunsmuir (No. 2)* (1903), 10 B.C.R. 23 (C.A.); *Cominco v. Westinghouse Canada* (1979), 11 B.C.L.R. 142 (C.A.)). The following passage from the reasons of Hunter C.J. in *Hopper v. Dunsmuir (No. 2)* has been cited frequently with approval:

> No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter at hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case, they are within the right given the cross-examining party by the Rule.
>
> It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as reveal their purpose, and it is needless to labour the proposition that in many cases such preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.
>
> It was argued by the learned counsel for the respondent that only a sort of cross-examination was allowed by the Rule; that it consisted in asking leading questions bearing directly on the issues and, if thought proper, in a loud tone of voice. I cannot agree. I think that the function of a cross-examiner is not to play the role of the ass in a lion's skin but to extract information that will be of use in the decision of the issues, and by the most circuitous routes if it shall appear necessary to do so.

6. Who is in Charge of the Record

For a long time, it was a commonly held view within the Bar that counsel conducting the examination for discovery was in charge of the record; that is, the counsel conducting the examination could decide when to go on the record and when to go off the record. In a 1981 memorandum, however, McEachern C.J.S.C. expressed his view that a reporter can go off the record only when both counsel agree. The court reporters have been instructed to act in accordance with that memorandum (see 39 *the Advocate* 515 (1981)).

7. Exhibits

As a general rule, any document that has been referred to on the discovery should be marked as an exhibit for identification. Permission of opposing counsel is not required to mark an exhibit. Even if the party being examined cannot identify the document, it may still be marked as an exhibit, even if only for the purpose of establishing that the witness could not or did not want to recognize it. The lawyer acting for the party being examined should advise the client before the discovery not to speak while an exhibit is being marked by the court reporter. It is not possible for the reporter to mark an exhibit and take down the evidence at the same time.

8. Matters to be Covered

Before each discovery, counsel should prepare a checklist of the matters counsel intends to cover at the discovery. Certain matters are common to all discoveries. Counsel will want to obtain the witness's full name, address, and the fact that the witness has been sworn to tell the truth. If the witness is appearing in a representative capacity, counsel will need to elicit their authority. If there are any oral admissions which have been made before the discovery and which have not been placed in writing, they should be put on the record at the discovery proceeding.

As the examination proceeds, counsel may want to leave a formal request on the record that the witness provide copies of relevant documents through their counsel. Counsel may also want to ask for the names and addresses of other potential witnesses (SCCR 7-2(18)).

Checklists are available that set out matters to be covered at examinations for discovery in various types of actions. Consult *Bender's Forms of Discovery* and the Continuing Legal Education Society of BC's *Discovery Practice in British Columbia* manual and other litigation series.

9. Manner of Questioning

An examination for discovery is in the form of cross-examination and, therefore, permits a broad range of questioning.

Counsel may ask leading questions, that is, questions that suggest the answer. It is also possible to impeach the witness, that is, bring out contradictions in the witness's evidence and seek to show that the witness is not telling the truth. This does not mean, however, that counsel should seek to bludgeon the witness into agreeing with counsel's point of view.

The style of questioning that counsel adopts will depend on what they are trying to achieve and the personality of the witness being examined. The personality of the witness may not be known until the discovery. The witness may be hostile, cooperative, intelligent or confused. Counsel may have to adjust their style of questioning accordingly. This makes it even more important for counsel to have decided beforehand what they are trying to achieve.

A lawyer should be cordial with the opposing party and counsel at all times. This stricture does not prevent counsel from being firm with a witness. Occasionally a witness is hostile towards the examiner. The witness may be flippant or answer a question with a question rather than a proper answer. In those circumstances, the witness should be firmly advised that counsel is the one asking the questions and that counsel is entitled to the answers in proper form.

Counsel should ask questions of a witness one at a time. If two or more questions are strung together and an answer is expected from the witness, not only is the form of question objectionable, but counsel may later find out, upon reading the transcript, that the court will not be able to tell to which question the answer relates. Counsel must learn to visualize the question and answer as they will look on paper in the transcript. Both question and answer must be clear and complete to be useful at trial.

10. Objections

During the course of an examination, counsel conducting the examination might ask objectionable questions. An examination for discovery is not limited by the rules of admissibility at trial. A question that could not be asked at trial is not necessarily objectionable on discovery.

One important difference between discovery and trial is the scope of relevance (see §2.04(5) "Scope of Examination" above). Relevance objections are rarely appropriate on discovery.

Another important difference is hearsay, which is not a valid objection on discovery. A witness must answer discovery questions that call for hearsay.

A question is of course objectionable if it seeks information that is privileged (*Nwachukwu v. Ferreira*, 2011 BCSC 1755).

A question is also objectionable if it calls for a legal conclusion (see e.g. *Northwest Sports Enterprises Ltd. v. Griffiths*, 1999 CanLII 5791 (BC SC)) or speculation (*Telus Communications Inc. v. Centurion Investment Properties Inc.*, 2007 BCSC 491).

A question that calls for opinion evidence is usually objectionable, but there are two recognized exceptions: when the sole issue in the action is the value of property, and when a professional is being sued for negligence and is asked for an opinion as to the appropriate standard of care (*Teachers' Investment & Housing Co-operative v. Jennings (Trustee of)* (1991), 61 B.C.L.R. (2d) 98 (C.A.)). In the latter case, however, counsel is not entitled to ask whether or not a professional was negligent—that is a matter for the court to decide.

A question that contains an assumption that has not been established is objectionable. For example, "Did you see the green Chevrolet that was on your left?" is not a permissible question unless it has already been established that there was a green Chevrolet on the left.

Questions that are vague, confusing, unclear, over broad, or misleading may also be objectionable (*Forliti (Guardian of) v. Wolley*, 2002 BCSC 858).

The proper procedure for making an objection is for opposing counsel to state: "I object to that question and I advise the witness not to answer." It is customary to give the ground for the objection, if requested. The witness may then state: "I refuse to answer the question" (or the examining counsel will assume as much and move on). The court may later determine the validity of an objection, and that court may order the witness to submit to a further examination for discovery (SCCR 7-2(25)).

Discovery Practice in British Columbia (2020), by Lyle Harris, QC, sets out a list of the most common objections (see §3.138 in that text):

(a) "Not related to a matter in question"

(b) "Protected by privilege"

(c) "Relates solely to credibility"

(d) "The document speaks for itself"

(e) "Relates to similar facts/acts and is collateral"

(f) "Relates to another person's out-of-court statement"

(g) "Elicits an opinion"

(h) "Calls for the witness to write something"

(i) "Begs an ambiguous answer"

(j) "Which one is the question?"

(k) "Argumentative" or "calling for a legal conclusion"

(l) "That calls for speculation on the part of the witness"

(m) "Asked and answered" (However, Harris, QC, notes that "merely asking the same question twice does not seem to be objectionable"; instead it "may be objectionable if the purpose relates solely to credibility or amounts to intimidation of the witness.")

(n) "The question presumes a fact that hasn't been elicited"

(o) "The question is too vague"

(p) "That wasn't the evidence"

(q) "The area is confidential/protected by a confidentiality agreement"

(r) "My client claims the protection of s. 5 of the *Canada Evidence Act*"

(s) "The question is confusing/misleading/ambiguous/unintelligible"

(t) "How can my client know what was in another's mind?"

(u) "That is a question of law"

Some forms of commonly made objections, however are not proper objections. Improper objections include:

(a) "That's a leading question"

(b) "My client lacks personal knowledge"

(c) "How is that relevant?"

(d) "That's not admissible"

(e) Statements "for the record" and "laying the foundation"

(f) "You haven't laid the foundation"

(g) Objecting to "Are you refusing to answer on the advice of your counsel?"

The only time counsel for the party being examined should say anything during the examination is to make an objection. It is inappropriate to continually interrupt the "flow" of the questioner (*C.P. v. RBC Life Insurance Co.*, 2013 BCSC 1434). Counsel should not use an objection to lead their witness, by supplying an answer in the form of an objection. As a general practice, however, opposing counsel usu-

ally provides helpful information or clarifies matters when the witness is unable to do so. While this is often welcome on an examination for discovery, it has its limits. Counsel conducting the examination is entitled to the evidence of the witness, not that of the lawyer. Moreover, counsel is entitled to the evidence of the witness without any prompting or interference from opposing counsel (*Cominco Ltd. v. Westinghouse Canada Limited* (1980), 14 B.C.L.R. 346 (S.C.)).

11. Preparing the Client

It is important for counsel to prepare the client for the examination for discovery by meeting well in advance, and not immediately before the discovery. The lawyer should explain to the client the purpose of the examination, where it will be held, who will be there, and what the resulting transcript can be used for. Counsel should tell the client to stay calm and answer the questions fully, truthfully and to the best of their ability, but not volunteer information or become agitated. Counsel should review with the client the issues in the action, any existing evidence, and the types of questions that will be asked.

Counsel should tell the client to say "yes" or "no" rather than nod or mumble. Also, counsel should instruct the client to wait until the question is completed before beginning to answer: failure to do so often results in a confusing transcript and may also lead the witness to answer a question not yet asked and therefore to volunteer information.

Counsel should not discuss evidence with the client during a break in the client's examination for discovery (*BC Code*, rule 5.4-2).

12. Re-Examination

Following the cross-examination of the witness, counsel for the party being examined has a right of re-examination. As a general rule, counsel should be cautious about re-examining on an examination for discovery. If the witness has stated something that counsel believes to be untrue or incomplete, counsel should discuss the matter with the witness in the privacy of the office when the discovery has been concluded. Any correction that is necessary can be made by sending a letter to the other side and, ultimately, addressing and explaining the issue in direct examination at trial. That said, an effective re-examination can address a problem that emerged in the examination and reduce the chances of it being read in at trial.

13. Concluding the Examination

An examination for discovery is not finished as long as there are outstanding requests on the record for the plaintiff to obtain information and produce evidence or documents. Continuation of a discovery in such circumstances is not a second examination, which carries a heavier onus to justify further discovery (*Li v. Oneil*, 2013 BCSC 1449).

The court has a discretion to order a second examination or an examination of an additional representative of a corporate party. This discretion will be exercised only where the court is satisfied that the first examinee is unable or unwilling to inform themselves about the subject of the examination. In making the determination as to whether the first representative can satisfactorily inform themselves, the court will consider such factors as the circumstances of the case, the responsiveness of the witness under examination and the degree to which the witness has taken pains to inform themselves, the nature and materiality of the particular evidence sought to be canvassed with the second representative, and what appears to be the most practical, convenient and expeditious alternative (see e.g. *Murao v. Blackcomb Skiing Enterprises Limited Partnership et al*, 2003 BCSC 558; *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2012 BCSC 582; *Samaroo v. Canada Revenue Agency*, 2016 BCSC 531).

As with documents produced during document discovery, evidence elicited during examinations for discovery is protected by an implied undertaking. Parties to litigation and their lawyers may use discovery evidence, including transcripts, strictly for the purposes of the court case and not for other purposes (*Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8).

14. Depositions

The basic rule is that witnesses should testify live before the court (*Byer v. Mills*, 2011 BCSC 158). However, where an examination for discovery is not possible or where a witness will not be available to testify at trial, a person may, by consent or by order of the court, be examined on oath and the recording tendered as evidence at trial (SCCR 7-8). Factors the court must take into account in exercising its discretion to order an examination by deposition include the convenience of the person sought to be examined, the possibility that the person may be unable to testify at the trial, and the expense of bringing the person to trial. This procedure is usually invoked to obtain evidence from witnesses outside BC or those unlikely to be present at trial by reason of illness, location, expense or death.

15. Equitable Bill of Discovery

Extraordinarily, a person may seek discovery of a third party before an action is even commenced by obtaining an equitable bill of discovery, also known as a *Norwich Pharmacal* order (*Kenney v. Loewen*

(1999), 64 B.C.L.R. (3d) 346 (S.C.)). Such an order is often sought to obtain the identity of a potential defendant who is known to the third party but unknown to the plaintiff. *Norwich Pharmacal* orders are not limited to circumstances where the information is being requested prior to the commencement of the action, and may be sought after an action has been commenced against "Doe" defendants (defendants whose identity is unknown, named in the claim as "Doe 1," "Doe 2," etc.) (*Brito v. Terry L. Napora Law Corporation,* 2016 BCSC 1476).

[§2.05] Interrogatories

Interrogatories are written questions relating to a matter in issue that are put to a party adverse in interest. In other words, they are a written question and answer form of discovery. SCCR 7-3 governs interrogatories and is intended to limit their use. Whereas interrogatories were issued as a matter of right under the former Rules, SCCR 7-3(1) allows a party to an action to serve interrogatories in Form 24 on any other party of record, or on a director, officer, partner, agent, employee or external auditor of a party of record if:

- the party of record to be examined consents, or
- the court grants leave.

Counsel should consider using interrogatories in appropriate cases to obtain uncontroversial evidence, narrow and focus the issues in the action, and reduce the length of examinations for discovery.

Within 21 days of service of the interrogatories, the receiving party must serve an affidavit in answer to the interrogatories (SCCR 7-3(4)).

The fundamental rule regarding the scope of interrogatories is that they must relate "to a matter in question." Although the scope of interrogatories is broader than initial document discovery in the sense that it is not limited to proof of facts necessary to establish a party's case, it is more limited than the scope of examinations for discovery (*Nicolay v. Georgia,* 16 C.P.C. (4th) 5 (B.C.S.C.)). In deciding whether to order interrogatories, a court must take into account the object of the SCCR to secure a just, speedy and inexpensive determination of a proceeding on its merits, proportionate to the amount involved, the importance of the issues, and the complexity of the dispute (*Credential Securities Inc. v. Qtrade Canada Inc.*, 2012 BCSC 1902).

Interrogatories are narrower in scope than examinations for discovery, should not be in the nature of cross-examination, should not include a demand for discovery of documents, and should not duplicate particulars (*Credential Securities Inc.*, *supra*). As well, interrogatories are directed only to facts within the deponent's personal knowledge or that can be ascertained on reasonable inquiry, and should not include questions that require the deponent to obtain an expert's opinion (*Martin v. British Columbia* (1986), 3 B.C.L.R. (2d) 60 (S.C.)). Interrogatories are not intended to provide a parallel opportunity for discovery and cannot be used to ask questions that should have been asked at the examination for discovery. Interrogatories cannot be used to require a party to create a document or narrative that did not exist at the material time, or to synthesize the evidence—a party is only required to identify which parts of the evidence were known to the party at material times (*Solomons v. Endnight Games Ltd.*, 2016 BCSC 404).

If a party objects to an interrogatory on the grounds that it will not further the object of the SCCR, the party may apply to the court to strike the interrogatory pursuant to SCCR 7-3(8) (*Loo v. Alderwoods Group Canada Inc.*, 2010 BCSC 1471). If a party objects to an interrogatory on the grounds that the response is privileged or that it does not relate to a matter at issue, the party may make the objection in an affidavit in answer (SCCR 7-3(6)).

There is a continuing obligation to update or correct an interrogatory even after a response has been provided. Subrule 7-3(11) states that if a person who has given an answer to an interrogatory later learns that the answer is inaccurate or incomplete, that person must promptly serve on the party who served the interrogatory an affidavit deposing to an accurate or complete answer.

[§2.06] Medical Examination

Pursuant to SCCR 7-6(1), a court may order a person to submit to examination by a medical practitioner or other qualified person if the physical or mental condition of that person is "in issue" in a proceeding (*Jones v. Donaghey*, 2011 BCCA 6).

In personal injury cases, orders that the plaintiff submit to a medical examination are routinely granted. The examining medical practitioner is generally chosen by the defendant, but that right may be challenged by the plaintiff in certain circumstances (*Sinclair v. Underwood* (2002), 99 B.C.L.R. (3d) 379 (S.C.)). The present practice is to require the defendant to provide the entire resulting report to the plaintiff, provided that the plaintiff reciprocates by providing to the defendant all medical reports that the plaintiff has acquired or will acquire in the future (*Bates v. Stubbs* (1980), 15 B.C.L.R. 65 (C.A.)). These reports usually form the expert evidence at trial in personal injury cases.

Usually an order will not be necessary to arrange a medical examination. However, court orders may be necessary if a party seeks multiple examinations (from one or different specialists) (*Hamilton v. Pavlova*, 2010 BCSC 493) or if counsel for the party to be examined objects to the examiner or the type of examination proposed. A party asking the court to order subsequent examinations need not meet a higher threshold or establish extraordinary circumstances: the court's concern is always putting the parties on an even footing in being able to present their evidence (*Tran v. Abbott*, 2018 BCCA 154).

[§2.07] Witnesses

1. Witness Lists

Counsel must prepare a list of all the witnesses that counsel intends to call at trial, other than experts providing evidence under Part 11 of the SCCR or adverse witnesses under SCCR 12-5(20)(a) or (b). This list must be filed and served on each party on or before the trial management conference or 28 days before the scheduled trial date, whichever is earlier (SCCR 7-4(1)).

Unless the court otherwise orders, the witness list must include the full name and address of each witness listed (SCCR 7-4(2)). If a party who provides a list of witnesses later learns that the list is inaccurate or incomplete, that party must promptly amend the witness list, file the amended witness list, and serve a copy of the filed amended witness list on all parties of record (SCCR 7-4(3)).

A party is not required to call as a witness at trial an individual named as a witness in the list (SCCR 7-4(4)). However, only witnesses whose names appear on the list will be permitted to testify at trial, unless the court otherwise orders (SCCR 12-5(28)). For the court to "otherwise order," there must be a reasonable explanation for the late notice, some ability for the court to rectify any prejudice caused by such a late addition, and some utility in the expected evidence (*Davies v. Canada Shineray Suppliers Group Inc.*, 2017 BCSC 304).

It is common practice for a party to provide the other parties with a short summary of the evidence it anticipates each of its witnesses will give, commonly referred to as a "will say" statement. Will say statements are often provided two to three weeks before the date a witness is expected to begin testifying, although deadlines may be set by agreement among counsel, a case management judge or the trial judge.

2. Pre-Trial Examination of Witnesses

When a person who is not a party to the legal proceedings may have material evidence relating to the matters in question, a court may order that the person be examined (SCCR 7-5(1)). The purpose of this rule is to facilitate full disclosure of the facts and information, not evidence or admissions, before trial. In practice, the rule permits examination of an uncooperative witness (*Gardner v. Viridis Energy Inc.*, 2014 BCSC 232).

As a prerequisite to the application, the proposed witness must refuse or ignore an applicant's request to give a responsive statement (SCCR 7-5(3). It is good practice for counsel for the applicant to put questions in writing for the proposed witness and ask for responses in writing. Counsel does this for two reasons:

- If the witness refuses to answer, counsel can show the court specifically what questions counsel wants to ask.
- If counsel receives written answers, counsel is in a position to have a note of what the witness's evidence will be at trial.

If the proposed witness neglects or refuses to provide a responsive statement, counsel can apply for an order that the person be examined on oath (SCCR 7-5(1)). In support of the application, counsel must provide affidavit evidence setting out what relevant evidence counsel thinks the witness has, and that the witness has refused to provide it. If counsel has asked for the information in writing, counsel should attach the written request. An opposing party has only limited standing on an application for an order under SCCR 7-5. Because there is no property in a witness, the opposing party does not have standing to object to a witness being questioned, but does have standing to address issues of procedure, proportionality and privilege (*Brooks v. Abbey Adelaide Holdings Inc.*, 2014 BCSC 2075).

When granting an order for the examination of the witness, the court may also order that the examining party pay the witness's costs in relation to the application and the examination, other than on a party and party basis. For the examination itself, counsel may serve a subpoena in Form 25 requiring the witness to bring any relevant documents or physical objects in their possession (SCCR 7-5(5)).

Once leave to examine is obtained, 7 days' notice of the appointment for the examination is required (SCCR 7-5(7)). At the examination, the proposed witness is cross-examined by the person who obtained the order, and then may be cross-examined by any other party. At the conclusion of the further cross-examination there may be additional cross-examination by the person who obtained the order (SCCR 7-5(8)). The examination takes place before a court reporter. As in examinations for discovery, the person being examined may be required to inform themselves. Objections may be made during this examination in the same way as during an examination for discovery.

[§2.08] Admissions

SCCR 7-7 provides a procedure for parties to admit to the truth of facts and the authenticity of documents that are not disputed. A party may serve a notice to admit in Form 26, requesting any party of record to admit to the truth of a fact or the authenticity of a document set out in the notice (SCCR 7-7(1)).

A party who receives a notice to admit must serve a written statement (within 14 days after service) admitting or denying the truth of the specific fact(s) or the authenticity of the document(s). If the party receiving the notice to admit does *not* respond within 14 days, the truth of the fact(s) or the authenticity of the document(s) is deemed admitted (SCCR 7-7(2)). Counsel receiving the notice to admit should carefully diarize it, so that the deadline for responding does not pass without response.

The party receiving the notice to admit must serve on the other party, within 14 days, a written statement that:

- specifically denies the truth of the fact or the authenticity of the document;
- sets out in detail the reasons why the admission cannot be made; or
- states that the refusal to admit the truth of the fact or the authenticity of the document is on the grounds of privilege or irrelevance, or because the request is otherwise improper, and sets out in detail the reasons for the refusal (SCCR 7-7(2)).

If a party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document contained in the notice, a court may order that party to pay the costs of proving the truth of the fact or the authenticity of the document, and may award costs against that party or deprive them of costs (SCCR 7-7(4)).

Counsel should consider using SCCR 7-7 to expedite proceedings and reduce matters that will be contentious at trial, in order to reduce the trial's length and expense.

When drafting a notice to admit, the lawyer should break matters down as finely as possible and set out each individual fact in a separate numbered paragraph. The lawyer should avoid colouring the facts with emotive or subjective language; instead, the lawyer should set out the facts plainly and simply, thereby forcing the other side to think seriously before denying or refusing to admit the truth of the facts set out.

The procedure for requesting the admission of the authenticity of a document is simply to list it in the appropriate section of Form 26 and to attach a copy of the document to the form. However, that may not be sufficient to lay the basis for proof of the document at trial. Instead, counsel may want to set out certain explanatory matters in the notice to admit that will lay the foundation for proof at trial.

Once an admission is made in response to a notice to admit or in a pleading, or becomes a deemed admission under SCCR 7-7(2), then the admission can only be withdrawn by consent or with leave of the court (SCCR 7-7(5); *Nagra v. Cruz*, 2016 BCSC 2469).

In *Munster & Sons Developments Ltd. v. Shaw*, 2005 BCCA 564, the Court of Appeal restated the test (set out earlier in *Hamilton v. Ahmed* (1999), 28 C.P.C. (4th) 139 (S.C.)) to be applied where there is an application to withdraw an admission with leave of court. The test is "whether there is a triable issue, which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact." In applying that test, all the circumstances should be taken into account, including the following:

- that the admission has been made inadvertently, hastily, or without knowledge of the facts;
- that the fact admitted was not within the knowledge of the party making the admission;
- that the fact admitted is not true;
- that the fact admitted mixes fact and law;
- that the withdrawal of the admission would not prejudice a party; and
- that there has been no delay in applying to withdraw the admission.

Munster & Sons was decided under the former Rules, but the test has since been applied to the SCCR (*Lam v. U.B.C.*, 2012 BCSC 670 and *Century Services Inc. v. LeRoy*, 2014 BCSC 702). However, admissions of fact are not lightly set aside (*Miller v. Norris*, 2013 BCSC 552).

An application for judgment (such as summary judgment or an application to strike) or any other application may be made to the court using a party's admissions as evidence (SCCR 7-7(6); *Lougheed v. Wilson*, 2012 BCSC 169).

[§2.09] Discovery in Fast Track Litigation

Proceeding under the fast track provisions in SCCR 15-1 means that counsel can access fewer pre-trial processes. This restrictive measure aims to ensure that the value of a claim is not eclipsed by the time spent and costs incurred in litigation. In accordance with this objective, the scope of the discovery process is narrower for actions brought under SCCR 15-1.

The requirements for discovery of documents in SCCR 7-1 apply equally to an action that proceeds under SCCR 15-1. Pre-trial examination of a witness pursuant to SCCR 7-5 and the requirement to serve witness lists under SCCR 7-4 also apply to a fast track action. However, a party's right to conduct an examination for discovery in a fast track action is limited under SCCR 15-1(11), which provides that, unless otherwise ordered by the court or consented to by the person to be examined, the examination for discovery of a party of record must not exceed 2 hours in total. SCCR 15-1(12) further provides that all examinations for discovery in fast track litigation must be completed at least 14 days before the scheduled trial, except by court order or consent.

For more on fast track litigation, see §1.18.

Chapter 3

Chambers Practice[1]

[§3.01] Matters Heard in Chambers

1. Jurisdiction

Matters heard in chambers comprise a large part of a civil litigation practice. All pre-trial applications that would not result in a final disposition of the matter (generally called "interlocutory" applications) are heard in chambers, except for those heard during trial. All petition proceedings, all requisition proceedings requiring a hearing, and all applications for summary judgment are heard in chambers (SCCR 22-1).

The procedures for chambers applications in civil proceedings are set out in SCCR 8-1, 8-2, 16-1 and 22-1.

The starting point for all chambers applications is to determine the legal basis for the order sought. The majority of chambers applications are based on the Supreme Court Civil Rules, and it is always worth considering and reviewing the rule governing the application you intend to make.

The order must be one the court has jurisdiction to make. Many chambers applications are heard and decided by masters. Masters are court officials appointed under the *Supreme Court Act*. Masters have more limited jurisdiction than judges. Generally, a master will hear:

(a) all interlocutory applications authorized by the Supreme Court Civil Rules, whether contested or not;

(b) applications that will result in final orders where no determination of fact or law is required; and

(c) uncontested foreclosure petitions.

The jurisdiction of a master is founded in s. 11.3(2) of the *Supreme Court Act* and in SCCR 23-6. Furthermore, the Supreme Court Practice Direction PD-50—*Masters' Jurisdiction* sets out guidelines to the profession and public.

Examples of orders a master does not have jurisdiction to make are orders for contempt, orders based on the inherent jurisdiction of the court, and orders granting injunctive relief, except certain interim orders in family law cases (see the Practice Direction).

The party setting down the hearing must indicate on the notice of application whether or not the application is within the jurisdiction of a master. If a notice does not indicate whether the application is within the jurisdiction of a master, the registry will generally treat it as if it is (AN-1—*Document Filing Standards*, s. 8).

Address a master as "Your Honour." In addressing a judge, use "Madam Justice," "Mr. Justice," or "Justice," as the context requires (PD-60—*Forms of Address*).

An order made in chambers can be appealed to the BC Supreme Court. To do so, counsel must file a notice of appeal in Form 121 within 14 days of the application (SCCR 23-6(8.1)). Note that the SCCR 23-6(8) has been repealed and replaced by new procedures. If the appeal hearing will take over two hours, counsel must set the date with Supreme Court Scheduling. If the appeal hearing will take less than two hours, it must be added to the chambers list (SCCR 23-6(8.7)). As with an application, counsel must file their appeal record in the proper format (SCCR 23-6(8.8)) and provide opposing counsel with proper notice (SCCR 23-6(8.2)). The appeal does not act as a stay on the proceedings; rather, the action proceeds as if the appealed order remains in force, unless the appeal is successful or the judge or master rules otherwise (SCCR 23-6(11)).

Abermin Corp. v. Granges Explor. Ltd. (1990), 45 B.C.L.R. (2d) 188 (S.C.) sets out the standard of review most often applied on appeals from a master's order to a Supreme Court judge. For purely interlocutory matters an appeal will not succeed unless the master's order was clearly wrong. A less deferential standard of review applies to final orders or orders "vital to the final issue in the case." In those cases a rehearing is the appropriate form of appeal. See more recently *Kondori v. New Country Appliances Inc.* 2017 BCCA 164 at para. 16. Note that the order of the master should be entered before the hearing of the appeal: *Chaud v. ICBC*, 2009 BCCA 559 at para. 41.

2. When to Apply

Applications in chambers are normally made after a proceeding has been commenced. However, there are rare occasions—pre-judgment garnishing orders are an example—when applications can be made in an "intended action" before the action is even commenced.

SCCR 8-1(5) provides that an application must be set for 9:45 a.m. on a date on which the court hears applications. In Vancouver, there are sittings of both master's chambers and judge's chambers on almost every court day. Both Victoria and New Westminster also have masters or judges hearing chambers matters on many (but not all) days. Counsel should consult with

[1] **Gurminder Sandhu** and **Kelsey Croft** of Hamilton Duncan kindly revised this chapter in January 2021. Previously revised by Gurminder Sandhu, Andrew Scarth, and Joshua Ingram (2019); H. William Veenstra (periodically since March 2002; substantially in 2010; and again in 2017); Craig P. Dennis (1998–2000); Leonard M. Cohen (1996); and Mark M. Skorah (1995).

the particular registry to find out on what days there will be chambers sittings—in some registries there may only be chambers sittings once a week or sometimes even less often. In those circumstances, keep in mind that an application may be set for hearing at another registry within the same "judicial district" in which the proceeding was commenced (SCCR 8-2(1) and *Supreme Court Act* s. 8(1)). Thus, for example, an application in an action filed in the Vernon registry may be set for hearing at chambers in Kelowna. (Note that information is available on scheduling for each registry at www.bccourts.ca.)

Note that there are a few days each year when, as a result of judicial conferences, there are no regular chambers sittings.

When the action is proceeding under SCCR 15-1 (fast track litigation), SCCR 15-1(7) prohibits the making of most interlocutory applications until after a case planning conference or trial management conference has been held. SCCR 15-1(8) lists the exceptions to SCCR 15-1(7), and SCCR 15-1(9) allows a judge or master to relieve a party from the requirements of SCCR 15-1(7).

[§3.02] Procedures on Applications in Chambers

1. Applications Without an Oral Hearing

A party can obtain some orders without an oral hearing: these are often referred to as "desk orders." When all parties affected by an order in an action consent, SCCR 8-3 sets out the procedure. When the nature of the application in an action is such that notice need not be given, SCCR 8-4 governs. Similar rules apply to proceedings that, pursuant to SCCR 2-1(2), are commenced by petition or requisition, and are either consented to by all parties or do not require notice (SCCR 17-1).

An application for a desk order is made by filing a requisition, a draft order, and supporting material or evidence of consent to the application. There is no restriction on the type of order that may be made by desk order, but the material filed must satisfy the judge or master that the application is appropriate for proceeding in that manner. If the registrar, master or judge has concerns about the application, then the application may be rejected or, in appropriate cases, a judge or master may give directions, including a direction that the application be spoken to (SCCR 8-3(3) and 17-1(5)).

Among the more frequent grounds for rejection of desk orders are:

(a) in the case of a consent order, a party of record has not consented and it is not clear to the registrar that the party is not affected by it;

(b) the court believes that notice must be given; or

(c) the draft order is unclear or makes little sense.

In some situations, counsel will make an application in chambers even if it could usually be handled by desk order—for example, where the application is urgent and cannot wait for the ordinary processing of desk orders, or where the order sought is complex or unusual and requires some explanation. SCCR 8-1(2) contemplates this possibility. The procedure for these applications is set out in the next section.

2. Preparing an Application to be Heard in Chambers

The bulk of chambers applications are dealt with by way of a hearing. Applications to be heard in chambers are initiated by a notice of application in Form 32 for interlocutory applications in proceedings (SCCR 8-1(3) and (4)), or by petition in Form 66 for proceedings referred to in SCCR 2-1(2) (SCCR 16-1(2)). The discussion in this section focuses on the procedure for initiating an application by notice of application. The procedure for dealing with an application by petition, which is similar, is briefly discussed in §3.02(10). In addition to these SCCR, pay close attention to Administrative Notices and Practice Directions from the Supreme Court (see e.g. PD-28—*Chambers Practice*).

(a) Notice of Application

Most chambers applications are initiated by a notice of application in Form 32. The most important element of a notice of application is the list of the order(s) sought. Counsel should state, with precision, the order requested (Part 1 of Form 32), with each part of the relief sought in separate numbered or lettered paragraphs. A notice of application must also contain:

(i) a brief summary of the factual basis for the application (Part 2);

(ii) the legal basis for the application (Part 3), including the rule, enactment or other jurisdictional authority relied on for the orders sought, and a brief summary of the legal arguments on which the orders sought should be granted (including, if appropriate, citation of applicable cases); and

(iii) a list of the affidavits and other documents on which the applicant intends to rely (Part 4).

The rules prescribe a 10-page limit for the notice of application (SCCR 8-1(4)). This rule is not always strictly enforced by the court registry.

Instead of setting out the orders sought in the notice of application form, the applicant can attach a draft of the order sought. This draft order does not count toward the 10-page limit (SCCR 8-1(4)).

Lawyers should keep in mind that the factual summary is just that—a summary—and the affidavits themselves may contain a more fulsome explanation of the underlying facts.

The "legal basis" section should fully disclose the argument to be made in chambers. This rule is meant to prevent the application respondent from being caught by surprise by the applicant's argument. It is also meant to ensure parties understand the basic arguments being made on the application so that they can have informed discussions and possibly resolve the application without attending court (see *Boury v. Iten*, 2019 BCCA 81 at paras. 31–33 and 62). In *Zecher v. Josh*, 2011 BCSC 311, Master Bouck stated (at paras. 30–33):

> No doubt the *Lieutenant Governor-in-Council* intended Part 3 of Form 32 to contain more than a cursory listing of the *Rules* that might support the particular application. For example, common law authorities can and should be included as well as a brief legal analysis. Such an analysis is particularly helpful given that parties are not able to present a separate written argument in civil chambers unless the application is scheduled to take two hours or more of court time.

In *Dupre v. Patterson*, 2013 BCSC 1561, Madam Justice Adair agreed with Master Bouck's comments concerning what the "legal basis" section of the notice of application should contain:

> The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

Many lawyers include a statement in a notice of application that the "pleadings and proceedings herein" will be relied upon. Such a statement serves no useful purpose and does not discharge a party's responsibility to list the material to be relied upon (*Keenoy v. Keenoy* (1921), 59 D.L.R. 699 (Sask. Q.B.)).

Similarly, the inclusion in the list of affidavits to be relied upon of words like "such further and other material as counsel may advise" is redundant. The rule requires that all material be listed, so a party seeking to rely on other information will have to obtain leave to introduce that other information and give an explanation of why it was not originally included. That party runs the risk of the court refusing to consider the new material or, alternatively, of the court granting an adjournment to the opposing party on the basis that proper notice was not given (see *Leskun v. Leskun*, 2004 BCCA 422; *Boury v. Iten*, 2019 BCCA 81 at para. 63). It is clear that the court *may* rely on material not specified in a notice of application, either generally or under SCCR 22-1(4)(e) (*Lackmanec v. Hoffman* (1982), 133 D.L.R. (3d) 502 (Sask. C.A.); aff'g (1980), 15 Sask. R. 10 (Q.B.) (statement of claim, collective agreement and union constitution looked at); and *Nichols v. Gray* (1978), 9 B.C.L.R. 5 (C.A.) (statements of counsel at hearing held admissible as "other evidence" under the predecessor to SCCR 22-1(4)(e))). However, the court is not required to do so if other parties will be prejudiced.

A notice of application must also specify the date and place for the hearing of the application. The date must be at least 8 business days after the notice of application is filed and served, or 12 business days in the case of an application under SCCR 9-7 (i.e. a summary trial) (SCCR 8-1(8)). Counsel must be realistic as to the time it will take for parties to respond. Counsel also should keep in mind that applications that will require more than 2 hours to be heard must be booked with the court registry on days when the registry expects to have judges available (SCCR 8-1(6)). (See §3.02(5) below.) As well, as noted above, not all registries will have chambers hearings every business day, so in registries other than Vancouver it is important to check and ensure that there will be a judge or master sitting in chambers on the day you select.

The place an application is to be heard is dealt with in SCCR 8-2. Normally an application is heard in the registry in which an action was commenced, but SCCR 8-2(1) permits an application to be heard at any other registry in the same judicial district, or at any other registry to which all parties consent. However, an applicant who selects an inappropriate location may face costs consequences (SCCR 8-2(3)).

Counsel is responsible for preparing any evidence required at the hearing of the application. Evidence on chambers applications is usually given by affidavit, but the court can receive other forms of evidence: *Vernon v. BC (Liquor Distribution Branch)*, 2010 BCSC 1688 at para. 12; SCCR 22-1(4). See §3.03 for a full discussion of affidavit drafting. SCCR 22-1(4) empowers the court to hear the oral testimony of a witness but this seldom occurs. Documents other than affidavits that are frequently referred to in chambers applications include pleadings, previous orders, previous reasons for judgment and, for applications under SCCR 9-7, notices to admit, discovery transcripts and expert reports.

Once counsel has finalized the written material needed for the application, the notice of application and all affidavits (that have not already been delivered for a prior application) must be filed in the court registry and then served, along with any notice that the applicant is required to give under SCCR 9-7(9), on each party of record and any other person who may be affected by the order sought (SCCR 8-1(7)).

If the nature of the application is such that there is nobody to whom notice must be given, but it is not being dealt with by way of desk order, there is no need for service of the application. Alternatively, if an application is served and none of the respondents choose to respond to it, then it may also be set down without further notice. Such an application would still have to be filed in accordance with applicable filing windows (or grounds given for urgency). Counsel would appear in court on the date specified and explain the basis for the application. In the event of an application without notice, counsel should also be prepared to deal with any questions as to whether notice should have been given.

(b) Application Response

In most cases, notice will have to be given to at least one other party. Any person who wishes to respond to an application must prepare an application response in Form 33 as well as any responsive affidavits needed to support the application response.

The application response will indicate, for each order sought on the notice of application, whether the application respondent consents, opposes, or takes no position with respect to such order. It will also contain a brief summary of the factual and legal bases on which the orders opposed should not be granted, to which the same approach should be taken as in a notice of application. The application response must also list the affidavits and other documents on which the application respondent will rely.

The application response is subject to the same 10-page limit as the notice of application (SCCR 8-1(10)). If the application respondent has not already provided an address for service in the proceeding, it must do so on its application response (SCCR 8-1(11)).

The application response as well as originals of any supporting affidavits that have not already been filed must be filed in the court registry within 5 business days after service of the notice of application, or 8 business days in the case of an application under SCCR 9-7 (SCCR 8-1(9)). The application respondent must also serve on the applicant, within the same time limits, *two* copies of, and on every other party of record, *one* copy of, the filed application response, the filed affidavits and documents referred to in the application response that have not already been served, and if the application is brought under SCCR 9-7, any notice that the application respondent is required to give under Rule 9-7(9) (SCCR 8-1(9)).

(c) Reply Materials

The original applicant may serve reply affidavits on the other parties no later than 4:00 p.m. on the business day that is one full business day before the day set for the hearing (SCCR 8-1(13)).

Reply affidavits should be responsive to matters raised in the application respondent's affidavits, and should not be used simply to put forward evidence that should have been included in the original application. It is not necessary to repeat evidence that appears already in the affidavits originally delivered with the application.

In the absence of a court order or consent of all parties, no party may serve further affidavits beyond those served with the application response and in accordance with SCCR 8-1(7), (9) and (13).

(d) Application Record

An application record combines all of the documents the court will need to refer to in a convenient bound format and is intended to make chambers proceedings more efficient.

The applicant must file an application record with the registry no later than 4:00 p.m. on the business day that is one full business day before the date set for the hearing. If the application record is not filed by the deadline, the application will be struck from the chambers list. A process for reinstatement is set out in Administrative Notice AN-10.

Since the application record is what is seen by the judge or master deciding the application, its contents are key. It is customary to circulate a draft index among counsel in advance for comment. In any event, the index to the application record must be served on all parties no later than 4:00 p.m. on the business day that is one full business day before the hearing (SCCR 8-1(17)). Typically, all parties will prepare a binder of their own with materials organized in the same manner as the copy that is to be used by the judge or master.

The application record must contain (SCCR 8-1(15) and Administrative Notice AN-14):

(i) a title page, including:

a. the style of proceeding, court file number, and registry;

b. a brief description of the nature of the material;

c. contact information for counsel or the parties, which may be used by the registry for contact purposes;

d. the time, date and place of the hearing;

e. the name of the lawyers appearing for the applicant and application respondents; and

f. the time estimate for the hearing;

(ii) an index;

(iii) filed copies of the notice of application and any application responses;

(iv) copies of every filed affidavit and pleading and every other document (apart from a written argument) that is to be relied on at the hearing.

There are certain items that an application record may contain, but which are not mandatory (SCCR 8-1(15)(c)). They include a draft order, a list of authorities, a draft bill of costs, and (if permitted) a written argument. The application should not include affidavits of service or copies of authorities (SCCR 8-1)(15)(d)).

The contents of the application record must be either consecutively numbered throughout the document or separated by tabs. The application record must be contained in a 3-ring binder, cerlox bound, or placed in some comparable secure binding (SCCR 8-1(15)(a) and (b)). Note also that PD-28 requires that an extra copy of the notice of application or petition be provided to the registry with the record. The extra copy should be separate from and not bound with the application or petition record, and should be highlighted or marked to indicate which of the orders listed in Part 1 will be spoken to at the hearing.

If there are cross-applications being heard at the same time, then the parties should, so far as is possible, prepare a joint application record that can be used for both applications (SCCR 8-1(18)).

If the application is a summary trial application under SCCR 9-7, then *all* filed pleadings should be included in the application record (SCCR 8-1(15)(b)(vi)).

The application record will normally be returned to the applicant at the conclusion of the hearing (unless judgment is reserved or the hearing is adjourned) (SCCR 8-1(19)). Only the filed original documents will be retained in the court file.

If an application is adjourned after the application record has been filed, the applicant should retrieve the application record and refile it in accordance with the filing window for the new hearing date.

(e) Written Argument

Both the notice of application and application response require inclusion of a summary of the facts and legal argument supporting or opposing the application. The underlying rationale is that these arguments will be read by the other side in advance, allowing them to adequately respond, and they may also be read by the judge or master in advance of the application (depending on when the judge or master was assigned to hear the application). Note, however, that in many cases the judge or master hearing an application will have little or no opportunity to review the materials, so counsel should not assume that anything has been read before the hearing commences.

SCCR 8-1(16) prohibits the parties from providing any further written arguments to the court, except when the application is estimated to take more than 2 hours. This rule is intended to prevent parties from holding back on their true position until the last minute, and to avoid any need for adjournments caused by parties being taken by surprise.

Where applications are estimated to take more than two hours, it is likely that the 10-page limit on the notice of application and application response will be inadequate to fully explore the underlying facts and legal issues. In many complex applications, the parties will agree to exchange written arguments in advance of the hearing, or they may already have a good understanding of the positions that are to be taken by each side. In those cases, it is permissible to file written arguments at the hearing.

In *Labrecque v. Tyler*, 2011 BCSC 429, Master Bouck stated:

> Since July 1, 2010 and pursuant to Rule 8-1(16), a written argument may only be presented to the court if the application consumes more than two hours. There is no discretion under the Rule to receive written argument in other circumstances. The application was estimated to be heard in 35 minutes but took one hour. Thus, no written argument can or should have been considered by the court.

However, see *Simon Fraser University v. A&A Plumbing & Heating Ltd.*, 2011 BCSC 1507, which suggested that some written submissions may be permissible.

3. Calculating Time

In order to understand and meet deadlines, counsel must know how to calculate time limits under the SCCR. The calculation of time is governed by SCCR 22-4(1) and s. 25 of the *Interpretation Act*.

If the time period prescribed by the rules or a court order is *less than 7 days*, holidays do not count in calculating time (SCCR 22-4(1)). "Holidays" mean Sundays as well as many statutory holidays (*Interpretation Act*, s. 29). Therefore, if the time period is less than 7 days, Sundays are not counted in calculating the end of the time period.

If the time period is *7 days or more*, all days (including holidays and Sundays) are counted.

The particular words used to describe the time period also affect how time must be calculated (*Interpretation Act* s. 25.2–25.4):

- If the time is expressed as "clear days," "clear weeks," "clear months," or "clear years," or as "at least" or "not less than" a number of days, weeks, months or years, then the first and the last days are excluded (not counted) in calculating time.
- Otherwise, the first day is excluded and the last day is included.

Some time limits are described in terms of "business days." The SCCR define a "business day" as "a day on which the court registries are open for business" (SCCR 8-1(1)). This means every day except Saturdays and holidays (which by definition include Sundays) (SCCR 23-1(2)).

When documents are served or delivered after 4:00 p.m. on a particular day, they are deemed to have been served or delivered on the next day that is not a Saturday or a holiday (SCCR 4-2(3) and (6)).

The *Interpretation Act* provides further guidance for when the deadline falls on a day that is a holiday or a day an office is closed (s. 25):

- If the time for doing an act falls on a holiday, the time is extended to the next day that is not a holiday.
- If the time for doing an act in a business office falls on a day that the office is not open during regular business hours, the time is extended to the next day that the office is open.

4. Short Leave Applications and Applications to Extend Time Requirements

The time limits set by the SCCR will not be appropriate in every circumstance. In some cases (generally on grounds of urgency) the court will hear an application before the regular time limits have expired. In other cases (generally when the time provided by the court rules is not sufficient to allow the application respondent to prepare) the time limits will be extended.

The usual practice is for counsel for a party seeking a reduction or extension of time limits to first approach counsel for the other parties. A judge or master when deciding an application to reduce or extend time limits will balance such matters as the urgency of an application, its complexity, the prejudice to the applicant arising from further delay, and the prejudice to the application respondents from any lack of time to respond. Most counsel are able to predict reasonably well how such an application will be decided, and work matters out among themselves without incurring the expense of an unnecessary court application.

The general jurisdiction of the court to extend or shorten time limits is found in SCCR 22-4(2). However, there is a specific provision for short notice applications (SCCR 8-5). The application is generally brought in a summary manner by filing a requisition in Form 17.1 (SCCR 8-5(2)). On a short notice application, the court will typically fix the date and time for the main application to be heard and set a schedule for the exchange of documents (SCCR 8-5(4)).

A party seeking a short notice order must establish that there is some urgency to the application so that it would be inappropriate to require the applicant to wait for the expiry of the time limits that would normally apply. Although the application may be made without notice (SCCR 8-5(2)), it is customary to advise other parties that short notice will be sought. A judge or master hearing such an application may ask what each party's position is on the matter, and whether the other parties are available on the proposed hearing date. The opposing party may have good reasons to oppose an application for short leave—for example, the client or counsel may require the full time allowed in order to properly respond, or may argue that the substantive application is not urgent and need not proceed on an urgent basis. See Master Baker's decision in *O'Callaghan v. Hengsbach*, 2017 BCSC 2182 at paras. 18 and 19, for a summary of considerations in short leave applications.

A party seeking an extension of time must establish that the ordinary time limit is insufficient. It is prudent to seek an extension of time before the time frame has expired, but the passing of the ordinary time frame is not a bar to seeking an extension (SCCR 22-4(2)).

5. Setting Matters Down in Chambers

Most applications with a time estimate of 2 hours or less are heard in regular chambers, and are scheduled for hearing in a chambers courtroom along with numerous other similar applications set for 2 hours or less. Materials are filed with the chambers registry no later than 4:00 p.m. on the business day that is one full business day before the date set for hearing.

An application that is estimated to take more than 2 hours is not, however, heard in regular chambers. SCCR 8-1(6) requires that a hearing date be fixed by a registrar. Each registry has posted information as to its scheduling procedures at www.bccourts.ca (see the Scheduling tab). In Vancouver, time is reserved with the trial division (604.660.2853). It is common to have to wait several weeks for a hearing date. However, in cases of urgency it may be possible to obtain an earlier date. Because the court registries schedule on the assumption that a substantial portion of the cases set for hearing will not proceed—either because of settlement or for some other reason—it is unfortunately also not uncommon to find that there are not enough judges to hear all scheduled applications when the hearing date arrives. If this happens, the application will be scheduled for the next available date that is convenient for all counsel.

Vancouver uses a Chambers Assize Program to address delays caused by a significant increase in the volume of long (over 2 hours) applications. See the Chief Justice's Notice of October 22, 2018, "Chambers Assize in Vancouver," for information about booking applications on the chambers assize list.

Hearings will also be booked through the court registry, whether or not the time estimate is over 2 hours, if a particular judge or master is seized of a matter and is to hear further applications. To set down an application before the judge or master who is seized, follow the procedure in Practice Direction PD-18 – *Request to Appear Before a Specific Judge, Master or Registrar*. This procedure eliminates the need in most cases to write letters to the court. In those cases where communication with the court is required, the guidelines set out in Practice Direction PD-27—*Corresponding with the Court* should be followed.

In case of emergency, urgent civil and family applications that cannot wait to be heard on the next scheduled chambers day may be arranged to be heard after-hours at the Vancouver Law Courts. See AN-15—*Emergency After-Hours Applications in Vancouver*.

6. Adjournments

Not every hearing will go ahead on the date specified in the original notice of application. It may be that the parties end up agreeing to do some or all of what was sought in the application, or it may be that the application is not ready to be heard on the date set out originally. In those cases, provided that all parties who were to appear at the hearing agree, the application can be removed from the chambers hearing list by way of a requisition "adjourning" the application. It is important to specify on the requisition that it is made "By Consent"—the registry will not accept a requisition adjourning an application unless it so provides.

A consent adjournment may be made:

(a) until 9:00 a.m. of the day set for hearing, by filing a requisition (either by filing at the registry during regular hours or by fax filing); or

(b) after 9:00 a.m., communicated in person in the chambers courtroom. (See Practice Direction PD-28, s. 8).

Adjournments made in person should be followed up with a filed requisition so that the court file properly reflects the course of events.

A matter may be adjourned "generally"—that is, to no fixed date—or it may be adjourned to a specific date. A matter that is adjourned generally may be rescheduled by way of a further requisition that refers to the earlier notice of application, that it was adjourned generally, and that it should be reset.

In many cases the parties will agree as to an adjournment. Even if a party is not happy to have a matter delayed, it makes sense to agree to an adjournment (and reduces costs to all parties) if it is obvious that the hearing would be adjourned in any event.

If not all parties agree to an adjournment, the party seeking an adjournment will have to attend court and apply to the judge or master who was to hear the application for an order adjourning the application. If you are in regular chambers, you should advise the court clerk that there will be an adjournment application (give a time estimate) and then, if the adjournment is not granted, argument on the main application. In many cases, depending on time estimates, any adjournment applications will be heard early in the day and separately from argument on the main application.

7. The Day of the Hearing

Each day in chambers, the registry staff prepare a chambers list of applications scheduled for the day. All applications scheduled for regular chambers state that they are to be heard at 9:45 a.m. You should arrive by 9:45 a.m. so that by 10:00 a.m. you have checked in with the clerk in the courtroom. The clerk will deal with consent adjournments and confirm time estimates for applications that will proceed. This is also a convenient time for opposing counsel to discuss whether it is possible to agree about all or part of the application. The judge or master will enter the chambers at or shortly after 10:00 a.m. The usual practice is for uncontested applications to be heard first, then contested applications with the order of hearing determined by the time estimates (the shortest applications heard first). Most counsel wait in or near the courtroom because, from time to time (particularly in Vancouver or New Westminster), longer applications will be referred to other judges or masters who become available.

In more complex applications, the party initiating the hearing should provide an "Appearance List" setting

out the names of all parties and counsel: Practice Direction PD-44. This applies in various circumstances —for example, if there are more than 3 parties, or more than 6 counsel, or if 2 or more proceedings are involved in the application.

Effective chambers advocacy—what you actually say when your application is heard—is dealt with in §3.04 below.

At the conclusion of the hearing, consider whether you need to ask for a specific order as to costs. (The types of orders that may be made are beyond the scope of this chapter: see Chapter 7.)

8. Fax and Electronic Filing

Many documents are filed by manually filing paper copies at the court registry during regular business hours. However, SCCR 23-2 and 23-3 provide for filing of documents by fax or by electronic filing. Note that fax filing is only available for certain registries, and electronic filing is only available to persons who have entered into electronic services agreements with the Court Services Branch. Not all documents can be filed under these rules. In particular, an application record cannot be filed electronically: SCCR 23-3(5)(b)(ii). However, in appropriate cases these rules may provide a means to save both time and expense.

9. Summary Trial

SCCR 9-7 provides for the court to decide a case or an issue based on affidavits, transcripts, and other written evidence.

While an application for a summary trial generally follows the same procedure as other chambers applications, it is worth noting that the applicant must give the respondent 12 business days' notice in advance of the hearing date instead of 8 business days' notice (SCCR 8-1(8)).

SCCR 9-7 is discussed in detail in §4.05.

10. Petition Proceedings

SCCR 2-1(2) requires certain applications to be made by petition or requisition (generally, proceedings concerning estates, trusts, interests in property or construction of documents). When all parties consent or the proceeding does not require notice, the proceeding can be started by requisition—that process is described in §3.02(1), above. Otherwise, a proceeding listed in SCCR 2-1(2) is commenced by petition in Form 66.

Typically, petition proceedings are heard and decided based on affidavit evidence. The petition and all supporting affidavits must be filed with the court, then served on all persons whose interests may be affected by the order sought (SCCR 16-1(3)). A petition respondent served with a petition has 21 days to prepare, file, and serve on the petitioner 2 copies of a response to petition (Form 67), together with any affidavits the petition respondent intends to rely on at the hearing (SCCR 16-1(4) and (5)). (The time is longer if the petition respondent resides outside of Canada.) The petitioner may then file and serve affidavits in response and set the matter down for hearing, giving at least 7 days' notice of the hearing (SCCR 16-1(6) and (8)).

SCCR 16-1 requires that the applicant prepare and file a petition record (SCCR 16-1(11)).

If a petition is contested and there are disputes of a nature that cannot be resolved based simply on the documents that have been filed, the court has the discretion to order a trial (SCCR 22-1(7)(d)).

[§3.03] Affidavit Drafting[2]

1. Form and Use of Affidavits

Most chambers applications will be supported by an affidavit or affidavits providing evidence as to the facts on which the application is based.

An affidavit is a written statement of evidence sworn by the person giving the evidence (the "affiant" or, sometimes, the "deponent") before a person authorized to take affidavits. The general law of evidence and the SCCR permit (and sometimes require) the use of affidavits in legal proceedings. There is, however, no formal definition of an affidavit in the SCCR. There is a definition in s. 29 of the *Interpretation Act*, but it merely states that the term affidavit or oath "includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*."

A court relies on affidavit evidence in the same way as it relies on oral testimony. Accordingly, counsel should take care when preparing affidavits to ensure that the affidavit tells the true story (*Rummens v. Cecil* (1910), 129 L.T. Jo. 263 (Ch. D.)). More than telling the true story, the affidavit should tell the *full* story.

SCCR 22-2 sets out certain requirements as to form for affidavits. Those requirements do not necessarily apply to affidavits required under other enactments. An affidavit meeting the requirements of a statute that authorizes its use may be received in a proceeding despite its failure to satisfy all the requirements of SCCR 22-2 (see SCCR 22-2(14) as well as *Banque d'Hochelaga v. Hayden* (1922), 63 D.L.R. 514 (Alta. C.A.)). Generally, the forms prescribed by the Rules may be varied where necessary (SCCR 22-7(1) and 22-3(1)).

[2] Subsections 1 to 11 of this section were originally based on a paper entitled "The Written Material," prepared by Professor James P. Taylor for the CLE publication, *Chambers Practice* (February 1987).

2. Swearing or Affirming

The words "swear" or "make oath and say" in the introductory paragraph of an affidavit mean that the person making the affidavit is swearing an oath in the same manner as a witness testifying orally in court. At one time, a notary public or commissioner would administer the oath in the same manner as a court clerk, with the deponent holding a Bible and assenting to the words of the oath. Today, these formalities are not usually observed. A recommended procedure is set out in §3.03(10)(c).

On what constitutes swearing or affirming an affidavit, see *Owen v. Yorke*, [1985] B.C.D. Civ. 1231-03 (S.C.):

> What constitutes the swearing or affirming of an affidavit? Is it sufficient merely to have the document signed, as occurred in this case before me? …
>
> I do not for one minute state that what is required are some specific words engraved in granite; indeed not. What is required, though, is that the person swearing or affirming is asked and replies to some simple fundamental inquiry as to the veracity of the content. Some such inquiry is necessary. I repeat, nothing elaborate; no Bible is necessary, no elaborate ceremony, but, rather, a simple inquiry which places some special meaning to the document that is complete. What we have in the case at bar is at best the witnessing of a signature … That is not enough. The Respondent's argument that the document itself is the legal act can't be successful. The affixing of the signature does not end the process, something further is required …
>
> The integrity of the procedure of swearing or affirming an affidavit is so fundamental that such procedures are not to be compromised.

Like witnesses in court, persons who do not wish to swear an oath may make a solemn affirmation instead (the *Evidence Act* (British Columbia) and *Canada Evidence Act*, s. 14). If an affidavit is affirmed rather than sworn, the words in the usual introductory paragraph and the jurat should be changed. For suggested wording see the Affidavit Precedents at the end of this chapter (Precedents 1 and 7).

3. When an Affidavit May Be Sworn

Generally, an affidavit is made and filed in a proceeding that is already commenced. However, an affidavit may also be made before the proceeding is commenced (SCCR 22-2(15)). In such a case, to ensure that the court is not misled into thinking that a proceeding has been commenced, it is customary to make the intended nature of the proceeding clear by heading the affidavit—"In the matter of an intended proceeding."

4. Parts of an Affidavit

(a) Style of Proceeding

An affidavit is headed with the style and number of the proceeding. The heading in the affidavit may be abbreviated under SCCR 22-3(5) to name only the first plaintiff, defendant and other party, if any, followed by the words "and others." The abbreviation "et al." is no longer used.

Each affidavit must be endorsed, in the top right hand corner of the title page, above the style of proceeding, with the initials and surname of the deponent, the sequential number indicating whether it is their first, second, third, etc. affidavit, and the date on which the affidavit was made (SCCR 22-2(3)).

(b) Introductory Paragraph

An affidavit is expressed in the first person and shows the name, address and occupation of the deponent (SCCR 22-2(2)(a)). If the deponent has good reason to keep their address secret, it should be expressed as being in care of the appropriate party's address for delivery. If the deponent is retired, unemployed or has no particular occupation, state this. There is a distinction between an occupation, which refers to vocational function (that is, nurse, carpenter, lawyer), and employment, which refers to the deponent's employer. It is the deponent's occupation, rather than employment, that is required to be given by SCCR 22-2(2)(a).

5. The Deponent

(a) Person with Direct Knowledge

Wherever possible, an affidavit should be made by a person who has direct knowledge of the facts deposed to (*Campbell v. Bartlett* (1979), 3 W.W.R. 571 (Sask. C.A.)). There are two reasons for this. First, hearsay evidence is not acceptable in certain applications. Second, the evidentiary value of direct evidence is always greater than that of hearsay evidence. An affidavit on information and belief invites the inference that the party with direct knowledge is afraid to face cross-examination (*Meridian Printing (1979) Ltd. v. Donald* (1981), 4 W.W.R. 476, 12 Sask. R. 234 (Dist. Ct.)). When extraordinary or discretionary relief such as an injunction is sought, a court may decline to accept hearsay evidence unless there is an explanation as to why first-hand evidence is unavailable. (*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (S.C.))

(b) Corporate Party

A natural person must make an affidavit on behalf of a corporate party. That person must depose to their personal knowledge of the matters

contained in the affidavit (*Bank of Montreal v. Brown* (1956), 21 W.W.R. 287 (B.C.S.C.)), unless hearsay evidence is permitted in the circumstances. For suggested wordings, see the Affidavit Precedents (Precedent 3).

(c) Identifying Deponent's Relationship to Party

When the deponent is a party, or the lawyer, agent, director, officer or employee of a party, this fact must be stated in the body of the affidavit (SCCR 22-2(2)(b)). It is usual to state this in the first paragraph. For suggested wordings, see the Affidavit Precedents (Precedents 3 and 4).

(d) Solicitor on Behalf of Client

For their own convenience and that of their clients, lawyers occasionally swear affidavits, deposing to facts told to them by their clients. When this is done, the body of the affidavit should include a paragraph stating that the deponent is the client's lawyer and that the affidavit is made on behalf of the client.

A lawyer swearing an affidavit on behalf of a client must consider the questions of admissibility and credibility that are involved when an affidavit is made on information and belief. In addition, the lawyer must take care to ensure that tendering the evidence of the lawyer will not effect an inadvertent waiver of solicitor-client privilege. See on this issue *Murao v. Blackcomb Skiing Enterprises Ltd. Partnership*, 2003 BCSC 558 at para. 83; and *Re Mannix Resources*, 2004 BCSC 1315.

The lawyer must also consider whether swearing an affidavit will subsequently restrict that lawyer from acting as counsel in the matter. Consider the rules governing "speaking to one's own affidavit" in section 5.2 of the *BC Code*:

> 5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless
>
> (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;
>
> (b) the matter is purely formal or uncontroverted; or
>
> (c) it is necessary in the interests of justice for the lawyer to give evidence.
>
> 5.2-2 A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

(See also the Commentary and Annotations to this section of the *BC Code*.)

The following statement by Judge J.P. van der Hoop, in the CLE publication, *Chambers Practice* (February 1982) reflects the general practice:

> I have no objection to a lawyer speaking to his own affidavit. I get a little annoyed, however, when opposing counsel gets up and says I consent to my learned friend speaking to his affidavit and halfway through starts to argue that the facts are not true. The decision the chambers judge must make is whether or not there is any issue arising from the facts as stated in the affidavit. If there is no issue over the facts, then speak to your own affidavit. I realize that frequently you are coming from a firm where you must use your own affidavit or be silent. If there is an issue arising out of the facts stated I do not care how much opposing counsel consents, I will not hear counsel on that affidavit because counsel then turns into a witness as well. That has to be cleared up before the affidavit is referred to.

The following are the reasons advanced against counsel acting as witness:

(i) if counsel testifies, the court is compelled to assess counsel's credibility as a witness, and this is incompatible with the assumption that counsel, as an officer of the court, meets the ethical requirement of never misleading the court;

(ii) if counsel testifies, opposing counsel may need to attack their credibility, which is incompatible with the requirement that counsel treat each other with respect and professional courtesy;

(iii) when the testimony of a witness previously examined by counsel is contradicted by counsel's own testimony, the credibility of the lay witness may be unfairly prejudiced. The credibility of counsel as a witness may be prejudiced because the trier of fact will regard counsel as an interested party. The result will be that counsel's duty to serve the best interests of their client is endangered and they may be compelled to withdraw.

For statements supporting the view of Judge van der Hoop, refer to *Pioneer Lumber Company v. Alberta Lumber Company* (1923), 32 B.C.R. 321 (C.A.), particularly the statements of Martin J.A.

It is clear that a lawyer is competent to testify on behalf of their client. In some cases, counsel is obliged to do so. In *Roland Roy Fourrures Inc. v. Maryland Casualty Co*. (1973), 35 D.L.R. (3d) 591 (S.C.C.), the court found that counsel was obliged under the circumstances to testify to establish that his client's inaccurate answer in a deposition was a misunderstanding rather than perjury. In *obiter*, the court also noted:

> Counsel for the appellant was correct in saying that counsel [for the plaintiff] ought to have refrained from taking any part in the trial, not even to provide evidence pertaining to other points in the case. Nor should the judge have tolerated such participation.

Many strong statements have been made condemning the practice of counsel giving evidence. See, for example, Cartwright J. in *Stanley v. Douglas* (1952), 1 S.C.R. 260 at 274, 4 D.L.R. 689, where he quotes Ritchie C.J. in *Bank of British North America v. McElroy* (1875), 15 N.B.R. 462 (S.C.). See also *National Financial Services Corp. v. Wolverton Securities Ltd* (1998), 52 B.C.L.R. (3d) 302 (S.C.) at para. 7.

6. Body

(a) Format

SCCR Form 109 is a standard form of affidavit. However, this form is not mandatory (SCCR 22-2(d)).

The body of the affidavit must be divided into consecutively numbered paragraphs (SCCR 22-2(c)). Some argue that each paragraph of an affidavit should contain only a single sentence. The better rule is that each paragraph should deal with a single matter. Long and complicated paragraphs can create difficulties, particularly when counsel wishes to draw the court's attention to a specific part of a long paragraph.

SCCR 22-2(a) requires that affidavits be in the first person.

(b) Scandalous or Unnecessary Material

At any stage of a proceeding, the court may order any document that is unnecessary, scandalous, frivolous or vexatious to be amended or struck out, either completely or in part (SCCR 9-5(1)).

The court may order that the entire affidavit be removed from the file, sealed by the registrar and destroyed after a period of time, or that an offending passage be expunged by the registrar in such a manner as to make it entirely illegible (*Black v. Canadian Copper Co*. (1917), 13 O.W.N. 255 (C.A.)).

(c) Statements on Information and Belief

(i) Final Orders

In general, an affidavit may state only what a deponent would be permitted to state in evidence at trial (SCCR 22-2(12)). Statements on information and belief are hearsay and when used in an application for a final order they are generally not admissible as proof of the truth of the matters deposed to. However, if statements on information and belief are not rendered for the truth of their contents, but rather to show that the statements were made, they do not offend the hearsay rule and may be included in applications for final orders. The court has discretion to order statements on information and belief to be entered as evidence in an application for a final order (SCCR 12-5(71)(a), 22-1(4)(e) and 22-2(13)(b)(ii)). See also SCCR 12-5(59) to (65) on the use of affidavits. There is a good general discussion of these issues in *Ulrich v. Ulrich*, 2004 BCSC 95.

In applications for summary judgment, courts have permitted defendants to rely on statements made on information and belief in affidavits in reply on the issue of whether the matter is appropriate for summary resolution. Because a successful defence is often based on facts that emerge only in discovery or at trial, the courts have held that a defendant should not be deprived of the right to defend an action merely because the defendant cannot tender proof of those facts before discovery (*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.)), citing with approval *Federal Business Development Bank v. Pallan* (1978), 9 B.C.L.R. 59 (S.C.)).

(ii) Orders that are not Final Orders

Statements on information and belief are permitted as of right under SCCR 22-2(13) "in respect of an application that does not seek a final order," provided that the source of the information is given. Note that the predecessor to SCCR 22-2(13) used the term "interlocutory orders" to refer to orders that are not final orders.

SCCR 22-2(13) is an enabling rule of general application and is not to be interpreted as restricting other rules or provisions which merely require the deponent to depose to a belief (*Soucy v. Routhier* (1967), 68 D.L.R. (2d) 154 (S.C.N.B.A.D.)). Even if hearsay evidence is permitted, in certain applications (like injunctions) judges will proceed cautiously when provided with hearsay evidence: *British Columbia v. Malik*, 2011 SCC 18.

(iii) Distinguishing between Final Orders and Interlocutory Orders

As noted above, the predecessor to SCCR 22-2(13) referred to "interlocutory orders." While the new rules seek to eliminate this terminology, it is used in many case authorities, will continue to be used by many

counsel, and may help with understanding the new rule. The classic definition of an interlocutory order is found in *Gilbert v. Endean* (1878), 9 Ch. D. 259. The Court defined it is as an order that maintains the *status quo* until a final determination of a question is made, or an order that gives directions with respect to the conduct of an action. A final order is an order that determines the rights or status of parties.

As set out in *Purewal Blueberry Farm Ltd. v. J.T. Johnson Co.*, 2005 BCCA 30 at para. 6:

> To determine whether an order is final, the effect of the order is examined. If the effect is to finally dispose of the rights of the parties, the order will be held to be a final order … If the order does not finally dispose of the rights between parties, the order will be considered interlocutory.

However, orders that are interlocutory in form may be final in effect. For example, in *Rossage v. Rossage* (1960), 1 All E.R. 600 (C.A.), which concerned an application to suspend visiting rights, statements on information and belief were held to be unacceptable because the order, although interlocutory in form (in that it could be altered at any time in the best interests of the child) was final in effect (in that it decided rights between the parties). The case was cited with approval in *Re CJOR Ltd*. (1965), 53 W.W.R. 633 (B.C.S.C.).

In *Glazer v. Union Contractors Ltd.* (1960), 26 D.L.R. (2d) 349 (B.C.C.A.), the court said that in proceedings such as contempt of court, the issue is not so much whether the proceedings are final or interlocutory as whether they are so severed from the general suit that they are to be treated as something separate in nature and not as incidental to the suit. If so, affidavits on information and belief will not be accepted.

(iv) Source of Information

Even where statements on information and belief are acceptable in affidavits, the source of the information must be given (SCCR 22-2(13)(a)). The source of information should be described in detail and any facts that enhance the credibility of the source should be given. If the source is not given, the court may disregard the statements in question, or the entire affidavit (*Tate v. Hennessy* (1901), 8 B.C.R. 220 (S.C.); *Scarr v. Gower* (1956), 2 D.L.R. (2d) 402 (B.C.C.A.); *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 (S.C.); and *Albert v. Politano*, 2013 BCCA 194 at paras. 19–23).

Many lawyers include a standard paragraph in all affidavits such as, "I have personal knowledge of all facts deposed to except where stated to be on information provided to me by an identified person and in each such case I believe the identified person and I believe the statement I make to be true." This practice can be dangerous because it may mislead deponents and lawyers into thinking that statements made on information and belief can properly be included in all affidavits. Statements on information and belief are acceptable only in applications for interlocutory orders and in cases where the court grants leave (SCCR 12-5(71), 22-1(4)(e) and 22-2(13)).

It is preferable for the person drafting the affidavit to be forced to consider each deposition as to hearsay specifically and individually.

A common and recurring error made with respect to third-party statements is the failure to distinguish between third-party statements that the deponent believes and wishes the court to believe, and third-party statements that the deponent wishes to record as having been made, but which the deponent does not believe and does not ask the court to believe or which do not constitute hearsay in any event (such as an admission). The use of the standard recitation as to statements on information and belief obscures this potential difficulty and the court, and the drafter, can be misled.

It is not sufficient to state that the source is a "corporation" without naming a specific person (*Re Mintz; Malouf v. Mintz* (1930), 24 Sask. L.R. 290, 2 D.L.R. 777 (C.A.); *Preiswerck* (*K.J.*) *Ltd. v. Los Angeles-Seattle Motor Express Inc.* (1957), 22 W.W.R. 93 (B.C.S.C.)). Generally, an informant's desire for anonymity is insufficient reason for refusing to name the informant (*Meier v. C.B.C.*, *supra*). However, if the informant desires anonymity, this should be stated in the affidavit.

When statements on information and belief are permitted, disclosure of the source of the information is the only requirement imposed by the Rules. The case of *R. v. Board of Licence Commissioners* (*Point Grey*) (1913), 18 B.C.R. 648 (C.A.) is sometimes cited for the proposition that evidence on information and belief will

not be received unless the deponent's statement on information and belief is corroborated by some person who speaks from their own knowledge. This is not now, and never has been, the law in British Columbia.

(v) Public Interest Exception

In a case filed by a taxpayer involving the public interest, the court accepted an affidavit including statements on information and belief, even where the belief and the grounds of belief were not deposed to, on the basis that an action of this type should not be defeated on technical objections (*Wilin Construction Ltd. v. Dartmouth Hospital Commission* (1977), 75 D.L.R. (3d) 145 (N.S.S.C.A.D.)).

(vi) Double Hearsay

Generally speaking, double hearsay (that is, "I am informed by my secretary that X told her …") is not admissible even on interlocutory applications (*Trus Joist* (*Western*) *Ltd. v. United Brotherhood of Carpenters and Joiners of America Loc.* 1958, [1982] 6 W.W.R. 744 (B.C.S.C.); *AG Canada v. Acero*, 2006 BCSC 1015).

(vii) Lawyer Informed by Client

See section 5(d) above.

(viii) Opinion Evidence

Opinion evidence may be given by affidavit, provided that the expertise of the deponent and the basis for the opinion are stated (*Trus Joist (Western) Ltd.*, *supra*).

7. Exhibits

An exhibit is a document or object referred to in an affidavit. The person before whom the affidavit is sworn must identify the exhibits. This is done by referring to the exhibit in the affidavit by a letter, and then endorsing the exhibit with a certificate as follows: "This is Exhibit [letter] referred to in the affidavit of [name] made before me on [month/day, year], [signature of person taking oath]" (SCCR 22-2(8)). When referring to the exhibit in the affidavit, a simple style is preferable: "I attach a true copy of the letter [or other document] as Exhibit 'A.'"

An exhibit referred to in an affidavit need not be filed but must be made available for use by the court and for inspection by other parties (SCCR 22-2(9)). However, in the case of a documentary exhibit not exceeding ten pages, SCCR 22-2(9) requires that a true reproduction must be attached to the affidavit and to all copies served or delivered. Where a document is longer than 10 pages, the lawyer may choose under SCCR 22-2(9) not to attach (or serve) it, and in that case the affidavit should state "the letter [document] is Exhibit 'A' to this affidavit."

Notwithstanding the wording of the rule, the usual practice in British Columbia is to deliver a copy of all documentary exhibits to each party, and a party who does not receive a copy of an exhibit will normally immediately request it.

Each page of the documentary exhibits referred to in the affidavit must be numbered sequentially (SCCR 22-2(10)).

As to what items should be included as exhibits, the general rule is that matters already before the court should never be attached as an exhibit. Attaching documents already filed in the proceeding as exhibits adds to costs without assisting the court in any way. This material should simply be referred to in the affidavit.

The contents of an exhibit should not be summarized in detail in the body of an affidavit. The exhibit speaks for itself.

Parties sometimes seek to rely on statements made in exhibits as evidence of the truth of those statements. Such evidence may be admissible as hearsay evidence on interlocutory applications, or as an admission against interest if the author of the document is the opposing party. However, if the deponent of the affidavit wishes to adopt a statement in the exhibit as their own evidence, that should be reflected in the text of the affidavit itself (*Ulrich v. Ulrich*, 2004 BCSC 95).

8. Jurat and Signature

(a) Form and Location of Jurat

The jurat is the clause that states where, when, and before whom the affidavit was made. The jurat should immediately follow the last line of text. At least one line of text should appear on the page where the jurat is printed, to forestall allegations that material was removed after swearing. The jurat is usually placed on the left side of the page, leaving room for the deponent's signature on the right.

(b) Several Deponents

The 1961 Rules provided that:

> In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except if the affidavit of all deponents is taken at one time by the same officer [in which case] it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

This rule is not found in the present Supreme Court Civil Rules and arguably, therefore, the practice of having several deponents swear one affidavit is no longer authorized. It could be argued that SCCR 1-3(1), 1-2(3) and 22-2(14)

authorize such affidavits in an appropriate case. However, the safer practice is to have the second deponent file a separate affidavit adopting the contents of the first.

(c) Deponent Who is Blind or Cannot Read

If the deponent is blind or is unable to read, the person before whom the affidavit is made must certify in the jurat that the affidavit was read to the deponent in their presence, and the deponent appeared to understand the affidavit (SCCR 22-2(6)). For suggested wordings see the Affidavit Precedents (Precedent 7(c)).

(d) Deponent Who Does Not Understand English

Where it appears that the deponent does not understand English, the affidavit should be interpreted to the deponent by a competent interpreter. The interpreter must certify by an endorsement in Form 109 on the affidavit that the interpreter has interpreted the affidavit to the deponent (SCCR 22-2(7)). For suggested wordings, see the Affidavit Precedents (Precedent 6(d).

(e) Signature

The deponent must sign the affidavit and the person before whom the affidavit is made must sign the jurat (SCCR 22-2(4)).

A deponent unable to sign an affidavit may place their mark on it (SCCR 22-2(4)). An affidavit by a person who could not make any mark at all was accepted by the court in *R. v. Holloway* (1901), 65 J.P. 712 (Magistrates Ct.).

The commissioner's signature should be placed on the page on which the jurat appears. To do otherwise is an irregularity as to form (*Pashko v. Canadian Acceptance Corp*. (1957), 12 D.L.R. (2d) 380 (B.C.C.A.)).

Affidavits prepared for filing in the Supreme Court must include the name, legibly typed or written, of the commissioner before whom the affidavit was sworn as part of the jurat (see Practice Direction PD-1—*Affidavits-Identification of Counsel or Commissioner*).

(f) Capacity of Person Taking Affidavit

The person before whom the affidavit is made should indicate their capacity in the jurat. However, failure to indicate capacity does not render the affidavit invalid where there is no statutory requirement that capacity be indicated (*Cameron-Hutt Ltd. v. MacMillen* (1933), 3 W.W.R. 241 (Sask. K.B.)).

9. Effect of Defects in an Affidavit

Courts have held that formal irregularities do not affect the validity of an affidavit (*Crown Lumber Co. v. Hickle*, [1925] 1 D.L.R. 626 (Alta. S.C.A.D.)). Refer also to s. 67 of the *Evidence Act* (British Columbia) and SCCR 22-2(14), both of which allow the court to use a defective affidavit. Whether it will do so in any given case is, however, a matter of discretion. The best practice is to observe all the formalities.

There is authority that the affidavit is inadmissible where the introductory paragraph omits the words "makes oath" or "swears" or "affirms" (*Allen v. Taylor* (1870), L.R. 10 Eq. 52, 39 L.R. Ch. 627 (Ch. D.); *Dobrinsky v. Kubara* (1950), 1 W.W.R. 65 (Man. K.B.)). The better view is that this omission is an irregularity (*R. v. McKimm* (1903), 2 O.W.R. 163 (H.C.)); this case may, however, be distinguishable as the opposing party was held to have waived his right to object by taking a fresh step in the proceedings.

The omission of the words "Sworn before me" from the jurat has been held a fatal defect (*R. v. Bloxham (Inhabitants)* (1844), 6 Q.B. 528. In other cases, omission of these words was held to be an irregularity of form only (*Eddows v. Argentine Loan and Agency Co*. (1890), 59 LF Ch. 392 (Ch.)); *Watrous Credit Union Ltd. v. Sikorski* (1969), 70 W.W.R. 521 (Sask. D.C.)).

When reviewing the various cases on this topic—which are not necessarily consistent—it is important to consider the context of the underlying applications. Some of them involve prejudgment garnishing orders, in which there is an overriding requirement of "meticulous compliance" with procedural rules, which may not be applicable in other cases.

10. Taking Affidavits

(a) Who May Take

The *Evidence Act*, R.S.B.C. 1996, c. 124, sets out, in ss. 56 to 64, who is authorized to take affidavits. In British Columbia, affidavits may be taken only by the following statutorily empowered commissioners:

(i) judges, justices of the peace, court registrars, practising lawyers as defined in s. 1(1) of the *Legal Profession Act* (which includes articled students), notaries public, municipal clerks, regional district secretaries, coroners, government agents, and other office-holders prescribed by the Attorney General by regulation (s. 60 of the *Evidence Act*);

(ii) persons appointed by order of the Attorney General (s. 56 of the *Evidence Act*); and

(iii) all commissioned officers of the Canadian Armed Forces (s. 64 of the *Evidence Act*).

Section 63 of the *Evidence Act* contains a list of those persons who are authorized to take affidavits outside of British Columbia for use in British Columbia.

Various statutes confer a limited power on certain persons to take affidavits in connection with their statutory powers and duties, including the *Evidence Act*, *Geothermal Resources Act*, *Land Act* and *Vital Statistics Act*.

(b) Counsel Taking Clients' Affidavits

The 1961 Rules rendered affidavits unacceptable if they were sworn before the solicitor acting for the party on whose behalf the affidavit was used, or before any agent of that solicitor. This provision is no longer included in the Supreme Court Civil Rules and consequently in British Columbia it is acceptable for lawyers, their partners and associates, to take affidavits from clients. Some reference works include discussions of the old rule because it remains in effect in some jurisdictions, and cite old British Columbia cases to illustrate the operation of the rule. Counsel in this province should not be misled into thinking they may not take affidavits from their clients.

(c) Safeguards to Follow in Taking an Affidavit

Note: this section includes material from notes on "Solemn Declarations and Affidavits" appearing in the February 1985 *Benchers' Bulletin*. **This section should be read with the provisions on affidavits and solemn declarations in Appendix A of the *BC Code*.**

Apart from the technical requirements discussed below, the most important safeguards to follow when taking an affidavit are to (a) carefully review and proofread the affidavit before you meet with the witness for the swearing of the affidavit; and (b) ensure that the witness reads the affidavit carefully before swearing or affirming it. In far too many cases, clients will assume that if their lawyer has drafted an affidavit and is putting it in front of them it must be right. Even minor errors in an affidavit can cause significant embarrassment later in a proceeding.

A person who makes, in either an affidavit or a solemn (statutory) declaration, "a false statement under oath or solemn affirmation by affidavit, solemn declaration or deposition or orally, knowing that the assertion is false," commits an indictable offence and is liable to imprisonment for 14 years (s. 131 of the *Criminal Code*). Consequently, commissioners who take affidavits should understand clearly the procedures involved, and should impress upon the deponent or declarant the seriousness of the oath.

The leading cases on the procedures to be followed in the taking of affidavits and solemn declarations are: *Re Collins (No. 2)* (1905), 10 C.C.C. 73 (B.C. Co. Ct); *R. v. Phillips* (1908), 9 W.W.R. 634 (B.C. Co. Ct); *R. v. Nier* (1915), 28 D.L.R. 373 (Alta. S.C.T.D.); *R. v. Schultz*, [1922] 2 W.W.R. 582 (Sask. C.A.); *R. v. Rutherford* (1923), 41 C.C.C. 240 (C.A.); *R. v. Whynot* (1954), 110 C.C.C. 35 (N.S.S.C.T.D.); *R. v. Nichols*, [1975] 5 W.W.R. 600 (Alta. S.C.); and *R. v. Chow* (1978), 41 C.C.C. (2d) 143 (Sask. C.A.).

From these authorities the following conclusions can be drawn as to the correct procedure to be followed in the taking of affidavits:

(i) The deponent must be physically present before the commissioner.

(ii) The commissioner must be satisfied that the deponent understands the contents of the document. This may be done by:

- the commissioner reading the entire document aloud to the deponent;
- the deponent reading the entire document aloud to the commissioner; or
- the deponent stating to the commissioner that the deponent understands the contents of the document.

(iii) The deponent must swear that the contents are true. In normal circumstances this may be accomplished by the commissioner asking the deponent, "Do you swear that the contents of this affidavit are true, so help you God?", or, where the affidavit is being affirmed, "Do you solemnly promise, affirm and declare that the evidence given by you is the truth, the whole truth and nothing but the truth?", and the deponent responding in the affirmative (see s. 20 of the *Evidence Act* and the *Affirmation Regulation*, B.C. Reg. 396/89).

(iv) In case of a solemn (statutory) declaration, the declarant must make their declaration in the language of the statute. In most circumstances this may be accomplished by the commissioner asking the declarant, "Do you make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath?" and the declarant responding in the affirmative. These words are found in s. 41 of the *Canada Evidence Act*, s. 69 of the *Evidence Act* (British Columbia), and in Appendix A, rule 1(c) of the *BC Code*.

(v) The commissioner should ensure that the deponent is who the deponent represents themselves to be. The deponent should in all circumstances acknowledge that they are the deponent. If the commissioner does not know the deponent personally, identification should be requested. A British Columbia

Driver's License, which includes a photograph, is a good form of identification for this purpose. Alternatively, an introduction should be obtained from someone known to both the commissioner and the deponent. Note that Appendix A of the *BC Code* requires that the deponent acknowledge that they are the deponent.

(vi) The deponent must sign the document, or where permitted by statute, swear that the signature on the document is that of the deponent (*BC Code*, Appendix A, rule 1(f)).

11. Alterations, Erasures and Reswearing

SCCR 22-2(11) requires that the person before whom an affidavit is made must initial all alterations in the affidavit, and unless so initialed, the affidavit cannot be used in a proceeding without leave of the court. Although the SCCR do not require it, it is wise for the deponent, as well as the person before whom the affidavit is sworn or affirmed, to initial all changes. "Alterations" includes interlineations, deletions, and additions. The usual method of making alterations is to place checkmarks at both ends of the alteration and to place initials between the checkmarks or in the margin opposite. Where blanks on a printed affidavit form are filled in, this does not constitute an alteration requiring initials (*Bel-Fran Invests. Ltd. v. Pantuity Holdings Ltd*. (1975), 6 W.W.R. 374 (B.C.S.C.)). Where paragraphs of a printed form are struck out, initials are required (*Colt Invests. Ltd. v. Sansai Securities Ltd*. (1974), 1 W.W.R. 279 (B.C.S.C.)).

If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialing the alterations, taking the oath again from the deponent, and then signing the altered affidavit. A second jurat should be added commencing with the word "resworn."

12. Signing as a Notary or Commissioner

A member of the Law Society of British Columbia is entitled to take affidavits and statutory declarations both as a commissioner for taking affidavits in the province of British Columbia and as a notary public in and for the province of British Columbia. If the document will be used in British Columbia, whether in a court proceeding or otherwise, counsel will almost always sign as a commissioner. If there is a statutory requirement, or if the documents are for use outside British Columbia, whether in another province or elsewhere, counsel will sign the documents as a notary.

When taking a statutory declaration or swearing an affidavit, if counsel signs as a commissioner, all that is necessary is that counsel sign on the line above the words "a commissioner for taking affidavits in the province of British Columbia."

When counsel is signing as a notary public, counsel will place their signature above the words "a notary public in and for the province of British Columbia." Over the signature counsel should then impress their notarial seal.

Some American jurisdictions may require, in addition to the statement that counsel is a notary public in and for the province of British Columbia, a statement as to whether and when the lawyer's commission to sign as a notary public expires. So long as the lawyer remains a member in good standing of the Law Society of British Columbia, the lawyer's commission never expires. Counsel may therefore insert the words "my commission never expires." Alternatively, if being cautious and precise, counsel could insert the date that the current practice certificate expires—normally December 31 of that calendar year.

Whether counsel signs as a commissioner or a notary, it is good practice to stamp their name and address below the signature, to satisfy the requirement for the commissioner's name to be legibly provided. This is mandatory for an affidavit that is to be used in the Supreme Court of British Columbia—see Practice Direction PD-1—*Affidavits-Identification of Counsel or Commissioner*.

When counsel is asked to swear documents for use outside the province, it is good practice to ask the person who sent the documents whether there are any special requirements in that jurisdiction. If counsel is having documents sworn outside British Columbia for use in British Columbia, review s. 63 of the *Evidence Act* and ensure that there has been compliance by the person taking the statutory declaration or swearing the affidavit.

13. Content and Style

Most applications are decided on the facts, not the law. Therefore, the way in which the facts are presented is all-important. There should be an element of advocacy in the affidavit. This does not mean that the affidavit should be argumentative, misleading or untrue. What it does mean is that your affidavit should be clear, concise and compelling. In short, simply by reading the affidavit, the master or judge should be able to determine what the facts and issues are, and form at least a preliminary opinion that the issues should be resolved in your favour.

How do you accomplish this? You must start with an understanding of the nature of the order you seek and the matters that you must prove to obtain that order. Then you should organize the facts so as to set out, in a clear way, each of the elements necessary to your application. Extraneous or irrelevant matters should not appear in an affidavit—they serve only to distract the master's or judge's attention from the issue at hand.

When preparing your affidavit(s), then, you may find the following checklist helpful:

(a) Make a list of the issues which you must address to obtain the order you desire.

(b) Make a list of the facts which bear on those issues.

(c) Identify the witnesses who are best able to give the evidence you require to establish those facts.

(d) Organize the facts in a logical way (for example, according to issue, or chronologically).

(e) Present the facts in clear, simple sentences which have subjects, verbs and objects. Avoid the passive voice.

(f) As a general rule, confine each paragraph in the affidavit to a single matter.

(g) Ensure that no extraneous or irrelevant matters appear in the affidavit.

Affidavits tend to be more persuasive when they are written in language that would be used by the witness, rather than in language counsel would use. (See, in the context of a summary trial application, *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.) at paras. 31–33.)

For detailed information on the preparation of affidavits, see *Affidavits* (Vancouver: CLE, December 1992), containing papers by Mr. Justice John Spencer, Mr. Justice Bruce Cohen, Mr. Justice Frank Maczko, and several practitioners.

14. Cross-Examination on Affidavits

Counsel should keep in mind when preparing affidavits of their own clients, and when reviewing affidavits of opposing parties, that the court has jurisdiction to order cross-examination of a party on an affidavit (SCCR 22-1(4)(a)). Cross-examination may be ordered where there is conflicting evidence on matters that are material to the application for which the affidavits are tendered. See *Brown v. Garrison* (1967), 63 W.W.R. 248 (B.C.C.A.); *Grinnell Co. of Canada Ltd. v. Retail, Wholesale and Department Store Union, Local 535* (1956), 18 W.W.R. (N.S.) 263 (B.C.C.A.); and, more recently, *Szeto v. Shon Yee Benevolent Association of Canada,* 2019 BCSC 2015; and *1247415 B.C. Ltd. v. 0763974 B.C. Ltd.*, 2020 BCSC 1283.

When deciding whether to seek cross-examination on affidavits, it is important to keep in mind two factors. First, in the case of a cross-examination on affidavits, the entire transcript is put before the court—the examining party is not entitled to pick and choose those questions and answers that are favourable to it. Second, when cross-examination is ordered, it is customary to order that the witnesses from both sides are to be examined. Whether to seek cross-examination is an important strategic decision, not to be taken lightly, and cross-examination on affidavits is rare in British Columbia.

15. Common Errors in Affidavits

The following are common errors in affidavits.

(a) Errors in Form

(i) Style of proceeding—inadequate information (e.g. missing action number, missing a plaintiff or defendant).

(ii) Introductory paragraph—words other than "swear" or "solemnly affirm."

(iii) Identifying the deponent's employer, but not the occupation.

(iv) Using "that" to start each paragraph (which is unnecessary, even though some statutory forms fail to recognize this).

(v) Incomplete or inaccurate references to attached or available exhibits; failure to complete exhibit stamps on exhibits or completing them improperly (SCCR 22-2(8) and (9)).

(vi) Not attaching exhibits referred to or attaching exhibits that are already filed in the proceedings.

(vii) Missing information in the jurat, for example, leaving out wording other than "sworn (or affirmed) before me" (SCCR 22-2(8)).

(viii) Failing to properly initial altered affidavits or failing to reswear affidavits changed after swearing (SCCR 22-2(11)).

(ix) Using "and/or" (use "A or B or both").

(x) Using words for sums of money (use figures).

(xi) Wordiness.

(xii) Run-on sentences and long paragraphs.

(b) Errors in Procedural Law and Evidence

(i) General statement that the deponent has personal knowledge except where stated to be on information and belief. Some affidavits cannot use information and belief. It is preferable to consider hearsay problems for each paragraph. For example, some affidavits may contain paragraphs stating that the deponent wishes only to identify that a statement was made, not that it is believed.

(ii) Making statements on information and belief in matters where a final order is sought (SCCR 22-2(12)).

(iii) Where deposing on "information and belief," failure to fully and accurately identify the source of the information. Almost always, the source must be fully identified. At the very least, give the name.

(iv) Use of double hearsay (for example, "I am informed by the lawyer's secretary that X told her . . .").

(v) Giving opinion evidence without providing the expertise of the deponent and the basis for the opinion (*Evidence Act*, ss. 10 and 11, and common law).

(vi) Using third-party statements where the facts are within the knowledge of the deponent (for example, using a secretary to depose on information and belief when the client should be the deponent).

(vii) Providing only part of the facts, exposing the deponent to loss of credibility on later cross-examination.

(viii) Making arguments rather than stating facts.

(c) Professional Responsibility

(i) Lawyer swearing own affidavit on matters that could be contentious (if you intend to speak to the matter).

(ii) Swearing own affidavit as counsel where you may be exposed to cross-examination. This also goes to the weight to be accorded the information.

(iii) Swearing an affidavit as counsel as to matters that give rise to a waiver of privilege.

(iv) Deponent making unnecessary, irrelevant statements about the conduct of the other party or lawyer or the progress or substance of the litigation.

(v) Using inflammatory or vexatious statements in the affidavit.

(vi) Using legalistic language that the deponent could not swear to understand and declare to be true (the affidavit is the deponent's statement, even if the language is yours).

(vii) Deponent referring to matters arising in the course of settlement discussions, or attaching communications between lawyers as exhibits when some of the contents relate to settlement discussions.

(viii) Taking everything the client says at face value without making further inquiries. This leads to further problems for both the lawyer and the client.

(ix) Swearing the affidavit without carefully reviewing it with the client to ensure it is accurate; that is, treating accuracy as the client's problem when in fact the lawyer shares the duty.

(x) Paraphrasing the language of the client to twist its meaning into something more favourable to the client.

(xi) Omitting a crucial piece of information from the affidavit that would put the facts in a different light.

(d) Substantive Deficiencies (in Specific Legal Field)

(i) No evidence provided on key elements of proof required for a successful application.

(ii) Failure to include evidence to support urgency in applications without notice.

(iii) Inclusion of material that is not relevant to the specific issue on the application before the court.

[§3.04] Chambers Advocacy: View From the Bench[3]

What follows are the characteristics of good counsel and good presentations in chambers. This list is by no means exhaustive, but it may assist you in being effective in chambers.

(a) Introductions

Ensure the court understands who you are and who you act for. You are building credibility from the moment you first stand up to introduce yourself.

(b) The Opening

Be clear and concise in stating the nature of your application or in stating your position when commencing an address to the court.

(c) Organization and Preparation

The documents you provide to the court should be carefully prepared, and, if numerous, should be adequately indexed.

(d) Oral Argument

Your oral argument should be relevant and as brief as the subject matter will permit.

[3] Prepared by Mr. Justice Hugh P. Legg for the CLE publication, *Chambers Practice* (February 1989); updated by PLTC and subsequent contributors to this chapter.

(e) Reasonable Position

You should confine your arguments to reasonable propositions if you expect to win the sympathy and attention of the judge.

(f) Candour and Professionalism

You must always be candid with the court and act with a high degree of professionalism.

You may find that all these points are elementary. They should be and, in most instances, counsel adopt them. But some counsel overlook some or all of these points, rendering their presentation ineffective. Each practice point will be discussed in more detail.

1. Introductions

After the matter has been called by the court clerk, each party stands in turn for introductions. Introduce yourself clearly and succinctly. Some counsel state their last name and first initial only; others use their full name—both are acceptable. Either way, also spell your last name and first initial. It is also important to say for whom you appear.

A proper introduction goes something like this:

> My name is Ms. Catherine Green, Articled Student, last name spelled G-R-E-E-N, first initial C. I use she/her pronouns. I appear for the applicant [or the plaintiff or the defendant who is the applicant], who uses he/him pronouns.

Then you stop for your learned friend to identify themselves. You do not speak for your friend.

It is important to speak up when you are saying who you are and who you act for. It is embarrassing to the judge not to know counsel's name, especially after counsel commences the application. If the judge has not been given counsel's name or if counsel has not spoken clearly enough for the judge to take a note of it, the judge is put in an unnecessarily embarrassing position. Chambers and court are no place for those who are too nervous or bashful to properly introduce themselves or their application.

If you slur your name so that the judge does not hear who you are, and because you are anxious to refer to an affidavit which you have not yet filed you immediately begin by speaking about it by saying, "and I wish to refer to the affidavit of Tom Jones—I apologize that I did not file it earlier, etc."—then by the end of all this, you have left the judge confused and worried about understanding any of what is to come. In this example, the judge doesn't get your name; the judge doesn't know who you are speaking for; the judge doesn't know if you are plaintiff or defendant. The judge may assume you are the applicant if you are speaking first, but some defendant applicants stand mute waiting for plaintiff's counsel to identify themselves. The judge doesn't know what on earth you want, and is unable to shift into the right gear. At this point the judge is hopelessly lost and is about to stop you. It may be near the end of a difficult day.

2. The Opening

When it is your turn to speak, start by giving a clear and concise introduction to your application or your position. If you are the applicant, you should also give the judge an indication as to the nature of the action as well. For example, a good opening might include something like this:

> This is an action in negligence arising out of a motor vehicle accident. I appear for the defendant. I am seeking an order for the delivery of an affidavit verifying a list of documents under SCCR 7-1(8) and for the production of documents under SCCR 7-1(13). The plaintiff has claimed privilege for documents without listing them. My position is that the plaintiff is not entitled to assert privilege for a number of these documents and should be ordered to produce them for our inspection.

An opening such as this tells the judge what the case is about, who the parties are and what the applicant is seeking. The judge has the rule number that can be jotted down so that it can be examined if necessary during the argument. The judge is also able to start thinking about the principles that apply to your kind of application without a lot of interruption.

It cannot be overemphasized how important it is to get the judge in context. You are not going to start persuading the judge until the judge has a grasp of the essential matters that you are going to address.

If an application is by consent or is unopposed, or if only some of the relief sought is being advanced, or if the respondent is only disputing some of the relief sought, you should say so at the very beginning. That information focuses the judge's attention on the aspect of your application that you wish the judge to consider. Obviously a judge who is immediately advised that an application is unopposed will be listening for points which will be different from an application that is contested.

If you do not say that the application is by consent or is unopposed, a judge will probably assume that the application is opposed if there are two counsel appearing. But if the application is unopposed, the judge may stop you from going any further.

When only one counsel appears, the judge wants to know right at the start if the application is without notice, consented to, not being opposed, or just a case where the other side hasn't appeared. In the latter situation the judge may want to know more: Where is the other lawyer? Should the application be stood down? Should another lawyer be telephoned? Don't keep the judge in the dark about these simple matters and don't assume the judge has read your mind and knows what

the situation is. Make sure you have particulars as to when and how the opposing party was served, in case questions arise.

3. Organization and Preparation

Good counsel will have available for the court well-prepared and well-presented documents. The following points will illustrate why preparation is so important.

The notice of application should state the rule or the statutory enactment relied upon. This is required by Form 32 but is not always followed in practice. Sometimes the notice of application will refer to rules that are not applicable. This creates confusion for the chambers judge. Precision in the notice of application is the result of precision in thinking about the application before it is spoken to. A precisely drawn notice of application assists counsel to win the support of the chambers judge to counsel's presentation. Moreover, it enables counsel to state at the start of the application what the application is for and under what rule or statute it is made.

After the clerk calls the case, the clerk hands the judge the application record. The first document read is the notice of application. Counsel should direct the judge's attention to the nature of the order sought. This cannot be done if the notice of application does not set out precisely what is sought. Counsel's position is assisted by a reference to the rules or to the statute relied on. If the notice of application does not meet this requirement, counsel may take their opponent by surprise and this may lead to an application for an adjournment.

It is important that the notice of application set out the remedy claimed. This will be particularly important if you want to take advantage of SCCR 13-1(4) by having the order made by endorsement of the notice of application.

Further, all of the relief that you seek should be set out. The court may not give any relief which exceeds that which is requested in the notice of application, especially if a respondent is not present at the hearing although the respondent may have been served. In *Bache Halsey v. Charles*, *Standfield and Dobell* (1982), 40 B.C.L.R. 103 (S.C.), a chambers judge had allowed an application to strike out a defence and then granted default judgment to the plaintiff although the defendant was not present on the application and the notice of application had not specifically sought judgment. The defendant applied later to set aside the default judgment. Spencer J. held that the default judgment was a nullity. Judgment had been given without notice to the defendant that judgment was sought. The notice of application sought only to strike out the defence.

(a) Brief of Documents

If it is necessary to look at a number of affidavits or documents, it is useful to produce a book or brief with these documents collected together so that the judge is not searching through the court file for the crucial document or endeavouring to manage a number of loose documents which are continually burying each other. (Note that an application record is now required for every application; see §3.02(2)(d), above.)

(b) Written Chronology

Sometimes a brief written chronology is helpful. This insures that the judge will have a better chance of getting the facts straight. A judge is not a computer. A judge does not always absorb and collate everything that is said, and memory plays tricks in such an intense environment as a busy chambers. Unless you expect a judge to reserve judgment, it is not likely that a narrative summary will be very helpful because the judge will not have a chance to read it. A chronology, on the other hand, may be very helpful.

If you have a reputation for accuracy (which should be cultivated), then a chronology may make lengthy references to the affidavits unnecessary. You will not be surprised to learn that a judge's spirit plunges when counsel announces that they propose to go through voluminous affidavits in detail. That should not usually be necessary if you prepare a chronology which accurately reflects what is in the affidavits. In complicated matters it is useful to make references in the chronology to paragraphs in affidavits which support your important points.

Of course, if the application is scheduled for two hours or less, then the chronology likely should have been included in the notice of application. SCCR 8-1(16) provides that unless an application is estimated to take more than two hours, a party is not permitted to submit a "written argument" other than what already appeared in the notice of application or application response. A chronology may well be considered a "written argument." If the application is scheduled for more than two hours, then a chronology can be handed up at the hearing.

(c) Calculations

It is very useful to produce calculations in written form. Examples include summaries of different kinds of claims or damages, mortgage calculations, spousal income and expense calculations, etc. There is nothing worse than counsel reciting a lot of numbers, even when they are extracted from various affidavits, and expecting the judge to remember them or to write them all down.

That wastes time and calls your professionalism into question.

Early service of these calculations on the other side will usually be helpful, and if calculations are not served in advance, they should at least be given to your friend as soon as you see each other in chambers so that your friend will have a chance to look at them before the application is called. Note that if the application is one that is estimated to take less than 2 hours, a party is not permitted to submit a "written argument" other than what already appeared in the notice of application or application response (SCCR 8-1(16)). Because a calculation in written form may be considered a "written argument," a party may need to include the calculation in the notice of application or application response.

(d) Written Submission

As noted above, both the notice of application and the application response contain summaries of the facts and law. As well, for an application estimated to take more than 2 hours, a party may prepare a more detailed written submission.

A written submission (sometimes referred to as a "chambers brief") helps you collect your thoughts, marshal the evidence appropriately, and assemble the key case references in a coherent and logical fashion.

Do not read a written submission that you have not provided to the court. Frequently, counsel who have gone to great pains to prepare in writing what they intend to say orally ruin the effectiveness of their argument by reading rapidly from written material which the judge does not have. This puts the judge in the difficult position of having to take notes when they would prefer to listen to what you have to say while following your written argument.

(e) Briefs of Law

The management of authorities in chambers is again a matter that you should consider before you make your application. You should always know, and have with you, the leading case on whatever point you are arguing. Books of photocopied or printed cases are not always necessary but, for most applications, at least some copies are useful. It is sometimes acceptable to include only a headnote and a page or two where the relevant point is made. It is not usually necessary to include the full text of cases such as *Donoghue v. Stevenson*.

4. Oral Argument, Relevance, and Brevity

State the facts briefly. Avoid reading affidavits verbatim.

Chambers operates on the "statement of counsel" principle. You should remember that anyone can read affidavits to the court, but only counsel can make a proper submission. The details, of course, must be in the affidavits, but in a few short sentences you should be able to paint a picture for the judge which permits you to make your point. You may refer to a passage or two from the affidavits, or to a document, or an authority, but do not get bogged down in the affidavits.

(a) Relevance

If you are acting for the plaintiff in an action for wrongful dismissal and your application is for the production of documents under SCCR 7-1(17), you can probably give a very brief and useful history of the action and concentrate on the circumstances under which the documents have been withheld in order to obtain an order for production. If your application is in the same action but is for judgment under SCCR 9-7, you would have to give much more detail of the history and nature of the action and state fully the facts which should be decided in your favour when arguing that type of application.

Judge van der Hoop, at a CLE seminar held in February 1982, stated:

> The first question you want to ask yourselves is, "Is the application necessary?" There have been a number of comments from the judges about the frequency of applications which do not appear to the judges to be really necessary. Sometimes these are contested. They are an unnecessary consumption of time. A number of these problems can be cleared up by cooperation between counsel. It is not a happy occasion to realize that an application is being brought and contested simply because there is ill-feeling between counsel. That should never be the basis for an application. Counsel should strive to cooperate with one another. I always felt, when I was practising, that the practice of law was tough enough without counsel making it more difficult than necessary.

Judge van der Hoop added that counsel should ask themselves, "Do I have a proper basis for the order I am seeking?" He mentioned that counsel sometimes view chambers as some sort of cure-all. He referred to the case of an application by a mortgagee's lawyer for an order that the mortgagor produce proof of fire insurance. As Judge van der Hoop pointed out, if there was no fire insurance, the proper remedy was for the mortgagee to take out its own fire insurance. No court order was needed.

Finally, if you have a number of authorities on the same point and have a brief of law containing those authorities, an effective presentation is to indicate to the chambers judge that although you are relying on all of the authorities, you intend to

quote from only the leading case on the point. Quote only from that case.

(b) Over-Running Time

With the pressure in contested chambers, the length of time which is estimated for an application is a matter of great significance to the chambers judge. Do not take more time than your estimate.

5. Reasonable Position

Counsel who confine their arguments to reasonable propositions will find most judges sympathetic to their applications.

The worst thing you can do is to appear to be unreasonable, even if you are legally correct. For example, there should be a good reason why you are in court. Why are you opposing an application for an adjournment that is bound to succeed? You should not be in court trying to vary a maintenance order when a trial is two weeks away. You should not be in court arguing where and when an examination for discovery should be held. In other words, there should be a real point in your case or in your opposition that warrants your being in court. Your standing at the bar is judged every time you are there. Counsel usually deserve whatever reputation they acquire in chambers.

6. Candour and Professionalism

(a) Without Notice Applications

When drawing an affidavit in support of an application to be made without notice, you should remember the requirement that you must lay all material facts before the court. Suppress nothing. If you fail to do this, you run the risk that the order will be set aside *ex debito justitiae* without regard to the merits; beyond this, you will lose your credibility. The general rule is that when you are applying without notice you must demonstrate the utmost good faith. If there are circumstances of which you are aware which should be brought to the attention of the chambers judge, you are under an obligation to do so, even though the circumstances may not be in your client's favour. See commentary [6] to rule 5.1-1 of the *BC Code*.

(b) Other Ethical Considerations

Chambers applications must frequently be prepared with a great deal of haste and under a great deal of pressure. Counsel will sometimes dash off an affidavit to meet a sudden problem without sufficient precision. It is essential in drafting an affidavit to take the time to carefully check it over with the deponent before it is printed in final form. When the deponent swears it, be sure that the deponent has been given sufficient opportunity to read it through and correct any errors and differences in wording. If possible, use the words of the deponent rather than your own. You should remember that clients and deponents will usually swear almost any affidavit prepared by a lawyer because they assume that the lawyer is putting it in correct form. You should always explain to a deponent the need for accuracy and precision. You should advise a deponent not to hesitate to change anything if it requires correction.

Also remember that before you draft an affidavit you should have a complete understanding of the facts and the law relating to the case. Remember that deponents may be cross-examined either before the hearing in which the affidavit is to be read, or at discovery, or at trial. You should remember not to allow your client, or a witness who is supporting your client, to make an incorrect or incomplete statement of facts or state an inaccurate or false position. Even very sophisticated persons will swear an affidavit on which they are subsequently cross-examined and obliged to admit to gross errors or exaggeration. Is their lawyer to blame for allowing that to occur?

You should avoid the practice of preparing an affidavit for your secretary to swear upon information and belief supplied by you, the lawyer. This is bad practice except in purely formal matters such as the mailing or receipt of a letter. Whenever possible the person chosen to swear the affidavit should be the client; see rule 2.1-3(k) of the *BC Code*.

Counsel should not attempt to speak to their own affidavits on matters that are controversial; see rule 5.2-1 of the *BC Code*. Even on matters that are not controversial, counsel should only speak to their own affidavit after discussing the matter with opposing counsel.

You should be reluctant to include something controversial in an affidavit that involves you personally. You should only do this if it is necessary and proper and no other course is open to you and you should be prepared thereafter to step out of the litigation if necessary (*Rottacker Farms Limited v. C.* & *M. Farms Limited* (1976), 2 W.W.R. 634 at 655; *Phoenix v. Metcalfe* (1975), 48 D.L.R. (3d) 631 (B.C.C.A.)).

You should think very hard and if possible obtain independent advice before you depose to anything said by another lawyer if the lawyer does not expect to be recorded. What happens in the barrister's room or in a judge's chambers should never appear in an affidavit unless the circumstances indicate that what was said was "on the record."

Personal criticism of a judge, registrar, trial coordinators or court reporters are matters that require much thought. It is probably contempt to attribute unfairly corruption, or conscious or unconscious bias to a judge. If criticism is not made in good faith or exceeds the limits of good courtesy, it amounts to scurrilous abuse. That also may be contempt.

[§3.05] Drafting and Entering Orders

1. Approval as to Form and Clarifying Terms

Following an interlocutory application, counsel must draw the resulting order. Under SCCR 13-1(3), the order must be in Form 34, 35, or 48 and must be approved by all parties in attendance. If a party has appeared in person, the court may dispense with the necessity for approval of the form of the order (SCCR 13-1(1)(b)). A lawyer must, however, ask the court for this direction, it will not be presumed.

When an oral order or judgment is granted, it is imperative for counsel to make careful notes of the terms. If you are unsure of a term, or if the order sounds ambiguous to you in any way, you should immediately ask the judge or master to clarify the point. If the judge or master has not in your opinion covered all of the relief asked for either in your pleading or in your notice of application, you should draw that to the judge or master's attention so that the notes you have will be unambiguous.

2. Drafting the Order

Orders and judgments must be drafted in accordance with the SCCR and Forms. You should review those forms before drafting your order or judgment, to lessen the possibility that your drafting will not be accepted at the registry. You should also review Practice Direction PD-26—*Orders*.

Where do you obtain the information that forms the heart of these documents? You will consider the contents of your originating materials (notice of civil claim, petition or notice of application) filed with the court registry. Next, your notes or the transcript of the reasons for judgment should reveal what was granted in full, in part, varied, etc. These notes will be the starting point for your drafting.

It might be worthwhile to devise a checklist of the relief sought, especially in complex cases, to minimize the amount of note taking, especially since you will rely heavily on your notes during the drafting process.

If you are uncertain of the terms of the order that was made, you should go to the registry and obtain a copy of the court summary sheet or order a transcript of the order or judgment. It may also be possible to arrange a time, through tape management, to listen to a recording of the comments of the judge or master when granting the order—this will be less expensive and time-consuming than ordering a transcript (which must be prepared by a court reporter and then approved by the judge or master before being released).

To the registry staff who check civil orders and judgments, the clerk's notes (the court summary sheet) are the most important factor in the entry of an order because they are part of the official record of court proceedings. One of the clerk's mandates is to provide complete and accurate notes of any order made so that the record is clear, and to make the task of checking large volumes of orders and judgments much easier.

After you have reviewed the clerk's notes, if you are still unclear as to any point in a decision of the court or if matters have not been dealt with that should have been dealt with, you should arrange with the other counsel to bring the matter on before that judge again to have matters clarified or completed.

3. Forms and Precedents

Some of the most important sources influencing the form and style of orders and judgments are as follows:

(a) Supreme Court Civil Rules generally;

(b) Forms 34, 35 and 48 of the Supreme Court Civil Rules;

(c) Supreme Court Practice Directions, *Orders* (PD-26) and *Garnishing Orders* (PD-10);

(d) case law (Supreme Court, Court of Appeal);

(e) published, court-approved precedents;

(f) other established, profession-wide, court-approved precedents;

(g) unpublished precedents, provided by the court registry; and

(h) preferences of groups or of individual judges.

Specific publications that are available to help you include:

(a) *Supreme Court Chambers Orders—Annotated* (CLEBC); and

(b) McLachlin & Taylor, *British Columbia Court Forms* (Markham: Butterworths).

4. Format

An order or judgment should follow the guidelines in the Supreme Court Civil Rules and the Forms, and be governed by two basic principles:

(a) it must accurately reflect the court's decision (see PD-26—*Orders*); and

(b) it should speak for itself, so that any reader (party, counsel, judge, police, interested public, etc.) can understand its meaning, without referring to other materials.

The construction of orders follows a fairly standard format, incorporating the following components.

(a) File Number and Style of Proceeding

The top right-hand corner reveals the file number and location of the registry. This is followed by the identity of the court, the appropriate enactment or rule (for example, "In the matter of the *Family Law Act*…"), and the names of the parties. The names must be in full (SCCR 22-3(5)). "And others" after the first name, while acceptable for some documents, is improper in an order. Ensure your use of the class of party (plaintiff/petitioner, etc.) is correct by comparing it to your copy of the originating document.

(b) Judge and Date

Supreme Court judges are shown as "Before The Honourable Mr./Madam Justice [name]." Masters are shown as "Before Master [name]."

By contrast to pleadings in Provincial Courts, first names and initials are not used (unless there are two judges with the same last name). The date of the order or judgment must be the date on which the decision was pronounced (SCCR 13-1(8)). If judgment was reserved, both the date and the preamble will reflect this.

If you are not sure how to spell the name of the judge or master, check the list on the Supreme Court website (www.bccourts.ca) (under "About the Supreme Court").

(c) The Preamble

This is the introduction to the order or judgment and includes the following information:

(i) that the application or trial of the action came on for hearing on the date shown (or others if judgment was given later);

(ii) name(s) of counsel or other representatives and who they represented;

(iii) appearances by other parties, such as those acting on their own behalf;

(iv) who was served, or if the matter proceeded without notice;

(v) if the matter was brought by consent of the parties; and

(vi) if judgment was reserved until the date shown above.

(d) The Body of the Order or Judgment

Following the preamble is the body of the order or judgment, which sets out in detail the relief granted by the court. Using available and appropriate resources (counsel's notes, precedents, stylistic preferences), you will be able to prepare this portion with little difficulty.

Don not forget to deal with costs, if appropriate.

(e) Endorsements

An endorsement is the signature of a party or counsel. Usually an endorsement will indicate that the order has been "Approved as to Form." If a party has consented to all of the order, the endorsement will usually indicate that it has been "Approved and Consented to." SCCR 13-1(1)(b) governs approval; SCCR 13-1(10) governs consent.

Generally, endorsements are required by all parties who attended an application unless:

(i) the court waives approval by one or more of the parties pursuant to SCCR 13-1(1)(b);

(ii) the order is signed or initialed by the presiding judge or master pursuant to SCCR 13-1(2);

(iii) a party did not attend and was not said to have consented to the order (SCCR 13-1(1)(c); or

(iv) an unrepresented party who attended before the judge or master orally consented to a consent order, or gave a written consent (SCCR 13-1(10)(b)).

It is important to understand the difference between consenting to an order and taking no position. If opposing counsel tells you that they consent to an order, then the order should not be entered without first being signed by counsel—whether or not they attended the hearing. If opposing counsel tells you that they are taking no position with respect to your application, and does not attend the hearing, then there is no need for their endorsement on the order. Be clear on the position that any non-attending party is taking and advise the court accordingly.

(f) Points to Observe

SCCR 13-1(1)(b) directs that approval of the order shall be in writing. This is generally understood to mean a complete and legible signature, on the line above the identity of the person signing (for example, counsel for the petitioner). Initials, or a name in quotation marks, are not acceptable. One lawyer signing on behalf of counsel for the party is acceptable. Approval in the name of a law firm is not acceptable (Practice Direction PD-26—*Orders*). There is no objection to pleadings being signed, filed and issued in the name of a law firm.

5. Entering the Order

When the order has been approved by all counsel who attended the hearing, it is then submitted to the registry for entry. If counsel cannot agree on the form or content of the order or judgment, then they should obtain the notes of the clerk immediately to see if the matter can be resolved without resorting to further court appearances.

If counsel cannot agree on the form of the order, the procedure is to take out an appointment to settle in accordance with SCCR 13-1(12), as described below. Notice of the appointment must be served on all other parties whose approval is required. The order will then be settled at a hearing before the registrar, based on reasons for judgment if available or, if not, based on notes taken by the courtroom clerk and material in the court file. Virtually all proceedings in chambers are taped, so a transcript may be ordered of oral reasons if any counsel deems it necessary. Note that this normally takes some time, as the reasons are transcribed by a court reporter and then forwarded to the judge or master for review before being issued to the parties.

In most cases, orders made in chambers need not be inspected or approved by the judge or master. The Practice Direction PD-26—*Orders* spells out situations where orders must be approved. For example:

(a) the order does not correspond with the clerk's notes;

(b) the order was made after a trial;

(c) the order was made after the judge or master had issued written reasons; or

(d) the order is a desk order in respect of an application of which notice is not required.

When counsel agree on the form of the order, but the registrar, after reviewing the clerk's notes or reasons for judgment, does not agree, the lawyer should arrange with the registry to attend before the judge to settle the terms of the order. The procedure for this is set out in PD-18—*Request to Appear Before a Specific Judge, Master or Registrar*.

If counsel substantially disagree on the terms of the order, and the matter is somewhat complex, the registrar may decline to settle the order and suggest it be referred to the original judge.

As a practical matter, if you are in a hurry to have the order entered, or if you feel the matter is too complex to be dealt with by the registrar based on the written reasons for judgment (or the clerk's notes or a transcript if the decision has been orally granted), you should proceed immediately to have the matter brought before the judge in question. Arrange an appointment before that judge with the registry, and serve your requisition.

It is also permissible to have a draft order available at the hearing of an application and to ask the judge or master to sign the order at the conclusion of the hearing. Before you do so, you should first have the order vetted by the registry (AN-17). Be prepared to explain to the judge or master why the order cannot be entered in the ordinary course. If the judge or master signs the order, the registry staff will generally enter it without further review (SCCR 13-1(2)).

The time required to process and enter an order in the ordinary course varies greatly from registry to registry. You can expect most registries will take a week or two to enter an order, but some take much longer than that. You can normally find out from the registry or from a registry agent what the typical timeline is.

You may ask the registry to enter it on an expedited basis by submitting the order with a covering letter or requisition explaining why expedited entry is necessary. Orders on an expedited basis are entered within a day or two. In the case of an order that must be entered more quickly (such as an urgent injunction), it is advisable to have a draft order signed by the judge, then take it to the registry yourself and explain to the registry staff why it is urgent.

6. Amending an Entered Order

In general, once an order has been entered, the presiding judge is *functus* and unable to deal further with any problems that should have been dealt with during the application or the trial, unless the order itself allows for the judge's further involvement. However, SCCR 13-1(17) does allow for correction of clerical errors and for amendment of an order to provide for relief that should have been adjudicated upon but was not. There is also an inherent jurisdiction to amend an order that reflects an error in expressing the manifest intention of the court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142.

Amendments to entered court orders and judgments cannot be made without permission of the court. The current practice is to make an application in chambers, or to the trial judge, to deal with this issue.

The original entered document cannot be amended. In addition, it is improper to tender a revised, backdated order or judgment for entry. A new order, setting out the amendment particulars, must be prepared. The two documents are then used together as the complete order or judgment.

7. Alternatives to Formal Orders

SCCR 13-1(4) permits other material to be endorsed (for example, a notice of application or a petition) in place of a formal order. This has not been a common practice in recent years. It has typically been used only when there is insufficient time or opportunity to draft an order. However, the Form 32 notice of application adopted in 2010 contains a specific section for en-

dorsement of the notice of application, so it may become more common. The document must contain substantially all the relief granted by the court. Similarly, Form 17.1 provides for an order by endorsement.

In the case of a restraining order application, it is doubtful that a notice of application would serve as a suitable substitute for a formal order. The police would almost certainly not accept the endorsed notice of application for enforcement purposes.

8. Identifying the Sender

In order to ensure that a copy of your entered order or judgment is returned to you, you must attach a backing sheet (or at least the name and address of the lawyer at the end of the document) to the order when it is provided to the registry.

Chapter 4

Disposition of the Action Before Trial[1]

[§4.01] General

There are several means by which civil claims may be disposed of before trial.

For matters before the Supreme Court:

(a) default judgment (SCCR 3-8);

(b) non-compliance with the Supreme Court Civil Rules (SCCR 22-7(2) & (5));

(c) summary judgment (SCCR 9-6);

(d) summary trial (SCCR 9-7); and

(e) judgment based on admissions, or on proceedings by way of a special case, or on a point of law (SCCR 7-7, 9-3, 9-4).

For matters in Small Claims Court:

(a) default judgment (Small Claims Rule 6);

(b) an order made at a settlement conference where no evidence is required (Rule 7(14)(b)) or where the claim is obviously without merit (Small Claims Rule 7(14)(i)); and

(c) non-compliance with the Small Claims Rules (Small Claims Rule 7(15), 7(17), 10(9), 10(10), 17(13)).

At either the Supreme Court or Small Claims Court:

(a) negotiation of a settlement; and

(b) acceptance of a payment into court or an offer to settle.

Note that it is beyond the scope of this chapter to address the Civil Resolution Tribunal, which deals with most civil claims involving amounts up to $5,000 (see §1.23).

[1] **Gurminder Sandhu** and **Adrienne Staley** of Hamilton Duncan kindly revised this chapter in January 2021. Previously revised by Gurminder Sandhu and Shahhin Asiaee (2019); H. William Veenstra (2010 and 2017); Adrienne G. Atherton (2004–2006 and 2008); Michelle Tribe-Soiseth (2003); Margaret M. MacKinnon and David R. MacKenzie (2001); PLTC (1998); Leonard M. Cohen (1996); and Mark M. Skorah (1995). Comments about proceedings involving Aboriginal claims contributed in June 2002 by F. Matthew Kirchner.

[§4.02] Default Judgment

The failure by a defendant to file a response to civil claim may result in the plaintiff taking judgment in default (SCCR 3-8; Small Claims Rule 6).

In Supreme Court, an application for default judgment may be made by way of a requisition filed with the court registry, which is often referred to as a "desk order." In other words, the party obtains an order without attending a hearing before a judge or master (SCCR 8-4).

The Supreme Court Civil Rules distinguish between different types of default judgments:

1. Final Money Judgment

   When a notice of civil claim sets out a claim that is solely for recovery of money in a specified or ascertainable amount, judgment may be entered for the amount claimed, interest and costs (SCCR 3-8(3)).

2. Judgment for Damages to be Assessed

   When the amount claimed is for damages in an amount that is neither specified nor ascertainable (for example, damages for breach of contract), the court will order judgment for damages to be assessed (SCCR 3-8(5)).

3. Judgment for Detention of Goods

   When the claim is solely for detention of goods, the plaintiff may apply for judgment for either the delivery of the goods or for the value of the goods to be assessed (SCCR 3-8(6)).

4. Other Claims

   When the claim does not fall into one of the above categories, a plaintiff can apply for judgment under SCCR 3-8(10) (SCCR 3-8(9)).

With respect to the difference between the first two types of judgment, note the following statement from *Pacific Blasting Demolition & Shoring Ltd. v. Skeena Cellulose Inc.* (1992), 68 B.C.L.R. (2d) 101 (S.C.), decided in the context of a prejudgment garnishing order:

> When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive *data*, it is said to be "liquidated" or made clear … But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated.

A party cannot convert an unliquidated claim into a liquidated claim simply by picking an amount. The claim itself must be such that by its nature an amount can be objectively ascertained or calculated.

The plaintiff who obtains a judgment for damages or value to be assessed may set the assessment down for trial; however, this assessment shall be tried at the same

time as the trial of the action or issues against any other defendant not in default (SCCR 3-8(12)). Alternatively, the plaintiff may apply to have the damages or value assessed in a summary fashion, typically based on affidavit evidence (SCCR 3-8(13)).

In Small Claims Court, Small Claims Rule 6 governs default proceedings. If a claim is for debt, the registrar may grant the default order (Small Claims Rule 6(4)). If a claim is not for debt, there must be a hearing before a judge (Small Claims Rule 6(5)). No default judgment can be taken in respect of a counterclaim or third party proceedings unless ordered by a judge pursuant to Small Claims Rule 16(6)(c) (Small Claims Rule 6(2)).

Some important aspects of default judgments, including ethical concerns, are discussed in §9.05.

When a party obtains default judgment, the other party may apply to set the entered judgment aside (SCCR 3-8(11) and Small Claims Rule 16(6)(j)). The case law establishes that for success on such an application there must be:

(a) an explanation as to why the default judgment was allowed to be entered;

(b) the basis of a meritorious defence set out in the affidavit material; and

(c) no undue delay in making the application after the defendant learns of the default judgment.

Although these factors have been affirmed by the Court of Appeal, the test is not to be rigidly applied (*BCI Bulkhaul Carriers Inc. v. Aujla Trucking Inc.*, 2015 BCCA 411).

[§4.03] Non-Compliance with Rules

When a party has failed to comply with the Supreme Court Civil Rules, and the person in default is the plaintiff or petitioner, the court may dismiss the proceeding (SCCR 22-7(2) and (5)). An application under SCCR 22-7(5) is within the jurisdiction of a master (see Supreme Court Practice Direction PD-50—*Masters' Jurisdiction*). If the person in default is the defendant, respondent, or third party, the court may order that the proceeding continue as if no appearance has been entered or defence has been filed. In the latter case, the plaintiff is then free to take default judgment.

In Small Claims Court, under Small Claims Rule 17(13) a judge of that court may make any order or give any direction the judge thinks is fair. Various other provisions in the Small Claims Rules provide for consequences of failure to obey rules or orders made—see, for example, Rule 7(15) (settlement conference) and 9.1(19) (simplified trials).

These rules are aimed at forcing compliance with the rules. In most cases, unless the other party has suffered serious prejudice as a result of non-compliance, the court will give the party who has failed to comply a "second chance"—putting them on notice that an order to strike the claim or defence will likely follow if that party does not comply. The court is usually open to considering whether a lesser remedy would both cure the default and encourage respect for court rules and orders in the future.

[§4.04] Summary Judgment

SCCR 9-6 allows the court to grant summary judgment on an application in chambers, on the ground that there is "no genuine issue for trial."

The purpose of the summary judgment procedure was described as follows in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

An application for summary judgment may be brought very early in the proceedings. Any party can apply for summary judgment after a responding pleading has been filed (SCCR 9-6(2) and (4)).

In an application by the plaintiff under SCCR 9-6(2), the affidavit must set out all the facts necessary to prove the plaintiff's claim. The defendant may respond in one of two ways: by alleging that the plaintiff's pleading does not raise a cause of action against that defendant, or by filing affidavit or other evidence that rebut the plaintiff's material and show that there is a genuine issue for trial (SCCR 9-6(3)). Note that SCCR 9-6(2) would also apply to a party claiming on a counterclaim or third party notice.

A defendant (or other party responding to a pleading) may also apply for a summary judgment dismissing the claim (SCCR 9-6(4)). The applicant bears the evidentiary burden of showing there is "no genuine issue for trial." If the applicant does prove this, the onus shifts to the respondent to either refute or counter the evidence: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10 and 11.

If the court finds that there is no genuine issue for trial with respect to a claim or defence, then it must grant judgment or dismiss the claim accordingly (SCCR 9-6(5)(a)).

On hearing an application for summary judgment, the court also has the power to grant judgment on all issues other than damages; determine a question of law and

pronounce judgment, if satisfied the only genuine issue is a question of law; or "make any other order it considers will further the object of these Supreme Court Civil Rules" (SCCR 9-6(5)).

Since an application for summary judgment is in the nature of a final order, the affidavits cannot be on information and belief (SCCR 22-2(12) and (13)). As with any other application, the applicant may seek an order requiring the deponent of an affidavit to attend for cross-examination (SCCR 22-1(4)).

A master has the jurisdiction to hear an application for summary judgment (see PD-50—*Masters' Jurisdiction* and *Esteban Management Corporation v. Edelweiss International Holdings Corp.* (1990), 43 B.C.L.R. (2d) 335 (B.C.S.C.)).

Under the summary judgment rule in the former Rules of Court, case law established that a court would not weigh the evidence or decide matters of credibility on a summary judgment application (*Hughes v. Sharp* (1969), 68 W.W.R. 706 (B.C.C.A.)). Thus, where there was conflicting evidence, the court would not resolve issues of fact, and if the opposing party filed an affidavit that directly took issue with the affidavit filed in support of the application, the summary judgment application would be dismissed. While the test under SCCR 9-6 is worded slightly differently, the approach taken has been similar (*Haghdust v. BC Lottery Corporation*, 2011 BCSC 1627; *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2012 BCCA 491 at para. 12).

As the court stated in *Sharrock v. Moneyflow Capital Corp*, 2010 BCSC 1219 at para. 5, in practice the rule is used infrequently:

> The summary judgment rule is not used very often because it creates such a difficult threshold to meet: the applicant needs to establish there is no triable issue of fact.

Even if a party loses an application for summary judgment, the effort is not necessarily wasted. The opposing party will have been forced to deal squarely with the real issue in the case and to concede that which is not in issue. As well, the opposing party's affidavit often provides an effective tool for cross-examination at trial. However, the application should not be brought solely for tactical reasons; that is, its purpose should not be to see the other side's material. If the court concludes that the application has been brought in bad faith, it may award special costs (SCCR 9-6(9)).

[§4.05] Summary Trial

SCCR 9-7 permits a party to apply for judgment either upon an issue or generally, on the basis of written evidence.

SCCR 9-7(15)(a) states that the court may grant judgment unless:

> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

In other words, there are two conditions to satisfy. Can the court determine the issue in question on the material placed before the court? If yes, then, would it be just to enter a judgment by summary trial in the circumstances? The case must satisfy both of these conditions for a judge to find it suitable for summary trial.

In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (S.C.), the court identified factors to consider in determining whether it would be unjust to proceed summarily. (This case was decided under Rule 18A, the predecessor to SCCR 9-7 under the former Rules of Court.) Subsequent case law has added to these factors (see e.g. *Gichuru v Pallai*, 2013 BCCA 60 at para. 31). Factors to consider include:

- the amount involved;
- the complexity of the matter;
- the urgency of the matter;
- any prejudice by delaying a full trial;
- the cost of taking the case to a full trial given the amount involved;
- the cost and the time for a summary trial;
- whether credibility is a critical factor in the determination of the dispute;
- whether the summary trial may create unnecessary complexity in resolving the dispute;
- whether the summary trial application would result in "litigating in slices" (i.e. unhelpful fracturing, where a party seeks to resolve some but not all of the issues in the case);
- the course of the proceedings; and
- any other matters that arise.

In a summary trial, the onus of proof is on the parties to prove the matters they assert on a balance of probabilities—just as in a conventional trial. The onus of proof does not shift simply because it is the defendant who moves for dismissal of an action under the rule: *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.); *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115 (C.A.).

A summary trial will in many cases result in a final order. An application under SCCR 9-7 that results in a final order is *not* within the jurisdiction of a master (see Supreme Court Practice Direction PD-50—*Masters' Jurisdiction* (PD-50)).

When an application is brought at an early stage, there is a real possibility that the defendant can bolster its defence by discovery, and there is a triable issue disclosed on the material before the court, then a court may conclude that it is unjust to decide the issues at that stage

(*Bank of BC v. Anglo-American Cedar Products Ltd.* (1984), 54 B.C.L.R. 350 (S.C.)). However, if the defendant has not taken the steps necessary to obtain that evidence in a timely manner, then the application may go ahead (*Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada* (1988), 27 B.C.L.R. (2d) 378 (C.A.); *Wendeb Properties Inc. v. Elite Insurance Management Ltd.* (1991), 53 B.C.L.R. (2d) 246 (C.A.)). Therefore, if an opposing party gives notice that a summary trial application will be brought, that notice must be taken seriously and active steps taken to ensure that all necessary evidence is obtained.

When confronted with conflicting evidence, the judge may find facts by weighing evidence and giving different value to it, by referring to the contents of documents, and by referring to the conduct of the parties. The court is entitled to look at *all of the evidence* and to resolve conflicts in the evidence. By comparison with SCCR 9-6, SCCR 9-7 is concerned with the resolution of issues rather than testing the validity of claims and defences. SCCR 9-7 gives the chambers judge much wider discretion to find facts to resolve disputed issues of facts and law.

When there is a credibility conflict on an essential issue, the case may still proceed summarily if that conflict can be resolved another way. When credibility findings are *required* to resolve conflicts in the evidence in order for the trial judge to find the essential facts, a summary trial will likely be inappropriate (*Jutt v. Doehring*, 1993 CanLII 560 (B.C.C.A.) at para. 13). However, to assist the judge in deciding a credibility conflict, the judge can order cross-examination on affidavits (SCCR 9-7(12)). If the judge believes that the unresolved facts are narrow enough to be resolved by a limited cross-examination, *and* the judge believes that the summary trial issues can be determined once the credibility conflict has been resolved, then the judge may order cross-examination (*Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (S.C.), under former Rule 18A).

The courts have also commented on whether or not SCCR 9-7 is appropriate in cases involving allegations by the defendant that the case had been settled, or pleas by the plaintiff of duress (see e.g. Gibb J.A.'s dissenting judgment in *Smyth v. Szep* (1992), 63 B.C.L.R. (2d) 52 (C.A.); and *Lavoie v. Musey*, (1993) 77 B.C.L.R. (2d) 152 (C.A.)). Certain issues involving what might be called "emotional issues" are very hard to decide on affidavits, even with cross-examination. Actions based on fraud, deceit, conspiracy, libel and slander are difficult to resolve on affidavit evidence and often (but not always) inappropriate for summary resolution.

Questions concerning the existence of Aboriginal rights and title are likely unsuitable for summary trial disposition (*Kelly Lake Cree Nation v. Ministry of Energy and Mines*, [1998] B.C.J. No. 3207; *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [1999] B.C.J. No. 984, aff'd [1999] B.C.J. No. 1665 (C.A. Chambers), further aff'd [1999] B.C.J. No. 2204 (C.A.); *British Columbia (Minister of Forests) v. Westbank First Nation*, [2000] B.C.J. No. 888). The Supreme Court of Canada held that "oral evidence of [A]boriginal values, customs and practices is necessary and relevant" in Aboriginal rights cases (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31). This finding suggests that summary disposition of such claims is unlikely.

SCCR 9-7(11) allows a party to raise the appropriateness of a matter for resolution on a summary trial either by preliminary application or at the hearing of the summary trial application itself. Depending on the circumstances, however, bringing a preliminary application may just result in having the full merits explored twice, and such applications rarely succeed (*Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54).

The summary trial rule may be invoked either generally with respect to an entire claim or only with respect to an issue. However, problems may arise when a party seeks to resolve some but not all of the issues in a case, and a court may conclude that determining one issue is not a suitable use of SCCR 9-7 (*Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485).

Similarly, in multi-party litigation, a court may determine that a summary trial application is not suitable if there are issues in dispute on the summary trial application that may overlap with issues that will be determined at trial in respect of the remaining defendants in the action (*The Owners, Strata Plan LMS 2262 v. Stoneman Developments Ltd. et al.,* 2005 BCSC 410).

SCCR 9-7(3) provides that an application under subrule (1) must be heard at least 42 days before the date set for trial. If an issue is likely to be appealed, and the application is brought with insufficient time before trial to have an appeal heard, a court may find that a matter is not suitable for summary trial (*Coast Foundation Society (1974) v. John Currie Architect Inc.*, 2003 BCSC 1781).

Under SCCR 9-7(5), evidence in a summary trial proceeding may be given by way of:

(a) affidavit;

(b) an answer, or part of an answer, to interrogatories;

(c) any part of the evidence taken upon an examination for discovery;

(d) an admission under SCCR 7-7;

(e) a report setting out the opinion of an expert if:

(i) the report conforms with SCCR 11-6(1), or

(ii) the court orders that the report is admissible even though it does not conform with SCCR 11-6(1).

Counsel should prepare their affidavits carefully so that no fact is concealed and the court is not misled. The parties must give advance notice of all evidence on which they intend to rely at the hearing of the summary trial (SCCR 9-7(8)–(10)). Because a summary trial is an application for a final order, the rule against hearsay evidence applies (SCCR 22-2(12)). Therefore, affidavit evidence on information and belief cannot be used as evidence in a summary trial, although it may be used for the purpose of attempting to convince the judge that the case is not an appropriate one for disposition by summary trial.

In terms of practice, in *Civil Litigation: Judges Series* (CLE, Fall 1992), Mr. Justice Finch (as he then was) recommended that counsel at the hearing of a summary trial should:

(a) tell the court, at the very outset, whether or not both parties agree that the case is appropriate for disposition by way of summary trial, and if not, why not;

(b) tell the court what the issues are, both fact and law. There should be an outline of the issues in the brief, with reference to the pleadings that raise those issues (if appropriate);

(c) explain, if there are contradictory affidavits, how the court can properly resolve issues of disputed facts on affidavit material, for example:

(i) there are admissions on discovery;

(ii) there is documentary evidence in the affidavit material; or

(iii) there are internal conflicts in the other party's affidavit material;

(d) relate the affidavit or other evidence to the issues identified in the pleadings or brief.

When the court is unable to grant judgment under SCCR 9-7, it may nevertheless impose terms to expedite the proceeding (SCCR 9-7(17)).

The applicant who does not get judgment is precluded from applying further under SCCR 9-7 without leave (SCCR 9-7(16)).

[§4.06] Summary Trial and Simplified Trial in Small Claims Court

The Small Claims Rules do not have equivalents to SCCR 9-6 or 9-7. However, both at a settlement conference (Rule 7(14)) and at a trial conference (Rule 7.5(14)), a judge has the power to:

- decide on any issues that do not require evidence; and
- dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it is without reasonable grounds, discloses no triable issue, or is frivolous or an abuse of the court's process.

As well, a Small Claims judge has general discretion on an application to dismiss a claim pursuant to Small Claims Rule 16(6)(o).

Pilot projects are underway for a form of simplified trial and a summary trial in Small Claims Court.

1. Simplified Trial—Small Claims Rule 9.1

Robson Square and Richmond Small Claims registries have a simplified trial process for claims with a value of between $5,001 and $10,000, pursuant to Small Claims Rule 9.1. The court will hear a claim for under $5,001 only if the claim is outside of the jurisdiction of the Civil Resolution Tribunal or if a notice of objection to the decision of the Civil Resolution Tribunal has been filed. A simplified one-hour trial is scheduled before an experienced lawyer who acts as a justice of the peace and is called a Justice of the Peace Adjudicator.

At Robson Square this simplified trial procedure does not apply to financial debt claims or personal injury claims, and these trials are scheduled during evening hours. At Richmond, the process does not apply to personal injury claims and the trials are scheduled during normal business hours.

2. Summary Trial—Small Claims Rule 9.2

A summary trial process applies to financial debt claims in the Robson Square Registry only. When the claimant is "in the business of lending money or extending credit," the claim is for financial debt, and the claim is filed at Robson Square, a 30-minute summary trial is scheduled (Small Claims Rule 9.2).

[§4.07] Negotiation and Settlement

Almost every action should begin with the view that settlement is a desirable outcome. Section 3.2-4 of the *BC Code* states: "a lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings." This section will provide some guidance as to the techniques of settlement negotiation with reference to the applicable Supreme Court Civil Rules.

The issue of the authority of a lawyer to settle for the client is discussed in §6.03 and §6.04 of the *Practice Material: Professionalism: Ethics*.

1. Why Settle?

In most cases, it is desirable to reach settlement. Litigation is expensive, can be time-consuming, and

is usually stressful for those involved. Also, a fair settlement can result in a cost savings to all parties. Moreover, litigation usually involves considerable delay and there often is an advantage to an early payment.

Further, remember that the outcome of a trial depends on a number of contingencies. While it is possible to predict a *probable* outcome, *certainty* is rarely, if ever, attainable.

Finally, the parties maintain control over the outcome when a case is settled, but completely lose control when the matter is litigated.

2. Preparation for Settlement

The greatest aid to settlement is preparation. Until the key relevant facts are known (both those that support counsel's case and those that damage it), a fair and proper settlement may be difficult to achieve. On the other hand, the cost of obtaining complete knowledge and confirmation of every relevant fact must be considered along with the benefits of having that knowledge.

The road to settlement begins with the first conversation with the client. The client must be advised of the cost of litigation and the delays and risks inherent in litigation. As early as possible, the client must also be accurately apprised of the merits of the case, as well as all negative factors.

3. Settlement Conferences

SCCR 9-2(1) provides:

> If, at any stage of an action, a judge or master directs that the parties attend a settlement conference, the parties must attend before a judge or master who must, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding.

A judge or master may order a settlement conference at a pre-trial conference (SCCR 5-3(1)(o)).

All proceedings at a settlement conference are without prejudice, and the judge or master conducting the settlement conference will not hear the trial, unless all parties agree (SCCR 9-2(3)). Typically, only judges and masters who have expressed interest in settlement techniques will be assigned to conduct settlement conferences.

The primary objective of a settlement conference is to effect a settlement. The conference's format and procedure are flexible. The parties should attend and present their respective positions. After hearing the submissions of counsel and the opinion of the judge or master, the parties may conclude that it is in their best interests to resolve their problems without further litigation and expense. As a general rule, the earlier the conference, the better the interests of the client are served, provided that all of the necessary information is obtained and values determined.

When counsel agree that there are particular judges who are best suited to handle a settlement conference in their case, they may request a name from the list. If the parties are unable to agree, the Chief Justice will appoint the judge or master.

At least four days before the settlement conference, counsel should file a concise brief setting out the nature of the case, the issues, a summary of relevant evidence they expect to call, and the legal principles.

Counsel should attend prepared to advise the court and the client of the following matters:

(a) the costs to the client if successful and if unsuccessful;

(b) the capability of the parties to pay a judgment; and

(c) the time the case will likely take.

Settlement conferences in Supreme Court are used occasionally, but are not as popular as private mediation using experienced mediators. As well, when the Supreme Court is operating with less than a full judicial complement, there may be insufficient judges available to hear settlement conferences.

In Small Claims Court, settlement conferences are set as a matter of course in most cases (Small Claims Rule 7(1)–7(2.2)). Parties attending a settlement conference are required to bring all relevant documents and reports. The settlement conference judge will explore the possibility of settlement, and if settlement appears unlikely, will consider what orders are necessary to ensure the matter is ready for trial. Small Claims Rule 7(14) lists what a judge may do at a settlement conference, including deciding any issues that do not require evidence, dismissing a claim or counterclaim, and setting up a trial date if necessary.

4. When to Settle

Several opportunities for settlement arise during the course of litigation:

(a) before commencement;

(b) after commencement of the action and service of the pleadings;

(c) before examinations for discovery;

(d) immediately following examinations for discovery;

(e) shortly before trial; and

(f) during trial.

At each of these stages, there are advantages to settlement. Before the litigation starts, minimal expenses have been incurred. After serving the pleadings, counsel's investigation is more complete. The defendant may have retained counsel and may, therefore, better understand their own case and its weaknesses, as well as the costs of proceeding with litigation.

Before discovery, each party may feel the pressure of mounting expense. Following the examination for discovery, each lawyer has had the first opportunity to assess the credibility and general demeanor of the lawyer's own client and the opposing client. At that time, the facts should be fully available and the lawyer and client should be in a position to evaluate the case accurately.

Again, before trial is the time when the fullest concentration on the action has been brought to bear. If the case has not been settled by this time, this may be the last opportunity. At this point, the issues should be clearly focused in the mind of the litigants.

Be prepared to settle as early as possible. By making an informed offer early in the proceedings, you establish a strong position. As well, the legal and other costs that each party will save as a result of an early settlement represent a larger savings early on than later in the proceedings, which might bridge the gap between strongly held positions.

5. Confirmation and Release Letters

The lawyer must have clear authority from the client before a case can be settled. Once the settlement has been agreed to orally, it should be confirmed in writing with the other lawyer. Defence counsel should also obtain an executed release from the plaintiff and a consent dismissal order that can be filed pursuant to SCCR 8-3. Defence counsel usually prepares the release and order and forwards them to the plaintiff's counsel.

Plaintiff's counsel must review releases very carefully to ensure that they are not too broadly drafted and release too much. Even though the lawyer may be keen to conclude a file and to collect and disburse the settlement funds to the client, the lawyer should not allow a client to sign a release without thoroughly considering its implications.

Poorly drawn confirmation letters and releases may give rise to difficulties. For example:

- If a confirmation letter contains new terms, they may be interpreted as a counter-offer.
- The recipient of a confirmation letter may subsequently deny there was any agreement.
- If no deadline is set for the plaintiff to have received funds, the defendant or insurer may delay payment.

[§4.08] Formal Offers to Settle

A party may make a without prejudice offer to settle a case at any time. In most cases, there is no consequence to failing to accept an offer, other than the missed opportunity. However, a party may also use a formal offer to settle to give additional incentive to an opposing party to act reasonably or face costs consequences.

1. Offers to Settle in Supreme Court—SCCR 9-1

SCCR 9-1 provides a procedure by which a party may be subject to costs consequences if a formal offer to settle is made but not accepted.

In order to fall within SCCR 9-1, an offer to settle must be made in writing by a party, served on *all* parties of record, and must contain the following sentence (SCCR 9-1(1)(c)):

> The…[*name of party making the offer*]…reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

As with most offers to settle, an offer made under SCCR 9-1 is without prejudice, and the fact that an offer to settle under the rule has been made must not be disclosed to the court until all issues in the proceeding, other than costs, have been determined (SCCR 9-1(2)).

The advantage of an offer under SCCR 9-1 is that the court may consider an offer to settle when exercising its discretion as to costs (SCCR 9-1(4)). When considering an offer to settle, the court may do one or more of the following (SCCR 9-1(5)):

(a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle;

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

(c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;

(d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the

proceeding after the date of delivery of the offer to settle.

When making an order under SCCR 9-1(5), the court may consider the following (SCCR 9-1(6)):

(a) whether the offer to settle was one that ought reasonably to have been accepted either on the date that the offer to settle was delivered or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

Note that a plaintiff who accepts an offer to settle for a sum within the jurisdiction of Small Claims Court is not entitled to costs, unless the court finds there was sufficient reason for bringing the proceeding in the Supreme Court (SCCR 9-1(7)).

Nothing in SCCR 9-1 provides that an offer expires at the commencement of trial. If counsel wants to ensure that their opponent does not accept counsel's offer in the event the trial starts going poorly for the opponent, counsel will want to include an expiry date.

As well, in order to provide certainty, it would be wise for counsel to include a term that any acceptance must be in writing.

It is important for lawyers to remember that settlements with persons who are under a disability require approval of the court, unless an enactment otherwise provides (SCCR 20-2(17)).

2. Offers to Settle in Small Claims—Small Claims Rule 10.1

Under Small Claims Rule 10.1(1) a party may offer to settle one or more claims by completing an offer to settle (Form 18) and serving the party to whom the offer is made with the completed offer to settle as if it were a notice of claim. The offer must be served within 30 days after the conclusion of the settlement conference, the conclusion of a mediation session held under Small Claims Rule 7.2 or 7.4, or the conclusion of a trial conference, whichever happens first, or at a later time, if permitted by a judge (Small Claims Rule 10.1(2)).

If a party wants to accept an offer, that party must complete an acceptance of offer (Form 19), and within 28 days after being served with the offer, serve the party who made the offer with the completed acceptance, as if it were a notice of claim (Small Claims Rule 10.1(3)).

If a claimant rejects an offer and if the claimant is awarded at trial an amount, including interest and all expenses, that equals or is less than the defendant's offer, the trial judge may order a claimant to pay the defendant an additional penalty of up to 20% of the amount of the offer. Conversely, if a defendant rejects an offer and the claimant is awarded at trial an amount, including interest and all expenses, that equals or exceeds the claimant's offer, the trial judge may order a defendant to pay the claimant an additional penalty of up to 20% of the amount of the offer (Small Claims Rule 10.1(5)-(7)).

[§4.09] Mediation

Mediation is a process of assisted negotiation, in which a neutral third party assists the parties to come to a consensus. Mediation may be used in almost any dispute and at almost any stage. It is common for parties to agree to mediate without compulsion. This section, however, focuses on how and when mediation may be initiated in the litigation process.

1. Notice to Mediate

The notice to mediate process allows any party to a Supreme Court action to initiate mediation in that action by delivering a notice to mediate in a specified form to every other party to the action.

There are three regulations that provide for a notice to mediate process, depending on the nature of the proceeding. The Notice to Mediate Regulation, B.C. Reg. 127/98, applies to motor vehicle actions (as defined therein). The Notice to Mediate (Residential Construction) Regulation, B.C. Reg. 152/99, applies to residential construction actions (as defined therein). The Notice to Mediate (General) Regulation, B.C. Reg. 4/2001, applies to all other actions (not including matters commenced by petition) other than family law proceedings or claims for physical or sexual abuse.

While the regulations differ, particularly with respect to timelines, they have many common features. Timelines under the Notice to Mediate (General) Regulation are as follows:

(a) The notice to mediate, unless the court orders otherwise, must be delivered no earlier than 60 days after the filing of the first response to civil claim in the action and no later than 120 days before the date of trial (Regulation, s. 5).

(b) Within either 14 days (4 or fewer parties) or 21 days (5 or more parties) after the notice to mediate has been delivered to all parties, the participants must jointly appoint a mutually acceptable mediator (Regulation, s. 6). Recourse to a "roster organization" designated by the Attorney General for appointment of a mediator is available if the participants don't agree (Regulation, ss. 7 and 8).

(c) The notice to mediate process may include a pre-mediation conference (Regulation, ss. 12–22).

(d) A mediation session must occur within 60 days after the mediator has been appointed (Regulation, s. 24) and the participants must exchange information before the mediation session is to be held (Regulation, s. 26).

The Regulation also prescribes when a mediation session can be postponed (s. 25), how the mediator may conduct a mediation (s. 32), the consequences for default (ss. 33–35) and how to conclude a mediation (ss. 38, 39).

Each regulation should be reviewed for deadlines such as those related to agreeing on a mediator, the holding of a pre-mediation conference, and the date of the mediation itself.

Following the notice to mediate regulations is not the only way to mediate. Many commercial contracts, and most standard form construction contracts, contain a contractual requirement of mediation. As well, in many cases the parties will agree to mediate even without the delivery of a formal notice. However, the notice to mediate regulations provide a convenient process to initiate a mediation in appropriate cases.

2. Small Claims—Mediation

As noted above, the Small Claims Rules mandate the holding of a Settlement Conference in most actions. One of the major purposes of a settlement conference is to mediate any issues being disputed (Rule 7(14)(a)).

The Small Claims Rules also permit any party to a case to initiate mediation pursuant to Rule 7.3 of certain claims between $10,000 and $35,000. A mediation is initiated by filing and delivering to all parties a notice to mediate (Form 29, Small Claims Rule 7.3(5)), which can only occur after a reply has been filed (Small Claims Rule 7.3(6)).

If a mediation is initiated pursuant to Rule 7.3, attendance by the parties is mandatory. If a claimant fails to attend, a defendant may apply to dismiss the claim (Rules 7.3(37) and (38)). If a defendant fails to attend, a claimant may take default proceedings (Rules 7.3(39) and (40)).

Note that the Small Claims Court mediation programs under Rules 7.2 and 7.4 have been discontinued.

Chapter 5

Preparation for Trial[1]

[§5.01] Introduction

This chapter covers how to prepare and organize for trial in the Supreme Court. It covers both long-term planning and steps immediately before trial.

We view preparation in two ways: first, finding out all you can about the case; and second, reducing it to a logical, understandable and presentable form. In this chapter we present three different strategies for harnessing the material into that presentable form.

Remember that at all stages of trial preparation, counsel may use technology to streamline work and improve how the case is presented to the court. Early on, counsel (with opposing counsel) should consider how to use e-filing and document discovery to assist the court (see SCCR 23-3).

[§5.02] Organizing the Case for Trial—Documents and Witnesses

1. Organizing the Case File

Preparation for trial begins when the file is opened. A common method is to prepare a "trial book" in the form of a binder containing various sections.

While trial books vary, it is useful to have a portion devoted to each witness, the opening statement, the argument, the pleadings, and the law. In many cases, these will need to be divided into separate binders for each subject.

The trial book will eventually contain minutes of evidence, witness statements, documents, photos, expert reports, and so on. The discovery transcripts should be summarized in a form that provides a summary of the transcript in the order in which the questions have been asked and answered. In addition, it is often useful to organize the summary into areas based on subject matter, and to index the questions according to subject.

Once the file is open, you should take an initial look at the law and then make a list of points that you must prove, as well as what the other side must do to substantiate their own case. For each point, make a list of the evidence required to prove those points. Later, you can add to that list a further list of where the evidence on each of those points will come from. You will find that your list changes as the case progresses toward trial.

A trial book is a useful basis for preparing the direct examination of your witnesses and the cross-examination of your opponent's witnesses. It is also helpful to prepare a one-page checklist for each witness summarizing the points that you want to establish through that witness. You should have this at hand when the witness is examined. Having a point-form list will help you check that the necessary points have been covered.

2. Controlling and Preparing Documents for Trial

You must keep documents in an organized fashion; otherwise, even the simplest case can get out of hand. As you receive documents, file and index them, either in a file folder (electronic or manual) or a binder. In large, complicated matters, it is essential to have document management software.

Keep the original documents separate and do not mark them up or write on them. Have a working copy of key documents that can be marked up (particularly expert reports). You must update your list of documents as new documents are received. Remember the duty of disclosure, as well as SCCR 7-1(21), which prohibits parties from using documents that they fail to disclose.

An organized brief of documents is also a welcome sight to a trial judge. In preparing for trial, you should determine which documents you want to put into evidence and, with the other side's consent, have them bound into an exhibit binder. This simplifies matters not only for the trial judge but also for the witnesses and counsel. Additionally, it forces you to focus your attention, before trial, on any issues of admissibility that may exist with respect to the documents.

In considering whether or not to prepare an exhibit binder, counsel should be mindful of the direction in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, in which the court cautioned against filing binders of documents as exhibits without clearly specifying the purposes for which the documents are tendered.

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[1] **Timothy H. Pettit**, Pettit and Company, kindly revised this chapter in October 2019 and January 2018. Updated by PLTC in April 2021. Previously revised by Nicholas Peterson (2016); Tannis D. Braithwaite (2010 and 2011); David A. Goult (2001 and 2003–2006); David P. Church (1997); Mark M. Skorah (1995); and Leonard Cohen (1996).

When preparing the brief of documents, you should address the admissibility of each of the documents. Try to reach an agreement with opposing counsel regarding all documents in terms of whether they are being admitted as to their authenticity only, or admitted both as to their authenticity and as proof of their contents. If you cannot obtain opposing counsel's consent to the admission of a document, you will have to seek to have it admitted by leave of the court. Carefully consider the basis for admission and, where necessary, prepare submissions with supporting case law.

Use SCCR 12-5(8) if the other side possesses original documents or physical objects that you want produced at trial. A notice to produce must be served at least two days before trial, but should be served long before that.

3. Preparing Lay Witnesses

One of the most important tasks in the pre-trial process is to prepare the witnesses to give testimony. Lay witnesses testify regarding matters of fact. For a lay witness, your preparation starts with the initial interview.

Either at the conclusion of the interview, or shortly thereafter, reduce the witness's evidence to a written statement. Preferably the witness should sign this statement. Some counsel prefer to have such a statement signed at the interview, while others prefer to send a written statement afterwards for the witness to review (and to make any necessary corrections). In either case, place a copy of the statement in the trial book and keep the original statement in your file. You may need it if the witness changes their testimony at trial.

If there is any chance that the witness may be required at the trial, inform the witness in writing of the trial date. If there is any doubt in your mind that the witness will cooperate in attending at trial, serve the witness with a subpoena in Form 25, together with the witness fees specified in Schedule 3 of Appendix C.

Before a witness gives evidence, you should conduct a further interview. You should explain the type of questions that you will be asking and ensure you know what the witness's answers will be. You should also indicate the type of question that will be asked in cross-examination. It is not appropriate to advise the witness as to what the answers should be. Counsel should appreciate the difference between open-ended questions and leading questions, the latter forming the basis for cross-examination.

Many witnesses are extremely nervous about appearing in court. Make an effort to put them at ease. What a lawyer takes for granted is entirely new to most witnesses. You should explain the functions of the various people in the courtroom, including the judge, the clerk and counsel. Also explain that the witness will be giving evidence from the witness box and will be required either to swear or to affirm. You must find out in advance whether each of your witnesses wishes to swear or affirm, and you need to inform the clerk before the witness enters the witness box. Explain to each witness how to address the court. Instruct the witness to speak clearly, so that everyone may hear the evidence.

One final caution with respect to preparing the lay witnesses—keep in mind that on cross-examination the witness can be asked any question relevant to the matters in issue. Opposing counsel is not confined to cross-examination of the matters covered on direct examination. Therefore, find out if the witness has any traits or history that could compromise the witness's credibility or reliability. You might decide not to call a witness if there is a risk that, overall, the evidence of that witness could be more harmful to your case than helpful.

4. Preparing the Expert Witness

SCCR 11 governs expert opinion evidence in BC Supreme Court trials. SCCR 11 allows the parties to jointly appoint an expert (SCCR 11-3), for each party to appoint its own independent expert (SCCR 11-4), or for the court to appoint an expert on its own initiative (SCCR 11-5).

Changes to the SCCR in February 2019 sought to limit the number of expert witnesses permitted to testify on the issue of damages in motor vehicle actions, and in all personal injury actions as of February 1, 2020. These limits were declared unconstitutional in *Crowder v. British Columbia (A.G.)*, 2019 BCSC 1824, and SCCR 11-8 was repealed. Effective August 10, 2020, the *Evidence Act*, R.S.B.C. 1996, c. 1224, was amended to include s. 12.1 and 12.2, which place many of the same limitations as the repealed SCCR 11-8. The *Evidence Act* amendments introduce a limit of three expert witnesses per party at trial in a motor vehicle injury action (and a limit of one expert witness per party if the motor vehicle action proceeds as a fast track action), unless the parties consent or the court orders that additional expert evidence can be tendered.

SCCR 11-6 governs the content and admissibility of expert reports. An expert witness cannot testify in court unless the expert's direct evidence has been included in a report that has been prepared and served in accordance with SCCR 11-6 (SCCR 11-7(1)). Counsel should assist the expert to organize the report logically and ensure that the report clearly sets out the assumptions of fact, the results of the expert's own investigations, and the conclu-

sions or opinions reached by the expert. The report should not contain any matters that are not admissible in evidence. For example, the entire report should be within the expert's field of expertise. Even within the expert's field, the expert should not express their opinion on the ultimate issue before the court. Also, make sure that any assumptions of fact contained in the report are matters that counsel will prove at trial. If the expert relies on facts that are not proven, the report may be of little value.

Note that the expert report must be listed in the trial brief in Form 41, which is required to be filed in advance of the trial management conference (see the next subsection for timelines).

Expert reports (other than reports from experts appointed by the court) must be served on every other party of record at least 84 days before the scheduled trial date (SCCR 11-6(3)). The report must set out the expert's name, address and area of expertise; the expert's qualifications, employment and educational experience in their area of expertise; the instructions provided to the expert in relation to the proceeding; the nature of the opinion being sought and the issues in the proceeding to which the opinion relates; the expert's opinion respecting those issues; and the expert's reasons for their opinion, including the factual assumptions on which the opinion is based, a description of the research conducted by the expert that led them to form the opinion, and a list of every document relied on by the expert in forming the opinion (SCCR 11-6(1)).

The party serving the report must, either on appointment of the expert or when a trial date has been obtained, whichever is later, notify the expert of the trial date and that they may be required to attend at trial for cross-examination (SCCR 11-6(9)). An opposing party may demand the attendance of the expert at trial for cross-examination, but the demand must be made within 21 days after service of the report (SCCR 11-7(2)). An opposing party may have to pay the costs of the expert's attendance if the court decides that the cross-examination was unhelpful (SCCR 11-7(4)).

If an opposing party intends to object to the admissibility of the expert report at trial, that party must notify the party who served the report of its objection on the earlier of the date of the trial management conference or 21 days before the scheduled trial date (SCCR 11-6(10)).

A party who serves a report prepared by their own expert is required, upon request by any other party, to produce the contents of the expert's file along with any written statement of fact on which the expert's opinion is based, any record of independent observations made by the expert in relation to the report, any data compiled by the expert in relation to the report, and the results of any tests or inspections conducted by or for the expert in relation to the report (SCCR 11-6(8)). For an interpretation of this rule see *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2014 BCSC 741.

Note that if a case planning conference has been held as provided for in SCCR 5, expert opinion evidence may not be tendered at trial unless provided for in the case plan order (SCCR 11-1(2)). Accordingly, if expert evidence is not anticipated at the time of the case planning conference, but later becomes necessary, counsel may have to apply to amend the case plan order pursuant to SCCR 5-4. That said, it does not appear that the courts are enforcing this subrule.

5. Trial Brief

The plaintiff must file and serve a trial brief in Form 41 at least 28 days before the date set for the trial management conference, unless the court otherwise orders (SCCR 12-2(3)). Any other party must file a trial brief in Form 41 at least 21 days before the date set for the trial management conference, unless the court otherwise orders (SCCR 12-2(3.2)). The trial brief must set out the issues, positions of the parties, witnesses to be called and cross-examined, documents (including expert reports) that will be put into evidence, admissions, and other matters set out in Form 41.

It is very helpful to review the parties' trial briefs and prepare a written estimate of how much trial time is required. This will assist the parties and the court at the trial management conference in knowing whether or not there is enough time set aside for the trial. To achieve this estimate, create a table outlining each trial event (e.g. openings, witnesses, closings, etc.), then setting down each party's estimate for each event and totalling the time. Remember that there are approximately 4 hours in a typical trial day once breaks are excluded.

6. Trial Management Conference

Counsel must schedule and attend a trial management conference at least 28 days before the scheduled trial date (SCCR 12-2(1)). In some cases the parties must also attend the trial management conference (SCCR 12-2(4) and (5)). The judge presiding at the trial management conference may make orders respecting the conduct of the trial, including orders relating to amendments to pleadings, admissibility of documents, whether the evidence of some witnesses may be given by affidavit, imposing time limits for direct and/or cross-examinations,

and prescribing a conference of expert witnesses (SCCR 12-2(9)).

Note the timelines for the filing and service of trial briefs in advance of trial management conferences (described in the above subsection).

The parties in a civil case may apply to dispense with a trial management conference by consent: see Practice Direction 51.

7. Trial Record and Trial Certificate

At least 14 days but no more than 28 days prior to the scheduled trial date, counsel must file with the court registry a trial record and trial certificate (SCCR 12-3 and 12-4). A trial record must contain the pleadings in the action, any demand for particulars made in the action (and the response to such demand), the case plan order and any order made relating to the conduct of the trial, and any document required by a registrar under SCCR 12-3(2). The registrar now also requires copies of the trial briefs to be included in the trial record (AN-13).

A trial certificate is a statement that the party filing the trial certificate will be ready to proceed on the scheduled trial date, and has completed all its examinations for discovery. If no party files a trial certificate within the proper time frame, the trial will be removed from the trial list (SCCR 12-4(5)).

[§5.03] An Alternate Strategy[2]

One possible preparation strategy starts in earnest not when the file is first opened but in the months before the scheduled trial. By this time counsel will have a thorough knowledge of the facts, evidence and law.

1. Starting With the Closing Argument

The first formal step in trial preparation might actually be drafting the closing argument, which encapsulates the theory of the case and describes how the evidence supports that theory. In drafting that argument, counsel will see the key facts and the witnesses or documents that help establish those facts. This is also the time to recognize the weak points in the argument, and to update the research to ensure that no legal points are missed.

When counsel knows the argument that shapes their case, they know what steps to take to prove that case. At this stage, counsel identifies the key legal claims and the facts they must establish to support those claims.

2. Support the Argument with Evidence

The next step is identifying the methods to prove those facts before the court. This might include interviewing or reinterviewing witnesses and gathering expert reports and key documents. It might also include preparing physical evidence, such as video or audio tapes, and diarizing when it must be disclosed.

In preparing for trial, there are many time frames that you need to be alert to. Carefully diarize all dates by which you must disclose, serve or file materials.

For documentary evidence, determine how you are going to prove the evidence in court. If you anticipate that opposing counsel will challenge the admissibility of a document, or if you plan to challenge the admissibility of a document you expect that opposing counsel wants to admit, do your research before the trial. Prepare an argument and have copies of your authorities on hand.

Update your list of documents. For each document that you want to offer as an exhibit, prepare copies for the judge, clerk, witness, opposing counsel, yourself, and, where appropriate, other counsel.

At this time counsel is filling in the trial brief (Form 41) with the witnesses to be called and the expert reports to be provided. This is also the time when counsel is preparing the witness list (see Chapter 2, §2.07(1)). Counsel should update the witness list continually.

While preparing witnesses, go over the key points and the overall theme of their testimony. Prepare them to authenticate evidence or to speak to particular documents at trial. Also prepare them for cross-examination.

The next step is preparing a trial calendar, which is a listing of what events are going to happen at trial, with a rough estimate of how long each will take. Events in the trial calendar will include openings and closings by counsel, as well as examination and cross-examination of witnesses.

Schedule the witnesses for trial and subpoena those who might not otherwise attend. Ensure that the subpoena requires the witness to bring their relevant records. It is important to keep witness contact

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[2] This §5.03 is based on the trial planning strategies of Timothy H. Pettit of Pettit and Company, who kindly shared these techniques for the purposes of this discussion.

information current and close at hand, since counsel need to be sure the witnesses know when they should appear.

3. Preparing Binders and Documents

Prepare one binder for a group of lay witnesses, divided by tabs. For each witness, prepare notes or a script to examine or cross-examine the witness. If you anticipate cross-examining a witness on a prior statement, include that statement in the binder. In this binder include the copies of subpoenas and affidavits of service.

For expert witnesses, make a separate witness binder for each expert. Include in the binder such things as working copies of the expert's reports, the expert's curriculum vitae, and your own notes of points on which to examine or cross-examine the expert.

Ensure that you have copies of all relevant discovery transcripts. Provide your client with a copy of their discovery transcript and ask them to review it. You only need copes of your client's transcript for yourself and your client, but you will need multiple copies of all transcipts of the discovery of opposing parties: for the judge, for the clerk/witness (a shared copy), for yourself, and, where appropriate, for other counsel.

Review the discoveries of opposing parties. Consider what parts (if any) of an opposing party's discovery transcript you want to read into evidence.

Prepare your book of authorities. Prepare one book for the court, one for opposing counsel, one for yourself, and one (where appropriate) for other counsel. The court convention has been to copy the documents one-sided.

4. Write Your Opening Last

Reflect on your closing submissions. Ensure that your theory of the case is clear and is well supported. Check that you have plans to prove everything you need to prove. Then the last step is to write the opening.

In a trial by judge, the opening should be brief and business-like: identify the parties, the general nature of the dispute, and the remedy you are seeking. Then give a brief background. Next, set out the issues and the parties' positions on the issues. Finally, list the witnesses you will be tendering. Keep in mind that at this point you are not arguing the case.

Once you have completed these steps, you should be ready for trial.

[§5.04] Planning and Presenting a Civil Case[3]

Counsel who are venturing into the field of civil litigation need to develop habits that allow them to plan and organize effectively. What follows are the author's comments and observations of the work habits of leading counsel.

In reading the comments that follow, you will note an emphasis on reducing almost everything to written form. Because of the complexity of the law and the inherent weakness of human memory, this is essential. It is also helpful for the following reasons:

(a) It serves as a checklist.

(b) It is easier to analyze the weaknesses and develop the strengths of your case when you are forced to write it out in the first instance.

(c) If counsel becomes ill or unavailable, the case can be taken by another counsel with a minimum of preparation because everything will have already been done.

(d) When openings, arguments, trial plans, witness statements, etc., are in written form, copies of these can all be given to the client before the trial. The client will then know in a far more direct way the amount of work you have done on their behalf. At the same time, the client will be able to see whether or not there is something essential that they may have forgotten to tell you.

(e) This kind of preparation makes the trial itself run much more smoothly. It leaves you open to meet any new point that may come up or to refine your existing position.

Preparation starts with learning the evidence thoroughly and applying it to the law. When you know all the evidence that you are going to put in as part of your case and, therefore, the facts that may be extracted from that evidence by the court, you are in a position to prepare the law that applies to those facts. In applying the law you develop a theme.

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[3] The remainder of this chapter was originally prepared by Mr. Justice John C. Bouck and is adapted and updated for PLTC. **Timothy H. Pettit**, Pettit and Company, kindly revised these sections in October 2019 and January 2018. Previously revised by Nicholas Peterson (2016); Tannis D. Braithwaite (2010); David A. Goult (2001 and 2004–2006); PLTC (2000, 1994 and 1993, using additional materials from the original author); David P. Church (1997); and Leonard M. Cohen (1996).

Harold A. Feder, in "Effective Trial Preparation," *Trial Magazine* (July 1992) and Stephen Luber in "The Trial as a Persuasive Story," 14:1 *American Journal of Trial Advocacy*, both suggest that you develop a theme for your case. It must be flexible enough to accommodate unforeseen events that invariably develop during the course of a trial. The theme should be wound around the strongest part of your case. It will form the foundation of your argument, and emerge in your opening and closing.

Stephen Luber recommends that the theme appeal to moral force and that it be presented in one or two sentences. It is used to give persuasive force to a legal argument. For example: "The defendant fired my client without cause and turned her out on the street at age 65 after 30 years of service." Or, "The plaintiff had many opportunities to get another job, but chose to do nothing."

Stephen Luber also suggests your case have a theory. A logical theory tells the judge the reason that a favourable verdict must be entered; a moral theme shows why it should be entered. A theory must be logical; it must speak to the legal elements of the case; it must be simple; and it must be easy to believe.

To develop a theory, you should ask yourself three questions: What happened? Why did it happen? Why does that mean the client should win? For example: "The plaintiff was a trusted and valued employee before she was dismissed without cause. She is entitled to damages for wrongful dismissal in the range of 15 months' notice." Or, "The plaintiff had many opportunities to mitigate her damages but she failed to do so. In the circumstances, she is only entitled to damages by way of six months' notice."

[§5.05] Preparing Court Briefs

1. Pleadings Brief

In every civil case, you should start by compiling the pleadings, with a table of contents. This could be a binder containing all the pleadings exchanged between the parties from the start of the action. This might include applications, affidavits, orders, lists of documents, and so on. They should be properly tabbed and placed in chronological order. A sample table of contents for the pleadings binder is set out at Appendix 1.

2. Trial Book

A trial book is the principal source of all your work apart from the pleadings binder, and may be a binder with several tabs. Appendix 2 sets out essential contents for the trial book on a judge-alone trial. Counsel might add other items to suit their circumstances, or might use a different order.

Good organization is key to effective advocacy. Have relevant documents flagged and arranged so that you can find them quickly. Shuffling through a pile of documents, especially if you are in the midst of cross-examination or trying to make a point in court, might annoy the judge or reduce the impact of your presentation.

The table of contents of the trial book will serve as a good checklist for your preparation. One suggested organization scheme is set out below, but you might have a different scheme that works.

(a) Trial Plan

The first document in your trial book could be a trial plan. It would include the names, addresses, and telephone numbers of all the witnesses you propose to call. It should also have a list of the witnesses, the order they will be called, and an estimate of the length of time they will spend giving evidence.

The plan could set out the probable length of the defendant's case and the time it will take for argument. You might give this plan to the client, so that the client has some idea of the number of days the trial will take and the witnesses you propose to call.

(b) Opening Comments to the Court

Prepare opening remarks carefully. Remember, the judge may not have seen the pleadings before entering the courtroom that morning. If the judge has seen them, it was likely only the night before.

Counsel's opening can be oral or in writing. Preferably, it should be in writing, supplemented by oral submissions. Here are the headings to matters that it should cover:

(i) **Cause of Action**. Describe the cause of action: This is a claim for damages arising out of a motor vehicle accident that occurred at Sidney, BC on the 26th of May 2018. Liability and damages are both in issue (etc.).

(ii) **Witnesses**. List the names of the witnesses and briefly describe the evidence they will give. State when each witness will be called and in what order. Try to call them in an order that follows your theme and the story you are trying to tell.

(iii) **Length of Trial**. State how long the trial will take. For example, "My part of the trial should take three days depending on the length of my friend's cross-examination. I understand my friend estimates the evidence in her case will take

about two days. We both will take about one hour in our closing arguments. So, we should be finished within six days."

(iv) **Facts**. From the evidence, counsel should articulate the facts the judge should find from the evidence in chronological order. For example:

(a) the defendant was totally at fault for the accident;

(b) there was no contributory fault on the part of the plaintiff or if there was it was no more than 20%;

(c) the plaintiff suffered the following injuries as a result of the accident;

(d) the plaintiff partly recovered from the effects of the accident on the applicable dates;

(e) the plaintiff suffered damages by way of pain, injury and suffering and loss of enjoyment of life in that she used to be a professional figure skater, etc.

(v) **Remedy**. From these facts, argue that the court should find the plaintiff suffered certain damages:

(a) Non-pecuniary damages $100,000.00

(b) Past loss of income $200,000.00

(c) etc.

(c) Statements of Witnesses

Witness statements should be typed up in narrative form and given to the witness well before the trial. It is preferable but not essential that the statement be signed by the witness. Questions can be framed at trial to bring out this evidence.

(d) Brief of Law on Anticipated Evidentiary Problems

You might wish to introduce some evidence that at first glance seems inadmissible. Research the point well ahead of time. If you are satisfied that the evidence is properly admissible, prepare a brief outlining the nature of the evidence you propose to adduce together with the authorities in support.

In addition, you may be alert to potential evidence that you believe inadmissible but which the other side may advance. Do the research and gather the authorities to illustrate that such evidence should not be admitted.

As a defendant, you may believe that the plaintiff will not prove their case. You may wish to apply to have the action dismissed at the close of the plaintiff's case, either under SCCR 12-5(4) (no evidence) or SCCR 12-5(6) (insufficient evidence). You should be in a position to make a submission on the evidence as well as present the law. This should be reduced to writing, to serve as speaking notes.

(e) Separate Divisions for Notes of Evidence of Witnesses

The evidence of your own witness will be in written form and appropriately indexed in the table of contents. You should have loose-leaf pages available in the same division to take down evidence of cross-examination. In that way, all of the evidence of every witness is easily found and conveniently separated.

As witnesses for the opposing party give evidence, their names can be added to the table of contents under a new tab and their examination-in-chief taken down. Again, the evidence of these witnesses is conveniently separated and can be easily found should any argument arise as to what was said.

(f) List of Discovery Questions

Before calling your own evidence, you should know from reading the transcript of the discovery of the defendant what admissions have been made that do not need to be proven by your own witnesses. These admissions can then be taken from the transcript and numbers of the questions written down.

There is no particular magic in reading in discovery at the beginning or end of the plaintiff's case.

(g) Outline of Argument

You draft your argument around your theory of the case. Sometimes, during the course of a trial, the evidence does not come out exactly the way you had anticipated. In that event, it may be necessary to adapt the theory or alter the argument. Nonetheless, if you have prepared most of it in advance, it probably will not require any major changes to cover the new events.

[§5.06] Trial Before Judge Alone

1. Decorum

If you come well prepared, a trial becomes an enjoyable experience. If you are ill prepared, you will probably find yourself scrambling, which may not help either your reputation or your client's cause.

Counsel are required to dress formally for trial: a black gown and vest; white shirt, collar and tabs; black shoes; black or black striped pants or skirt. Formal dress reflects the importance of the occasion and a reverence for the law which judge and counsel have been sworn to administer.

Do not be late. Arrive at least 10 minutes before the time the court is expected to sit. If you are late, this not only starts you off badly with the judge, but also does not give you the opportunity to collect your thoughts and adjust to the atmosphere of the courtroom and the problems you then have to face.

2. Opening Remarks

Give the judge time to write down the name of the case in the judge's bench book. Counsel then introduce themselves. Spell out your last name and your first initial, and provide the court with your title (e.g. Ms., Mr., Mx., Counsel) and pronouns to be used in the proceeding (PD-59—*Forms of Address for Parties and Counsel in Proceedings*).

The matters that counsel's opening should cover are addressed above at §5.05(2)(b) ("Opening Comments to the Court").

In personal injury cases, it is some judges' practice to ask both sides at the opening of the trial their suggested range of damages.

It is highly recommended that counsel provide a draft of their opening to the court at the beginning of the trial.

3. Documents

Make sure you have at least four copies of each exhibit, one to be marked as the official exhibit (preferably the original of the document), one for counsel who files the exhibit, one for opposing counsel, and one for the judge.

Before the trial starts, try to obtain the approval of opposing counsel as to the admissibility of your exhibits. Then, file these exhibits during your opening comments. This will save a good deal of court time in wrangling over the admissibility of exhibits that might have been avoided through pre-trial discussions with opposing counsel.

More and more, photocopies of originals are being put into evidence rather than the originals themselves. This is usually done by consent. Before counsel consents to the introduction in evidence of a photocopy, counsel should first examine the original. The original might have other notes on it that do not show up on a photocopy. These notes may be on the front or on the back of the original. They may affect the meaning of the document. Similarly, if the original is handwritten, some parts may have been written at a different time. This can be seen by comparing the kind of writing implement used (i.e. a pen or a pencil), but both may look the same on the photocopy.

4. Use of Discovery Evidence

The traditional procedure is for the plaintiff to read in the discovery evidence of the defendant after all the evidence of the plaintiff has been given. The plaintiff first gives the judge a list of the questions taken from the transcript of the defendant's discovery. The plaintiff then reads the questions and their respective answers into the record.

Some judges only want a list of the discovery question numbers to read over. Others will ask you to read in the actual questions and answers. Best practice is to read the questions and answers into the record.

Simply because the questions are in the form of the transcript of an examination for discovery does not make that transcript a part of the record for trial. It is the record at trial that is important if the matter proceeds to appeal. Counsel should always be looking to the future and anticipating an appeal. If that is kept in mind, counsel will always be alert to see that the record is complete.

The discovery evidence that is read in should consist of admissions made by the defendant at discovery and be of a nature that fills in the gaps of the plaintiff's case where the plaintiff is required to prove a particular fact (e.g. that the defendant was the person involved in the accident at the time in question, that he was the owner of the car and that he was the driver of the car, etc.). If the facts have already been proved by admissions in the pleadings or in a notice to admit, the additional admission from the discovery is redundant.

Where the admission of the defendant relates to an issue in which the onus of proof rests on the defendant, counsel may want to avoid reading it in as part of their case. Since the onus of proof is on the defendant, the defendant will have to lead evidence on the issue and the admission can be used in cross-examination. A simple example is an allegation of contributory negligence. All *you* need do is prove the defendant negligent.

Furthermore, do not read in discovery evidence that tells a different or less helpful story than that which the plaintiff alleges in their claim. If the different story of the defendant on discovery is read in as part of the plaintiff's case, the judge is left with two different versions of the event, both now alleged by the plaintiff. Because the onus of proof is on the plaintiff to establish their case by a preponderance of evidence, the plaintiff may not succeed where

doubt is left in the court's mind because of the conflict in the plaintiff's case. In essence you are helping to prove the defendant's case. Some counsel do this thinking that the plaintiff's version gains weight since it "contradicts" the defendant's version. This is not so. Let the defendant lead the evidence if they choose.

Remember also that, although you are allowed to discover on matters not directly mentioned in the pleadings, you still cannot introduce evidence at trial that is unrelated to the pleadings.

5. Persuasive Effect of the Evidence

Remember that you can usually tell whether the evidence of a witness is getting the attention of the judge by watching the judge's pen. If the judge stops taking notes, you can infer that the judge may not find the evidence persuasive.

Avoid, where at all possible, interrupting the testimony of one witness to insert the evidence of another.

6. Technical Terminology

Where expert evidence will be given, try to anticipate what words or technical terms will not be commonly known to the trial judge. Make up a list of the terms in alphabetical order together with their plain meaning. If the other side will agree to a common list of terms, file the list as an exhibit at the start of the trial.

A medical expert's report should be divided into the following six parts:

(a) **Date, place and time**. Describe the date and place of the examination, and the length of time it took to examine the plaintiff.

(b) **History**. Chronologically, recite the plaintiff's relevant medical history and treatment to the date of the report.

(c) **Other sources**. List the sources relied upon by the examining doctor, such as other medical reports, instructions by counsel, etc.

(d) **Present Condition**. Summarize the plaintiff's present medical condition.

(e) **Treatment**. Outline the nature of any recommended future treatment.

(f) **Prognosis**. State the prognosis for the plaintiff's recovery. Include approximate dates.

7. Evidentiary Issues

Try to anticipate the nature of any objections that may arise with respect to the evidence and prepare a brief of the law on the issue. For example, in personal injury actions one major area of contention is the admissibility of expert reports. Besides having a brief of the law, have available bound and indexed copies of the case law.

8. Argument

In the written outline of the argument, counsel should have reviewed the notice of civil claim and pointed out where the evidence of a witness proves the allegations of fact referred to in the pleading.

The written outline of argument is exactly that. It does not have to be followed verbatim. One of the advantages of reducing it to writing is to allow the judge to concentrate on your verbal submission rather than spending a great deal of time writing down what you are saying. In this regard, never say "I think…"; say "I submit …" The court is not interested in what you think. Indeed, there are times when counsel say they think something to be the case which is not the case. This reduces respect for them in the eyes of the court.

Do not walk around the courtroom when you are asking questions or presenting argument. It is distracting to the court and it makes it more difficult for the judge to concentrate on what you are saying. Stay in one place.

Many oral arguments suffer from repetitiveness, contradictions, ambiguities and inconsistencies. This is usually because counsel have not gone through the difficult chore of disciplining their thoughts by reducing them to writing. When an argument is repetitive or lacks focus it becomes boring and hard to follow. The listener then tends to tune out.

At the conclusion of the argument, give a brief summary. If the order you want is complicated, set out the exact form of the order you are seeking, taken from such precedents as Atkin's *Encyclopedia of Court Forms and Precedents* and Seton's *Forms of Judgments*.

The same kind of preparation should be done by counsel for the defendant but differently directed.

9. Written Closing Argument

Good counsel start preparing their final submission when they first receive the file. As the case progresses, they refine their ideas. They try to develop a theme that dominates the case, one that can be explained in a simple sentence or two. By the time the trial arrives these counsel have their closing argument perfected.

Once all the evidence is in, it should take only a short time to update the closing argument and give

a written copy to the judge. Keep your closing submissions down to 10 pages or less on a trial lasting 5 days or less; from 5 to 10 days, no more than 20 pages; for trials of more than 10 days, the length should be no more than 30 pages. Edit and re-edit.

10. Case and Text Authority

You should pick the leading case from the highest court, preferably from a British Columbia court or the Supreme Court of Canada. Do not cite a whole line of cases from a lower court that say the same thing if there is one case from a higher court that states the principle adequately.

If the cases can be photocopied, bound and tabbed, so much the better. If the case has many pages and you only wish to refer to one or two pages, photocopy the portion of the case with the heading and the headnote as well as the two pages that you are relying upon. However, you should bring one complete copy of the case to court in case opposing counsel or the judge wish to review it.

A copy of the brief of authorities should be given to counsel for the defendant as well as to the court. Nothing should ever be given to the judge that is not first tendered to opposing counsel.

[§5.07] Trial Before a Judge and Jury

1. Pleadings Brief

This is the same kind of book that you should have in the trial before a judge alone. The nature of its contents has already been covered (see §5.05).

2. Trial Book

Again, the trial book should be similar to the kind of book you have for trial before a judge alone (see §5.05).

3. Opening Remarks to the Jury

An opening to a jury should be less formal than an opening to a trial judge sitting alone. Informality does not mean talking down to the jurors. They are the judges of the facts in the case and should be treated as judges. Counsel should not use the opening as an opportunity to present argument. Nor should they tell the jury they will prove a fact unless they will call evidence for that purpose.

Counsel should cover all items mentioned in a judge alone trial opening, with some exceptions. For example, do not say the jury will have before them expert opinions, unless those expert reports have been ruled admissible.

Do not suggest an amount to the jury for what they should award for non-pecuniary damages. This will result in a mistrial.

There is nothing wrong with giving a jury a written copy of each counsel's opening, provided the judge sees it first and rules on any objections. Written openings often assist a judge in a judge alone trial. They could also assist a jury.

4. Documents

Have sufficient exhibits for the record, the judge, opposing counsel, and one for each two jurors (there are a total of eight jurors in a civil case).

If you give jurors written material expecting them to read it, do not be surprised if they fail to do so. Jurors are not required to do homework. So, you must always read to the jury the significant parts of any written exhibit. You can do this when it is presented as an exhibit or as part of your closing.

Expert reports present problems. Too often counsel put books of documents together without considering their admissibility. Some reports may not be admissible if they do not pass the tests laid down by the leading cases. Clinical records of doctors often are included in counsel's proposed exhibits, even though they do not qualify as expert reports under SCCR 11. Before a document goes to the jury, the judge should rule on it.

As a general rule, be careful about tendering clinical records to a jury, as a jury will have difficulty understanding them. Best practice is to call the practitioner who prepared the records and have the admissible evidence go in through oral testimony.

5. Use of Discovery Evidence

This is the same as in a non-jury trial.

6. Jury Questions

Before the trial, draft a list of questions that should be left with the jury at the conclusion of the trial. For suggested forms, see CIVJI—Appendix C—Sample Forms of Questions for the Jury.

7. Jury Charge Checklist

If counsel have concerns about the judge's charge to the jury, they should raise those concerns promptly. If they do not complain about the instructions and suggest a solution at the time they are given, it is unlikely they will later succeed in the Court of Appeal on the allegation of faulty instructions.

To do this consult CIVJI, Appendix B—Checklist of Instructions Usually Delivered in Civil Jury Tri-

als. Prepare any amendments that may be necessary to suit the case you are trying. Present your list of CIVJI instructions and proposed amendments to the trial judge at the beginning of the trial. Do not assume that CIVJI is perfect or that a CIVJI-based jury instruction is appropriate (see *Knauf v. Chao*, 2009 BCCA 605).

8. Closing Submission

As with any closing argument, you should start drafting it when you get the file. Edit and re-edit until you deliver it to the jury. Tell the jury what you are going to say. Say it. Then tell them what you said.

Set a theme for your closing. Try to adopt it to an idiom or a proverb. Sprinkle your remarks with one or two metaphors. For help, buy a few books on these topics. Speak to the jury as if you were talking to your next-door neighbour.

Keep your remarks to a maximum of 20 minutes. This is an instance where written closing arguments are out of place. It is an opportunity for you to test your skills at oratory.

[§5.08] Conclusion

The description above is a skeleton outline of the conduct of a civil trial. You may alter the schedules to suit your own work habits, but unless you have thoroughly covered all the points mentioned, you will likely find yourself unprepared. There are few shortcuts to success.

Chapter 6

Trial[1]

[§6.01] Resources on Trials

Much has been written about the trial process. It is an art, not a science. In these materials, we seek only to set out the framework provided by the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR"). For further reading, we suggest the following texts: J. Kenneth McEwan, *Sopinka on the Trial of an Action*; W.B. Williston and R.J. Rolls, *Conduct of an Action*; Mauet and Casswell, *Fundamentals of Trial Techniques* (2nd Canadian ed.); Steusser, *An Advocacy Primer*, 4th ed. (Toronto: Carswell, 2015); David C. Harris, QC, et al eds., *British Columbia Civil Trial Handbook*, 4th ed. (Vancouver: CLEBC, 2015); Geoffrey D.E. Adair, QC, *On Trial: Advocacy Skills Law and Practice* (Markham: LexisNexis Canada Inc., 2004).

[§6.02] Jury Trial—Selecting the Jury

Jury trials are much less common than trials before a judge alone (see SCCR 12-6 regarding the availability of a jury trial in a civil claim). However, they are a difficult test for counsel's skills because the rules of evidence must be applied strictly. When dealing with a jury for the first time, the rule should be the same as for your first appeal—have senior counsel.

When your trial is before a jury, the first step in the trial will be the selection of the jury members. The method of selection is outlined in the *Jury Act*. Eight jurors are chosen from a panel of sixteen. Each party has the right to four peremptory challenges without cause. The procedure is that the plaintiff will speak first with respect to the first juror called. If content, plaintiff's counsel simply says "content." Defence counsel will then say either "content" or "challenge." The latter word indicates that the defence has used one of their four peremptory challenges. For the second person, the defence counsel will speak first, either indicating challenge or satisfaction with that juror. The process continues until the jury selection is complete.

When you are involved in a jury trial, you will not get the list of prospective members of the panel until immediately prior to jury selection. Therefore, there will be no meaningful way to conduct research on the members of the jury pool. Furthermore, the information provided on the list is extremely limited: name, address, and occupation. Where a potential juror's occupation has not been provided, request that the judge ask the prospective juror. Potential jurors sometimes share further information voluntarily to raise the issue themselves as to whether they should be empanelled. Regardless, there is a definite information shortfall and you will generally be exercising your challenges with a fair bit of intuition.

[§6.03] Opening

After the jury has been selected (or, in the case of a trial by judge alone, after the case has been called) the plaintiff opens their case. Under SCCR 12-5(72), the plaintiff, or the party on whom the onus of proof lies, is permitted to make an opening statement before calling evidence. In almost every case, make an opening statement, have the statement in writing, and give the judge a copy.

The purpose of the opening statement is to introduce the trier of fact to your case. Outline the basic framework of your case, leaving the details to be filled in by the witnesses. It helps to explain what the issues in the case are and what witnesses you will be calling to address those issues. One rule of opening statements is to be careful not to overstate your position. If the evidence falls short of what you say, you can rely on opposing counsel to draw that to the judge's attention in the closing argument.

SCCR 12-5(72) stipulates that, where the defence is leading evidence, the defence's opening statement must follow the close of the plaintiff's case. This rule is strictly applied in jury trials but not so in trials by judge alone, where the trial judge may ask defence counsel for an opening statement immediately after the plaintiff's opening. This practice often helps to place the issues in perspective at the outset of the case.

[§6.04] Direct Examination

Contrary to popular opinion, direct examination is usually more difficult to conduct than cross-examination. Part of the pressure is that this is *your* client's case—it should go smoothly. When examining someone in chief, you are not permitted to ask leading questions. A leading question is a question that suggests the answer. Accordingly, your questions must be carefully and precisely framed so as to elicit the appropriate testimony.

Because of the requirement that your questions in chief must be neutral, it is important to prepare the witness thoroughly. Otherwise, the witness may become confused and even nervous. By contrast, the witness will be put at ease by hearing a question for which the witness has already been prepared.

[1] **Timothy H. Pettit**, Pettit and Company, kindly revised this chapter in October 2019, January 2018 and December 2016. Previously revised by Tannis D. Braithwaite (2010 and 2011); David A. Goult (2001 and annually from 2003–2006); David P. Church (1997); Mark M. Skorah (1995) and Leonard M. Cohen (1996).

Also, do not hide unfavourable evidence—deal with it. Otherwise, it *will* emerge on cross-examination and do far more harm.

[§6.05] Cross-Examination

Perhaps each lawyer has a vision of conducting a television-style cross-examination that will be so effective that the witness will be forced to admit all the lies they previously told and will be reduced to tears, and the case will end on a triumphant note.

It is rare that you will cause a witness to break down. The witness (certainly if a party to the action) will not be telling their story for the first time when they give evidence. The witness will be well versed in it and, even if the story is not true, will probably firmly believe it to be true. Rarely will you be able to achieve an effective result simply by going head to head with that witness.

There are more styles of cross-examination than can possibly be described. It is important not only to develop at least one style, but also to be able to adjust that style to the demeanor of a particular witness. You may have to be forceful with one witness who simply refuses to answer your question. With another witness, you may have to be perpetually patient even though an answer is not forthcoming. Whatever approach you decide to use in cross-examining a particular witness, remember that you have to establish control. Do not engage in a dialogue with the witness. Do not ask your questions tentatively, even if you are attempting to be gentle in your cross-examination.

Prepare thoroughly for cross-examination. Research the witness using the internet or social media. If the witness is an expert, research their previous court experience or scholarly research as appropriate. As well, research the substantive content of the expert's field as material to the case. Prepare a detailed cross-examination script with notations to yourself referencing information in the various transcripts, documents and other evidence. This will permit you to put contradictory evidence to a witness in an effective and efficient manner. Think about your various lines of attack against a given witness and write them into your cross-examination script. However, be prepared to go off script as necessary. Observe the witness, observe the judge's or jury's reaction to the witness, and always be ready to change the flow of your questioning as the situation dictates.

Before you cross-examine a witness it often helps to consider areas that are totally unrelated to the evidence already given by the witness but with which the witness may be familiar. Consider the friend of the injured motor vehicle passenger who is called to describe how the accident happened. Having given that evidence, the witness is then left to cross-examination. By preparing beforehand, you may know that the witness has ample evidence to give concerning the wage loss claimed by the plaintiff and the activities that the plaintiff has been carrying on since the accident. Exploring that area early on may elicit some excellent answers from the witness because the witness has a sense that you are not going to be challenging the evidence about the accident itself and that you are confining yourself to a totally different area.

It is often said that you should not ask a question in cross-examination to which you do not know the answer. You will not always be able to adhere to that rule. However, you can adhere to another rule—keep your cross-examination as brief as possible. This is particularly true in jury trials. Another thing to remember is that it is disastrous to ask a question and then attempt to cut off the witness when you see that the answer is a bad one. Instead, particularly with juries, as soon as the witness has finished answering the question with the bad answer, immediately move the witness into an unrelated area of examination. This will hopefully mitigate the harm of the bad answer. In each case, be sure that the witness is allowed to answer fully. Do not fear the witness whose answers are perpetually qualified in order to be helpful to their own cause. That kind of lengthy answer does nothing to enhance the witness's credibility.

[§6.06] Common Methods of Proof at Trial[2]

1. Knowing How to Prove a Fact

Once you have determined what facts must be proven in order to succeed at trial, you must decide on the appropriate method of proving each fact.

"Proof" refers to the process by which evidence is tendered in court to be used to persuade the trier of fact of the existence or non-existence of a fact.

There are a number of different methods of proof and often it is possible to prove a particular fact in more than one way. In such a situation, consider your options and decide the best method of proving each fact.

To use some methods of proof under the SCCR you must take some steps before the trial. For example, see SCCR 7-2 (examination for discovery), SCCR 7-3 (interrogatories), SCCR 7-5 (pre-trial examination of witnesses), SCCR 7-6 (physical examination and inspection), SCCR 7-7 (admissions), SCCR 7-8 (depositions), and SCCR 12-5 (evidence and procedure at trial). Read all of these rules and keep the requirements in mind. Many of these are described in Chapter 2.

[2] Revised by **Timothy H. Pettit**, Pettit and Company, in October 2019, January 2018 and December 2016. Previously revised by Tannis D. Braithwaite (2010 and 2011); David A. Goult, (2001 and annually from 2003–2006); David P. Church (1997); Mark M. Skorah (1995) and Leonard M. Cohen (1996). Prepared by Frank Kraemer for PLTC.

It is essential for a litigator to be familiar with each method of proof and to be able to use each of them effectively. If you use the law of evidence and the SCCR effectively you will improve your client's chances of success at trial and, very importantly, you can sometimes substantially reduce the length, and thus the expense, of the trial.

2. The Methods

The following are the most significant methods of proof.

(a) Oral Testimony in Court

This is the most common method of proof. Under SCCR 12-5(27), a witness at trial must testify orally in open court unless otherwise agreed by the parties.

The advantage of oral testimony is that the trier of fact has the best opportunity to assess the credibility of the witness through that witness's demeanor and performance on cross-examination. However, this is not a particularly advantageous method if you have a witness who will not present the evidence well.

Unless the court otherwise orders, a witness must not testify unless that witness is listed in a witness list served pursuant to SCCR 7-4 (SCCR 12-5(28)).

(b) Real Evidence

An object (such as an outboard engine or a knife) can be marked as an exhibit at trial to form part of the evidence of the case. Sometimes it is the *condition* of the object that is a fact in issue (for example, the object is defective or has been damaged).

A party may require any other party, by a notice delivered at least two days before trial, to bring to trial any specific object which the party contemplates tendering at trial as an exhibit (SCCR 12-5(8)). Under SCCR 12-5(36), a party can subpoena any person who is not a party or a representative of a party to bring to trial any specific object that the party contemplates tendering as an exhibit.

Unless all parties consent or the court otherwise orders, no plan, photograph or object can be put into evidence at trial unless all parties have been given an opportunity to inspect the photograph, plan or object at least 7 days before the start of trial (SCCR 12-5(10)).

(c) Documentary Evidence

A document may be introduced into evidence as real evidence to prove its existence or to prove that it was in someone's possession. For example, in a criminal trial in which it is alleged that the accused stole a share certificate, the certificate could be tendered as an exhibit because it has the fingerprints of the accused on it.

Alternatively, a document may be introduced into evidence as testimonial evidence to prove the truth of its contents. In this case, the document is hearsay, and is only admissible under an exception to the hearsay rule. For example, a letter written by a party to a lawsuit might be put into evidence through the testimony of the letter's author or its recipient.

Some documentary evidence that would otherwise constitute hearsay may be admissible if the hearsay evidence is reliable and necessary and, of course, relevant. The Supreme Court of Canada outlined how and when this is acceptable in two criminal cases: *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) and *R. v. Smith* (1992), 94 D.L.R. (4th) 590 (S.C.C.). For an application of the *Khan* and *Smith* reasoning to evidence in a civil trial, see *Wepruck (Guardian ad litem of) v. McMillan Estate* (1993), 77 B.C.L.R. (2d) 273 (C.A.).

Business records are a particular category of documentary evidence. Special rules apply to them. Under the *Evidence Act*, R.S.B.C. 1996, c. 124, s. 42, a business record is admissible if made or kept contemporaneous with the event recorded and in the ordinary course of business (i.e. not in contemplation of litigation). The circumstances surrounding the making of the record, including lack of personal knowledge by the maker, may affect its weight but not its admissibility. The maker or the keeper of the record is called for the purpose of tendering the record into evidence. Under the *Hospital Act*, R.S.B.C. 1996, c. 200, s. 51(2), a hospital record certified true by a hospital administrator is admissible without proof of the administrator's signature.

SCCR 12-5(8) (notice to produce), SCCR 12-5(10) (7 days' notice before trial), and SCCR 12-5(36) (subpoena of documents and objects), all of which were discussed under "Real Evidence," also apply to documentary evidence. Refer to SCCR 12-5(9) regarding the requirements when a copy of a document is to be introduced as an exhibit, including numbering each page of the exhibit sequentially.

Pre-trial disclosure of documents is addressed in Chapter 2. In practice, counsel may experience significant difficulties and delays in obtaining pre-trial disclosure of documents.

Indeed, counsel may find themselves in the short weeks before trial lacking key documents and with significant obstacles in obtaining them before the trial. Consider using subpoenas to ensure that key documents are produced at trial. The subpoena process does not permit pre-trial production of documents, but does ensure at-trial production of documents, which is better than having no documents at all. There is a place on the subpoena form where the lawyer issuing the subpoena can stipulate what documents the subpoenaed witness must bring. List the requested documents as clearly and specifically as possible (Form 25).

Where your case requires testimony from the opposing party and there is a possibility that opposing counsel will not call the opposing party to testify at trial, use Form 45 to require the opposing party to attend trial to testify in your case (SCCR 12-5(21)).

(d) Examination for Discovery

The examination for discovery process is described in §2.04.

SCCR 12-5(46) governs the use of discovery evidence at trial. Under this rule, the evidence given on an examination for discovery by a party or by a person examined pursuant to SCCR 7-2(5) to (10) may be tendered in evidence at trial by any party adverse in interest, provided it is otherwise admissible. However, discovery evidence is admissible only against the adverse party who was examined, or against specified other parties, such as against a company whose director was required to be examined (SCCR 12-5(46)).

The current way of proceeding is to advise the court and your opponent of the discovery questions you wish to read in, provide the judge with the applicable examination transcript, and read the questions aloud from the transcript. The questions then form part of the trial record. If opposing counsel thinks one or more of the questions has been taken out of context, opposing counsel may ask the judge to require other portions of the transcript to be read into evidence to explain matters. Alternatively, counsel can correct the context in cross-examination or re-examination (*Smith v. B.C.T.V. Broadcasting Ltd. and Langley Riders Soc.* (1988), 32 B.C.L.R. (2d) 18 (C.A.)).

The mere fact that answers were given on discovery does not make them admissible at trial. The rules of evidence at trial must be complied with. Hearsay is perfectly permissible on an examination for discovery but, depending upon the use to which it is being put, hearsay may not be admissible at trial.

Reading in of evidence is primarily useful to the plaintiff, especially when the defendant has admitted relevant facts in discovery that assist the plaintiff. Sometimes, reading in evidence from the discovery transcript will be the only way, or the most convenient way, for the plaintiff to prove an essential element of their case.

That said, it is permissible for a plaintiff to call a defendant in the plaintiff's case. See SCCR 12-5(19) to (22).

For the defendant, while they may use a discovery transcript in the same manner as a plaintiff as set out above, defendants primarily use discovery transcripts to contradict ("impeach") a plaintiff's witness in cross-examination. If the evidence of a witness at trial varies from their discovery evidence, the witness is given a copy of the transcript, the question and answer are read to the witness, and the witness is then asked, "Do you recall being asked that question? Do you recall giving that answer? Is that answer true?" This can also be done for a series of questions.

Generally speaking, a defendant may not read in discovery evidence unless they have confronted the plaintiff with that evidence and allowed the plaintiff an opportunity to respond. This is the rule in *Brown v. Dunn* (1893), 6 R. 67 (H.L.).

(e) Depositions

SCCR 7-8 governs the procedure for arranging and conducting the taking of deposition evidence. Depositions may be permitted where it is difficult or impossible to have the witness at trial. Full direct and cross-examination of the witness is conducted before a court reporter, and the transcript or video recording of the deposition is tendered at trial.

SCCR 12-5(40) to (45) govern the use of deposition evidence at trial. Under SCCR 12-5(40), a transcript or video recording of a deposition may be given in evidence at trial. Unless otherwise ordered or agreed, the whole deposition must be given in evidence (SCCR 12-5(45)), subject to objections to the admissibility of particular portions that might be raised at trial under SCCR 12-5(56).

Where there is an issue as to the admissibility of deposition evidence, a *voir dire* may be required to determine admissibility, particularly in trials by jury.

Deposition evidence can be a great convenience in terms of trial scheduling as it is easy to play a deposition video to fill a time during the trial where there are otherwise no *viva voce* witnesses available to give evidence.

(f) Pre-Trial Examination of a Witness

The procedure for conducting a pre-trial examination of a non-party witness under SCCR 7-5 is described in §2.07(2). A pre-trial examination of a witness is similar to an examination for discovery in that there is only cross-examination of the witness, not full direct and cross-examination.

SCCR 12-5(52) governs the use at trial of a pre-trial examination of a witness. If a non-party witness has been examined before trial, the testimony recorded in the transcript may be used to contradict or impeach the testimony of the witness at trial (SCCR 12-5(52)(a)). Only when the witness's attendance at trial cannot be secured will the court allow the evidence of the witness obtained under SCCR 7-5 to be read in as direct evidence (SCCR 12-5(52)(b)). If you are allowed under SCCR 12-5(52)(b) to read in a portion of the transcript, the court may look at the whole of the transcript and rule that related parts also be put into evidence (SCCR 12-5(53)). This would normally occur as a result of submissions by opposing counsel.

(g) Interrogatories

Interrogatories under SCCR 7-3 are described in §2.05. Note that this procedure is available only by consent of the party to be examined or with leave of the court. SCCR 12-5(58) governs the use of interrogatories at trial. It provides that a party may tender into evidence an answer or part of an answer given to an interrogatory. Again, the court may compel other answers that are connected to that answer to be put into evidence.

(h) Affidavits

Under SCCR 12-5(59), part or all of the evidence at a trial may be given by affidavit with leave of the court. However, any opposing party may require the deponent of the affidavit to attend trial for cross-examination by providing notice of the requirement within 14 days of receiving the affidavit (SCCR 12-5(61)). Such cross-examination is not limited to matters contained in the affidavit (SCCR 12-5(64)). If the cross-examination does not add materially to the evidence, the person requiring the deponent's attendance for cross-examination may be penalized in costs (SCCR 12-5(65)).

Only evidence that might have been given orally at trial (personal knowledge) may be included in the affidavit (SCCR 12-5(63)).

Counsel may find that it is much more efficient to simply subpoena witnesses to attend trial than to negotiate with opposing counsel the admission of affidavit evidence at trial.

(i) Transcripts of Previous Proceedings

Under SCCR 12-5(54), a transcript of sworn evidence from a previous proceeding can be put into evidence, with permission of the court, when the witness is unable to attend or cannot be compelled to attend by subpoena. Reasonable notice of the intention to use such a transcript must be given. Though the previous proceeding need not have involved the same parties, there is substantial jurisprudence surrounding the use of transcripts of previous proceedings, which counsel for a party should refer to before choosing to use this method of proof. See *Seelig v. Schulli Estate* (1992), 73 B.C.L.R. (2d) 279 at 283-4; *Jessen v. Christopherson*, 1994 CanLII 226 (B.C.S.C); *Serdar Estate v. Srdanovic*, 2007 BCSC 223; *Marszalek Estate v. Bishop*, 2007 BCSC 324; *Malik Estate v. State Petroleum Corp*., 2007 BCSC 934.

(j) Admissions in Pleadings

Once a fact is admitted in a pleading (most commonly in the response to civil claim), it is no longer in issue, and therefore it is not necessary for the party relying on the fact to prove it by other means.

Admissions made in pleadings must be expressly made. An allegation in a pleading not expressly admitted or denied is deemed to be outside the knowledge of the responding party (SCCR 3-3(8)).

Once an admission has been made in a pleading, it can *only* be withdrawn by consent or with leave of the court (SCCR 7-7(5)). The provision in SCCR 6-1(1)(a), which permits a party to amend a pleading once without leave of the court before the earlier of the date of service of the notice of trial or the date the case planning conference is held, does not apply in this instance.

(k) Notice to Admit

The important process under SCCR 7-7 for obtaining admissions relating to facts and documents before trial is discussed in §2.08.

Be cautious in making admissions. This is true both with respect to notices to admit but also for agreed statements of facts. Do not make

admissions that permit opposing counsel to avoid having to call a witness who would otherwise have other useful evidence. As well, avoid making admissions on points which your opponent cannot otherwise prove.

(l) Discretionary Power of Court to Allow Proof of Facts

A court may order that evidence of a fact or a document may be presented at trial "in any manner," including evidence on information and belief (hearsay), documents or entries in books, copies of documents or entries in books, or by a publication which contains a statement of fact (SCCR 12-5(71)). SCCR 12-5(71) is designed to give the court considerable scope in admitting evidence; however, the court will read the SCCR subject to the laws of evidence.

SCCR 12-5(71) is particularly useful if counsel wants to use copies of documents. Counsel may want to use a copy if the original is unavailable or where it is inconvenient to use the original. If you want to use a copy of the document rather than the original, the best practice is to obtain the consent of all parties, in order to avoid the necessity of formally applying for an order.

When the parties consent, you should ask the court, out of courtesy, to approve the use of copies. Approval of the court will almost certainly be granted unless the copy is of poor quality. Use of copies of documents is particularly common in cases involving a large number of documents. In such cases, copies of documents are usually placed in three-ring binders and the entire binder or the individual documents in the binder are marked as exhibits.

When making an application under SCCR 12-5(71), it can be useful to refer the court to SCCR 1-3(1): "The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

(m) Expert Reports

This subject is addressed in §5.02(4).

(n) Telephone and Video Conferencing

SCCR 23-5(4) allows a party to apply, or the court to direct, that an application be heard by way of telephone or video conference.

Telephone or video conferencing can be used whenever appropriate, to reduce or avoid movement of witnesses and to speed the progress of cases. Telephone or video conferencing might be used when you have tendered an expert report, and counsel for the opposing party wants to cross-examine your expert. It might be used also to examine and cross-examine a lay witness whose evidence is not particularly controversial. In any given case, the cost advantage of not having the witness travel to the community in which the proceeding is taking place will need to be weighed against any prejudice suffered as a result of not having the witness present in the courtroom for the judge to view live while the witness is being cross-examined, and against any costs associated with video conferencing.

When considering video conferencing, counsel also need to be realistic about present limitations. For example, poor image and sound quality may impair hearing the evidence properly, let alone assessing credibility. As well, it is impossible to put court exhibits to a witness attending by video conferencing.

Telephone and video conferencing is set up through Supreme Court Scheduling, provided a judge has approved the use in the particular proceeding. See Supreme Court Administrative Notice—*Video Conferencing* (AN-6). Requesting parties must complete a Court Videoconference Request Form. The parties must also agree to pay the charges for using the equipment and are responsible for paying any charges associated with booking a private facility. Most courthouses have video conferencing equipment. Many correctional centres in BC also have equipment.

(o) *Voir Dire*

A voir dire is a separate hearing within the trial, generally on the admissibility of evidence. For example, an expert witness may be subject to cross-examination during a *voir dire* on the admissibility of a part or all of their report. In jury trials, a *voir dire* occurs in the absence of the jury.

3. Summary

In summary, while there are alternative methods of proof available which can overcome difficulties in tendering evidence by other methods and potentially render the trial process more efficient, the most compelling evidence remains that of oral testimony from an in-person witness.

[§6.07] Objections

If you object to the form of question asked or the evidence given, you should rise and state, "I object to [this evidence/this form of question] because…." For

example, if the witness is asked to identify a letter written by a non-party and counsel seeks to place the letter in evidence for the truth of its contents, you would say, "I object to this evidence because the letter is hearsay and is being tendered for the truth of its contents."

If you can foresee objectionable evidence prior to the trial, prepare brief submissions and have case authority to support your objection.

[§6.08] Exhibits

When a proper evidentiary foundation has been laid, a document or object may be marked as an exhibit at trial. After the document or object has been shown to opposing counsel, the procedure that counsel follows is to say, "I tender this as the next exhibit" or "I ask that this be marked as an exhibit." Any objection to its admission into evidence must be made at that time.

If the proper evidentiary foundation cannot be laid through the witness, but you want to have the witness comment on the document or object and have it entered through another witness at a later time, you may ask to have the exhibit marked for identification only. The court practice is to use a number to identify exhibits and a letter to identify exhibits marked for identification only. An example of an exhibit marked for identification is a written statement taken by a witness who will be called later to testify, but which requires comment by the present witness. Exhibits on the *voir dire* are marked differently from exhibits marked in the trial proper.

During the trial, keep a list of the exhibits, though the clerk will generally distribute their list from time to time. As well, physically mark your documents with the exhibit numbers or letters as the case may be.

[§6.09] Order of Witnesses

In calling your witnesses, try to call them in a way that leads logically to an explanation of your case. Sometimes, you have to call them out of order to accommodate their schedules. If so, your opening will be important so that the judge or the judge and jury can see where this witness fits in the scheme of your case.

There is a great degree of flexibility in the order in which you call witnesses. It may be that you are unable to call a particular witness during your portion of the case but that opposing counsel will agree to interrupt their case so that you may call that witness then. Do not be reluctant to explore these possibilities with opposing counsel before the case so as to deal with matters effectively and expeditiously. This is in fact the norm, particularly with expert witnesses, even in jury trials.

[§6.10] Re-Examination

After your witness has been cross-examined, you will want to re-examine that witness. You will only be able to re-examine on matters that arise out of the cross-examination but which were not canvassed in any way on direct examination. It is not proper simply to try to restate the evidence already given in direct examination, nor can you lead your witness in re-examination any more than you could in the direct examination.

It may be that at the close of cross-examination you realize that you have overlooked a portion or piece of evidence during the direct examination. If it is important, do not simply let the witness be excused, but raise it with the judge and ask leave of the court to bring that evidence out. Opposing counsel will, of course, have a right to make submissions concerning that, and, should the question be allowed, will have a right to cross-examine.

[§6.11] Reply

At the end of the defendant's case, the plaintiff may have the right to call reply evidence. The rule governing permissible reply evidence is quite restrictive and generally excludes any evidence that a plaintiff should have led in their case. Exceptions include evidence on matters that could not have been reasonably anticipated or evidence in response on issues where the defendant bears the onus of proof. See *Midland Doherty Ltd. v. Zonailo* (1983), 37 B.C.L.R. 329, and *Singh v. Bains*, 2009 BCSC 298, where motions were made to reopen the trial after reasons for judgment had been filed.

[§6.12] Judgments and Orders

Generally, a "judgment" is a decision that finally determines the questions in issue between the parties, while an "order" may or may not have this effect. Judgments and orders, however, are treated identically in the Supreme Court Civil Rules. The procedures for drafting and entering orders are described in §3.05. See also *Supreme Court Chambers Orders—Annotated* (Vancouver: CLEBC, loose-leaf).

Chapter 7

Costs[1]

This chapter discusses costs orders in the Supreme Court, and refers throughout to the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "SCCR"). A rule under the former Rules of Court, B.C. Reg. 221/90, which were in effect until July 1, 2010, is referred to as a "former Rule."

For a review of costs issues under the SCCR, see Christopher J. Hope and Kathryn S. Sainty, QC, *Plus TC&D: The Assessment of Costs and Disbursements in Motor Vehicle Injury Litigation*, 4th ed. (Vancouver: Continuing Legal Education Society of BC, 2020.

[§7.01] Entitlement to Costs

An award of costs is meant to partly compensate the successful party in an action for legal fees, time, and out-of-pocket expenses incurred in pursuing or defending an action. "Costs" include both a fees and a disbursements component.

Clients need to understand from early in the litigation that an award of costs will not indemnify them for all legal fees paid.

The rules governing costs are set out in SCCR 14-1 (for most actions), SCCR 15-1(15) to (17) (for fast track actions), and Appendix B.

1. General Principles

The court's decision to award costs and to decide the level at which they must be paid is in the complete discretion of the court. However, there are some circumstances in which the statute guides the court. One such statute is the *Negligence Act*, R.S.B.C. 1996, c. 333, particularly s. 3(1), which provides that the parties' respective liability for costs is in the same proportion as their respective liability to make good the damage or loss, unless the court otherwise directs.

Another general principle is that "costs follow the event" (SCCR 14-1(9) and s. 23 of the *Court of Appeal Act*). In other words, the unsuccessful party pays the costs of the successful party. The "event" is a matter before the court, be it an application, a trial or an appeal. If an entitlement to costs arises during a proceeding, costs are payable once the proceeding concludes, unless the court orders otherwise (SCCR 14-1(13)).

The general rule that "costs follow the event" was considered in *McLeod Engines Ltd. v. Canadian Diesel Engines Co. Ltd. (No. 2)*, [1951] 1 W.W.R. 803. The "event" must be construed distributively and the determination of any separate issue may be an "event." This interpretation is consistent with SCCR 14-1(15), which provides: "The court may award costs (a) of a proceeding, (b) that relate to some particular application, step or matter in or related to the proceeding, or (c) except so far as they relate to some particular application, step or matter in or related to the proceeding and in awarding those costs the court may fix the amount of costs, including the amount of disbursements."

For further clarification, see *Chaster (Litigation Guardian of) v. LeBlanc*, 2008 BCSC 47, in which the court stated that when assessing whether to award costs under former Rule 57-9) (now SCCR 14-1(9)), the court should (a) consider the "matters in dispute," not just pleaded issues; (b) assess the weight and importance to the parties of the matters in dispute; (c) globally determine the overall winner by reference to the matters in issue; and (d) decide whether there is any reason to deprive the winner of their costs.

2. Specific Principles

(a) Costs in Pre-Trial Applications

Costs that may be awarded in connection with bringing or defending pre-trial applications for non-final orders, sometimes called "interlocutory" applications, are set out in SCCR 14-1(12). For a different opinion see *Gotavarken Energy Systems Ltd. v. Cariboo Pulp & Paper Co*. (1995), 9 B.C.L.R. (3d) 340 (S.C.), in which the court stated that applications under this subrule (former Rule 57(15)) should not be a regular feature of litigation; rather, this subrule should be invoked where there have been discrete issues occupying distinct portions of the action and which can objectively be identified as won or lost. See *Sutherland v. Canada (A.G.)*, 2008 BCCA 27, which sets out the test for apportionment under former Rule 57(15) (now SCCR 14-1(15)).

(b) Costs in Family Matters

As in other civil cases, costs in family law proceedings should follow the event unless the

[1] **Nicholas Peterson** of Collins Peterson LLP revised this chapter, most recently in January 2021 and before that in 2019, 2018, and 2016. Previously revised by Kuldip S. Johal (2013); Joseph Wong (2002–2011); Ian D. Aikenhead, QC, and Joseph Wong (2000); Ian D. Aikenhead, QC (1997); and Gordon Turriff (1997).

court orders otherwise (*Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.)).

(c) Costs to Encourage Settlement

Costs are awarded as indemnity for expenses incurred but also to encourage settlement and to promote sensible conduct in court proceedings. In particular, see SCCR 9-1 regarding the potential cost options that the Supreme Court may consider when one party fails to accept an offer to settle made under that rule.

Clients should be told that, if there is a settlement, it usually means that the parties pay their own costs.

(d) Costs for Unrepresented Litigants

A party need not have incurred an obligation to a lawyer before claiming costs. Specifically, since *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), non-lawyer litigants have been entitled to claim costs not limited to disbursements. Self-represented parties are not entitled to lesser costs than parties represented by a lawyer: *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 979. Nor is a party disentitled to costs solely because the lawyer who represented the party is also an employee of the party (SCCR 14-1(11)).

(e) Costs for Witnesses

Supreme Court Civil Rules relating to costs payable to non-litigants include SCCR 7-5 (pre-trial examination of a witness) and SCCR 7-1(18) and (19) (production of documents from a non-party).

(f) Costs for Matters in Small Claims Jurisdiction

Under SCCR 14-1(10), a plaintiff who recovers an amount within the jurisdiction of the Small Claims Court is not entitled to costs (other than disbursements) "unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders."

Whether there was "sufficient reason" is based on more than a simple comparison between the amount recovered and the monetary jurisdiction of the Small Claims Court. Rather, the court should take into consideration all of the factors leading to the plaintiff's decision to commence the action in Supreme Court to determine if the decision was reasonable. Furthermore, whether there was "sufficient reason" is based on the circumstances at the time the action was commenced; a plaintiff does not have an ongoing obligation to assess the value of the claim (*Reimann v. Aziz*, 2007 BCCA 448) (decided under former Rule 57(10), identical to SCCR 14-1(10)).

In *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2011 BCCA 136, the Court of Appeal confirmed that "sufficient reason" for commencing an action in Supreme Court instead of Small Claims Court is not limited merely to the value of the claim. This is so even if it is apparent when the action is commenced that the claim likely will not exceed the Small Claim Court's monetary jurisdiction. However, in *Gehlen v. Rana*, 2011 BCCA 219, the Court of Appeal stated that while quantum is not the only factor, it is perhaps the most important one in determining sufficient reason. The court also affirmed in that case that "the burden is on the plaintiff to establish eligible circumstances that are persuasive and compelling to justify 'sufficient reason.'"

A plaintiff who is unable to satisfy the court that there was "sufficient reason" is still entitled to disbursements, and those disbursements include all reasonable disbursements incurred in Supreme Court and not merely those disbursements that would have been incurred if the proceeding had been commenced in the Small Claims Court. See *Canaccord Capital Corporation v. Clough*, 2000 BCSC 410.

(g) Costs in Fast Track Proceedings

Subject to SCCR 14-1(10), costs in proceedings under SCCR 15-1 (the fast track litigation rule) are determined in accordance with SCCR 15-1(15), unless the court orders otherwise or the parties consent. When exercising its discretion under SCCR 15-1(15), the court may consider a settlement offer made under SCCR 9-1. For a useful discussion of the interplay between SCCR 15-1(15) costs and SCCR 9-1 offers, see *Johal v. Radek*, 2016 BCSC 1170.

Under SCCR 15-1(15) a party is entitled to $8,000, exclusive of disbursements, if the hearing of trial required one day or less; to $9,500 if it required more than one day but less than two days; and to $11,000 if it required more than two days. According to *Mann v. Klassen*, 2001 BCSC 1275, these amounts are intended to be the costs of the action, not just of the hearing of the trial. However, in *Dogra v. Thakore and ICBC*, 2001 BCSC 1227, the plaintiff was found to be entitled to costs of an application (brought under former Rule 66(7)(b), which has since been repealed) *as well as* costs under former Rule 66(29) (similar wording to SCCR 15-1(15)). In *Gill v. Widjaja*, 2011 BCSC 1822, the court

affirmed the master's decision to cap costs, exclusive of disbursements, of a fast track action that settled before trial at $6,500. SCCR 15-1(15) also permits the court to "otherwise order" a different amount, where special circumstances warrant a departure from the stated costs limits (see *Peacock v. Battel*, 2013 BCSC 1902).

For a case awarding two equal set of costs for two fast track actions ordered heard together for the purpose of trial, see *Wang v. Dhaliwal*, 2014 BCSC 1662. In *Wang*, the court awarded $6,500 (plus taxes) for each action when the cases jointly settled. The court's discretion to apportion costs between the two actions pursuant to Rule 14-1(15) remains.

Taxes are payable on costs awarded under SCCR 15-1(15) (SCCR 15-1(17)).

It is important to note that under the SCCR if "the only relief granted in the action is one or more of money, real property, a builder's lien and personal property" and the plaintiff recovers a judgment of $100,000 or less (not including interest or costs), *or* the trial of the action was completed in three days or less, costs will be assessed under SCCR 15-1(15) to (17) (even if a notice of fast track action was not filed), unless otherwise ordered by the court: SCCR 14-1(1)(f).

3. Orders

Some of the typical orders relating to costs, and their effects, are as follows:

(a) Judgment with costs

The party in whose favour judgment is given will have the assessed costs of the proceeding.

(b) No order as to costs

Neither party receives any costs (each party bears their own costs).

(c) Costs thrown away

When one party has forced another party to take a wasted step in the proceeding, or when a party successfully applies to set aside a judgment or order (e.g. a default judgment) properly obtained by the other party, the application may be granted on terms that the party seeking the order pay the costs unnecessarily incurred (or "thrown away") by the other party.

(d) Costs in the cause

The costs of an application will be recoverable by the party who succeeds at the end of the action.

(e) Plaintiff's [defendant's] costs in the cause

The party who is awarded costs after the hearing or trial will recover the costs relating to the interlocutory application in question, but will not recover them if not successful.

(f) Costs in any event

Costs in any event is also sometimes phrased as "costs in any event of the cause."

On an interlocutory (pre-trial) application, the party to whom such costs are awarded will have those interlocutory costs, no matter who succeeds in the action. However, costs awarded on this basis typically are assessed once the entire proceeding has concluded.

(g) Costs payable forthwith

In limited circumstances the party to whom interlocutory costs are awarded may have the interlocutory costs assessed immediately (i.e. before the final outcome of the proceeding has been determined). Unless an interlocutory order states that costs are payable forthwith, they can usually only be assessed at the end of the entire proceeding (SCCR 14-1(13)). For a review of the cases that consider this principle see *Parkin v. MacMillan* (1991), 49 C.P.C. (2d) 83 (B.C.S.C.).

When costs are awarded, they are usually awarded as ordinary costs. Under SCCR 14-1(1), costs are payable as ordinary costs unless the circumstances in SCCR 14-1(1)(a) to (f) exist. Ordinary costs are assessed in accordance with Appendix B of the SCCR.

The court may fix a lump sum for the costs of part or an entire proceeding (SCCR 14-1(15)).

The court may order costs on applications by fixing a lump sum, either inclusive or exclusive of disbursements (SCCR 14-1(15)).

If anything is done or omitted improperly or unnecessarily by a party, the judge or registrar may disallow any costs in connection with that act or omission and may order costs to the other party arising from that act or omission (SCCR 14-1(14)).

By SCCR 14-1(33), where the court considers that the lawyer for a party has caused costs to be incurred without reasonable cause or has caused costs through delay, neglect or some other fault, the court has the power to:

(a) disallow any fees and disbursements between the lawyer and the client;

(b) order the lawyer to indemnify the client for any costs ordered against that client in favour of another party;

(c) order that the lawyer is personally liable for all or any part of the costs that their client was ordered to pay to another party; or

(d) make any other order that "will further the object of these Supreme Court Civil Rules."

The court has the power to make some or all of the orders described above. But before the court makes such an order, the lawyer is entitled to be present or have notice (SCCR 14-1(35)).

Wasted cost orders of this kind are intended as compensation, not punishment. The Supreme Court of Canada reaffirmed this principle in *Young v. Young* (1993), 84 B.C.L.R. (2d) 1. Lawyers may be punished with costs if they have acted in bad faith, that is, contemptuously, by encouraging abuse and delay. But courts must be "extremely cautious" about awarding costs personally against lawyers because of the lawyers' duties "to guard confidentiality of instructions and to bring forward with courage even unpopular causes."

When the court makes an order under SCCR 14-1(33), the court may direct the registrar to conduct an inquiry and file a report with recommendations as to the amount of costs (SCCR 14-1(34)(a)), or the court may fix the costs "with or without reference to the tariff in Appendix B" (SCCR 14-1(34)(b)); but that amount is limited to $1,000 in respect of the costs of an application (SCCR 14-1(37)).

It is important that the question of costs be dealt with at the trial or hearing, or else be specifically reserved to be spoken to later. As well, the judgment of the court about costs must be included in the final order that is entered. If costs are not referred to in the final order, the proceeding will be treated as if the court had expressly made no order as to costs. See *Chernoff v. ICBC* (1992), 12 C.P.C. (3d) 220, and *Maurice v. Maurice* (1994), 100 B.C. L.R. (2d) 291.

A party may apply to the court for an order for costs before the court's formal order is entered. But after the order is entered, a party may only apply under SCCR 13-1(17) for an order for costs on the ground that costs should have been, but were not, adjudicated upon.

When the court makes an order that provides for costs, but does not fix the scale of costs (see §7.02), and the order is entered, the court is *functus officio* with respect to the *scale* of costs and costs must be assessed under scale B (*Maharaj v. ICBC* (1991), 48 C.P.C. (2d) 53 (B.C.S.C.)).

At any time before the registrar issues the certificate under SCCR 14-1(27), any party may apply under SCCR 14-1(7) to the judge who made the order for costs for a direction that any item of costs, charges or disbursements be allowed or disallowed and the registrar must follow that direction.

The Continuing Legal Education Society of BC's manual *Practice Before the Registrar* addresses most issues that arise on an assessment of costs. For cases, see also the annual article entitled "Costs" in CLEBC's *Annual Review of Law and Practice*. See also the *Registrar's Newsletter* on the Supreme Court website.

[§7.02] Ordinary Costs

The determination of ordinary costs is a two-step procedure: fixing the scale to be applied and having the registrar assess the bill of costs.

1. Scale of Costs

Effective January 1, 2007, Appendix B was amended so that scales A, B and C replaced former scales 1 to 5. As with the former scales, each of these scales fixes a dollar value per unit upon which the items in the tariff are assessed: A is $60 per unit, B is $110 per unit and C is $170 per unit. Scale A is to be used for matters of "little or less than ordinary difficulty" and scale C is for matters of "more than ordinary" difficulty. In the absence of a court order or agreement otherwise, scale B applies. Scale B is for matters of ordinary difficulty.

When fixing the scale, the court may take into account the following:

(a) the difficulty of the issue of law or fact;

(b) the importance of the question to a class or body of persons; and

(c) whether the decision effectively determines the issue between the parties (beyond the relief actually granted or denied).

See *Mowatt v. Clark*, 2000 BCSC 432 for a consideration of various factors used to determine the "difficulty" of a matter as referred to in s. 2(2) of Appendix B.

The court may also order an increased unit value under s. 2(5) of Appendix B (called "costs with the uplift"). For recent application of this type of award, see *Johnson v. Heer*, 2020 BCSC 1751, where the court awarded such costs consequences against a defendant in a personal injury claim who

was found to have forced the plaintiff to trial, given the defendant's quantum submission at trial was higher than the plaintiff's pre-trial offer to settle.

2. Assessment by the Registrar

The second step in determining ordinary costs is the assessment of the bill of costs by the registrar. The procedure for the assessment is relatively straightforward.

A bill for ordinary costs must be drawn up in Form 62. However, counsel should use Form 63 if the bill of costs pertains to a default judgment under SCCR 3-8 (SCCR 14-1(20)). The bill should set out the scale of costs awarded or agreed and an itemized list of the applicable items from the tariff in Appendix B and the number of units claimed for each of them. The bill should include taxes on fees and should also include a list of claimed disbursements (and taxes on these). For guidance in drawing and issuing bills of costs, see *Practice Before the Registrar*.

Send a draft bill to the lawyer for the party against whom costs are to be assessed, with a request for consent. If the amount claimed in the bill is accepted, the bill may be delivered to the registry, with a copy of the order authorizing the assessment of costs and a requisition requesting a registrar's certificate to be issued without a formal assessment. The registrar may then issue a certificate in Form 64 without an appointment (SCCR 14-1(27)).

If there is no consent, the party seeking a costs assessment must obtain an appointment from the registrar in Form 49, and serve a copy of the appointment, together with the bill of costs and any affidavit in support, to the party against whom the costs are to be assessed and to every other person whose interest may be affected (SCCR 14-1(25)). The lawyer must give five days' notice (SCCR 14-1(21)(c)).

The lawyer seeking the assessment must attach a copy of the bill to be assessed to the appointment and on the face of the appointment should refer to the order or SCCR on which the lawyer is relying. It is preferable to attach a copy of the order, but counsel should, in any event, be ready to produce the order on the hearing whether the assessment is contested or not.

An assessment may be conducted by telephone "or other communication medium" in case of urgency (SCCR 23-5(3)).

Either party may make an offer to settle a bill of costs, for a specified amount, in Form 123 (Appendix B, s. 8).

A different procedure applies to default judgments, for which costs may be fixed without an appointment (SCCR 14-1(26)).

While several items of the tariff have minimum and maximum units, many have *fixed* units. For example, under item 34, "Preparation for trial," the party entitled to costs is allowed five units for each day of trial where the trial is commenced; but no more than five units may be allowed under item 34 (formerly item 24) for preparation for a trial that does not take place (*Wong v. Leung* (1998), 20 C.P.C. (4th) 159 (B.C.S.C.) and *Ebrahimi v. Stevenson*, 2006 BCSC 983). Under item 31, "Process relating to entry of an order," counsel is allowed one unit. Appendix B also sets amounts to be allowed as costs on default of appearance or pleading, and in matters of execution and garnishment. Many of the fixed unit values allow a certain number of units per day.

Under item 36, up to 10 units may be allowed for "written argument." This is 10 units for all written argument prepared over the course of the action, not up to 10 units for each written argument (*Brar v. British Columbia Medical Association*, 2008 BCSC 1108) (decided under former item 26).

When items in the tariff have maximum and minimum units, the number of units allowed will be based on how much time a reasonably competent lawyer should have spend on the work for which costs are claimed (see *Elder v. Stewart*, 2007 BCSC 73). The registrar must also compare the complexity and difficulty of the case at bar with other cases that come before the court (see *Laxton v. Coglon*, 2009 BCSC 1544).

The units for each item are totalled and multiplied by the fee rate determined by the applicable scale (i.e. scale A, B or C). After calculating an allowance for the tariff items, the disbursements are assessed and the disbursements reasonably incurred and reasonable in amount will be allowed.

An item will be reduced under s. 4 of Appendix B if the lawyer spent less than two and a half hours during a day on the item, or increased if the lawyer spent more than five hours during the day on the item. Section 4(4) of Appendix B also provides that for any tariff items for which preparation for an activity may be claimed, the registrar may allow units (up to the maximum allowable for one day) for preparation for the activity that does not take place or is adjourned.

Counsel must be able to satisfy the registrar that the work for which the costs are claimed was necessary or proper (SCCR 14-1(2)) and that the expenses and disbursements were necessary or proper. The registrar must allow a reasonable amount for those expenses and disbursements if counsel satisfies the

requirements (SCCR 14-1(5)). The test for assessing the propriety of a disbursement is whether it was proper "in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred" (*Van Daele v. Van Daele*, [1983] B.C.J. No. 14 (C.A.)). "A 'necessary' disbursement is one which is essential to conduct the litigation. A 'proper' disbursement is one which is not 'necessary' but is reasonably incurred for the purposes of the proceeding" (*McKenzie v. Darke*, 2003 BCSC 138). In *MacKenzie v. Rogalasky*, 2014 BCCA 446 at para. 80, the Court of Appeal confirmed the requisite connection required between the expense and the litigation to warrant recovery: "To be recoverable a disbursement must arise directly from the exigencies of the proceeding and relate directly to the management and proof of allegations, facts and issues in litigation, not from other sources." See also *Turner v. Whittaker*, 2013 BCSC 712 at para. 5, for a concise summary of the legal principles applicable to the court's assessment of disbursements.

Counsel should also be aware of recent legislative changes affecting the ability to recover disbursements in motor vehicle injury cases. Recent regulations made under the *Evidence Act*, R.S.B.C. 1996, c. 124, place limits on the monetary amounts payable to a party for disbursements related to motor vehicle injury litigation in Supreme Court ($3,000 per expert report, with total recoverable disbursements limited to 6% of the overall judgment or settlement amount). The regulations therefore expressly restrict a litigant's ability to recover excess disbursement expenses incurred, subject to the exercise of judicial discretion.

The onus rests with the party presenting a bill of costs for assessment to prove entitlement to all the items and to all the disbursements listed on the bill (*Holzapfel v. Matheusik* (1987), 14 B.C.L.R. (2d) 135). The decision should be read in the context of SCCR 14-1(2) and (5). These SCCR give the registrar a broad discretion to allow costs, but unless the party presenting the bill (and, if necessary, the party or parties objecting to it) leads this evidence, the registrar has no means by which to exercise the discretion. Often there is no evidence to support items or disbursements. In the absence of evidence, and where there is dispute, the registrar—applying *Holzapfel*—disallows the costs claimed. Any other approach would require the registrar to exercise the discretion in an arbitrary way. The form and degree of proof will depend on the nature of the objections by the paying party, but unless the facts can be agreed, affidavit or oral evidence will be required from the lawyer responsible for the work done and the outlays made. While what is sufficient evidence is a matter for the registrar, an affidavit of justification is an indispensable requirement where a disbursement is at issue (see *Wheeldon v. Magee*, 2010 BCSC 491). In the interests of justice, a lawyer can be granted leave to speak to the lawyer's own affidavit of justification: see *Antulov v. Emery*, 2018 BCSC 898 at para. 5.

The costs assessed against the unsuccessful party will be the total of the fees and disbursements, including applicable taxes (SCCR 14-1(8)). This amount should be set out in a certificate of costs to be signed by the registrar on the conclusion of the assessment. The certificate may be endorsed on the original bill of costs, or may be a separate certificate in Form 64. The party assessing costs is under an obligation to file the certificate after the conclusion of the assessment (SCCR 14-1(27)).

When a party is dissatisfied with the decision of the registrar on an assessment, the dissatisfied party may apply to the court for a review of the assessment within 14 days after the registrar has certified the costs (SCCR 14-1(29)).

[§7.03] Increased Costs

On July 1, 2002, the mechanism by which a court could make an order for "increased costs" was repealed. Until then, a court had the power to order increased costs if an award of ordinary costs would produce an unjust result.

However, as of January 1, 2007, s. 2(4.1) (now s. 2(5)) of Appendix B allows a court to order that the value of units be set at 1.5 times the value that would otherwise apply if, after fixing the scale of costs applicable to a proceeding, the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust. According to subsection 2(6) of Appendix B, an award of costs is not to be considered grossly inadequate or unjust merely because of the disparity between the actual legal expenses and the cost that would be fixed under scales A, B or C. While special costs are reserved for, but limited to, such things as misconduct deserving of reproof or rebuke, the Court of Appeal in *Gichuru v. Purewal*, 2018 BCCA 267 at para. 17 reiterated that "increased costs at Scale C cannot be used to punish a party for improper conduct."

[§7.04] Special Costs

"Special costs" replaced the former "solicitor and client costs." In *Garcia v. Crestbrook Forest Industries* (1994), 9 B.C.L.R. (3d) 242 (C.A.), Lambert J.A. states that these costs will be awarded when the litigation involves reprehensible conduct: "… it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as 'reprehensible.'" As Chief Justice Esson said in *Leung*

v. Leung (1993), 77 B.C.L.R. (2d) 314, "'reprehensible' is a word of wide meaning" which encompasses scandalous or outrageous conduct but also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs. As stated in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, special costs may be deemed appropriate where a party:

- pursues a meritless claim and is reckless with regard to the truth;
- makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- made the resolution of an issue far more difficult than it should have been;
- is in a financially superior position to the other and brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- brings a proceeding for an improper motive;
- maintains unfounded allegations of fraud or dishonesty; or
- pursues claims frivolously or without foundation.

The Supreme Court Civil Rules do not provide authority for the court to award *double* special costs: *Wang v. Shao*, 2018 BCSC 790.

In the contingency fee context, see *Norris v. Burgess*, 2016 BCSC 1451 where the court ordered ICBC, on behalf of the defendant, to pay the plaintiff the entire contingency fee payable to her counsel (rather than units for special costs) on account of late disclosure of video surveillance contrary to an earlier court order and disclosure obligations.

A bill for special costs is presented in the same form as a bill between a lawyer and the lawyer's own client under the *Legal Profession Act*, and the registrar's assessment of special costs proceeds in a manner similar to a registrar's review of a bill under the *Legal Profession Act*. A court order may require the assessment of a party's special or "reasonable" costs. Supreme Court Civil Rule 14-1(3) provides that special costs will be those fees that the registrar considers were proper or reasonably necessary, judged objectively, to conduct the proceeding. Expert opinion is sometimes needed to address the issue of reasonableness. *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.) is the leading authority on special costs, and a thorough discussion may also be found in *Sarkodee-Ado v. Sarkodee-Ado*, 2003 BCSC 950.

When exercising discretion, the registrar must consider "all of the circumstances," including those listed in SCCR 14-1(3)(b)(i) to (viii).

A bill for special costs may be rendered on a lump sum basis, provided that the bill contains a description of the nature of the services that, in the opinion of the registrar, would afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

[§7.05] Interest on Costs and Disbursements

Unless ordered otherwise, postjudgment interest is payable on the costs from the date of the judgment in which the costs were awarded and not from the date of the assessment or the registrar's certificate (*Syed v. Randhawa* (1996), 24 B.C.L.R. (3d) 164 (S.C.)).

Prejudgment interest is prohibited on costs (*Court Order Interest Act*, R.S.B.C. 1996, s. 2(c)). However, in *Gill v. Fowler*, 2016 BCSC 1163, where the earlier mediated settlement between the parties included settlement of damages "plus costs," the court ordered *postjudgment* interest on costs and disbursements from the date of *mediated settlement* up to the date of the costs' assessment hearing.

Previously there was authority in British Columbia (and elsewhere in Canada) permitting the recovery, as a disbursement, of interest paid to fund disbursements incurred in the course of litigation. However, the Court of Appeal has ruled that interest incurred to finance disbursements is not recoverable as a disbursement under SCCR 14-1(5) (*MacKenzie v. Rogalasky*, 2014 BCCA 446, leave to appeal refused, [2015] S.C.C.A. No. 24).

Chapter 8

Interest[1]

[§8.01] Court Order Interest

1. Introduction

The governing principle of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 is that interest on pecuniary judgments is to be awarded to the successful litigant as compensation for the loss of the use of the money. This basic principle is easier to state than to apply, however, and this has resulted in a series of inconsistent decisions.

Under the *Court Order Interest Act*, only simple interest is provided for. Compound interest, or interest on interest, is expressly prohibited (s. 2(c) and s. 7). The Supreme Court of Canada has noted "[t]here is no doubt that compound interest is a more accurate way of compensating parties for the time-value of money. … However, the legislature has not yet amended the [Act] remove the prohibition of interest on interest, so simple interest, despite its flaws, remains the rule in British Columbia courts" (see *British Columbia (Forests) v. Teal Cedar Products Ltd.*, 2013 SCC 51 at paras. 8–10).

This chapter focusses on the awarding of interest on pecuniary judgments. For a discussion of interest on costs specifically, see §7.05.

In addition to applying to the BC Provincial Court and Supreme Court, the *Court Order Interest Act* applies to the Civil Resolution Tribunal as if it were a court (s. 48(3) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25).

2. Prejudgment Interest

Section 1(1) of the *Court Order Interest Act* requires a court to add prejudgment interest to a pecuniary judgment from the date on which the cause of action arose to the date of the order.

While a court has discretion as to the rate to be paid for prejudgment interest, courts generally award prejudgment interest "at the Registrar's rates as varied from time to time." District Registrars set the rates for the calculation of prejudgment interest; computer software packages are available to help lawyers make the calculations. The rates are available on the BC Supreme Court website.

The *Court Order Interest Act* distinguishes between pecuniary or general damages and special damages for the purpose of when prejudgment interest is calculated. Special damages include "out-of-pocket" expenses, whereas general damages encompass all other damages. Interest on special damages is calculated at the conclusion of each six-month interval in which the loss was incurred (s. 1(2)). On the other hand, under s. 1(1), general damages attract interest from the date the cause of action arose. Note that despite s. 1(1), no prejudgment interest is awarded on parts of an order that represent nonpecuniary damages arising from personal injury or death (s. 2(e)).

It can be difficult to determine whether a particular item of damages should be classified as general or special. Clearly damages for pain and suffering are general; damages for medical expenses clearly are special. By contrast, other types of damages, such as wage loss prior to the date of trial, are not easily classified.

The majority of cases treat past loss of income as special damages (see e.g. *Baart v. Kumar* (1985), 66 B.C.L.R. 61 (C.A.)). An acceptable alternative approach treats past income loss as general damages, and reduces the interest rate to reflect the fact that not all lost income accrued from the date of the accident (*Andrews v. Farrell Estates*, [1984] B.C.D. Civ. 3375-01 (C.A.)).

Section 2(a) of the *Court Order Interest Act* provides that no interest is to be awarded on future losses (on that part of an order that represents pecuniary loss arising after the date of the order).

The court cannot order interest if the parties have already agreed on interest or if the judgment creditor has waived the right to interest (ss. 2(b) and 2(d)). No prejudgment interest is awarded on interest or costs (s. 2(c)) (see also §7.05). In addition, interest is awarded only on the sum that the defendant must pay to the plaintiff after taking into account all proper discounts, such as the payment of no-fault benefits in a motor vehicle accident claim (*Ammerlaan v. Drummond* (1982), 36 B.C.L.R. 155 (S.C.)).

A defendant may make interim payments to a plaintiff on account of damages and will often do so where liability is not seriously contested. It is well established that when such voluntary payments are made, prejudgment interest is calculated on the declining balance of the liability as subsequently determined by the court.

[1] **Nicholas Peterson** of Collins Peterson LLP reviewed this chapter in January 2021, and previously revised it in 2019, 2018 and 2016.

3. Postjudgment Interest

Section 7 of the *Court Order Interest Act* provides that pecuniary judgments will bear interest at an annual rate that is equal to the prime lending rate of the banker to the government of Canada. The governing rates will be set on January 1 and July 1 of each year, and those rates will prevail for the ensuing six months.

Under s. 8 of the *Court Order Interest Act*, the court has the power to vary the rate of interest or fix a different date from which interest is to be calculated.

4. Default Judgments

Under s. 3 of the *Court Order Interest Act*, where judgment is obtained by default, the registrar of the court is entitled to add prejudgment interest to the award. Unless the date the cause of action arose is set out in the writ or statement of claim, however, the registrar will award interest only from the date the writ was filed (*Allen v. The New Naked Spud Drive-In Ltd.* (1980), 18 C.P.C. 251).

Chapter 9

Collections[1]

[§9.01] Law and Practice

1. Scope of Materials

In this chapter we provide a brief outline of collections practice in British Columbia. The emphasis here is on the remedies of the unsecured creditor *after* judgment. Civil procedure *before* judgment is detailed in earlier chapters of the *Practice Material: Civil*. The rights of secured creditors are considered in this chapter only in the context of priority rights between secured and unsecured creditors; other information on secured creditors appears in Chapter 3 of the *Practice Material: Business: Commercial*. In addition, collection remedies in family law are dealt with in the *Practice Material: Family*, and builders liens are covered in Chapter 8 of the *Practice Material: Real Estate*. Bankruptcy law is beyond the scope of the *Practice Material*.

2. Harmonizing the Law

Collections law has been codified to a great extent by legislatures across Canada to ensure harmonization of the legal recovery process. This allows creditors to have uniform lending and recovery processes across Canada, and ensures that there are reciprocal enforcement procedures should debtors move assets to other jurisdictions.

3. Upcoming Change: *Enforcement of Money Judgments Act*

The *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 is currently the governing statute for the enforcement of judgments and other creditor remedies in British Columbia. However, the British Columbia legislature is creating a new statute called the *Enforcement of Money Judgments Act*, which will replace the *Court Order Enforcement Act* and bring sweeping new changes to the law of creditor remedies in British Columbia. The new Act is expected to be presented as a bill in 2022. If passed, it is expected to streamline many aspects of the current seizure, garnishing and debtor examination rules in British Columbia. Among other things, the *Enforcement of Money Judgments Act* would:

- expand the items that are exempt from seizure;
- impose a "reasonability" test on all seizures;
- eliminate the need to apply to court multiple times for garnishing orders against wages; and
- refine the rules regarding seizure of shares in private companies.

The new Act will be based on the *Enforcement of Civil Judgments Act* adopted by the Uniform Law Conference of Canada, and on recommendations by the British Columbia Law Institute.

4. Court Rules

Practice in the Supreme Court of British Columbia is governed by the Supreme Court Civil Rules (the "SCCR"). Practice in Small Claims Court is governed by the Small Claims Rules.

Both the SCCR and the Small Claims Rules contain extensive procedural processes for recovery of judgments, which supplement the *Court Order Enforcement Act*.

[§9.02] Source Material

1. References

A basic text for Canadian collections law is C.R.B. Dunlop's *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1994). For British Columbia practitioners there is Lyman R. Robinson, QC's *British Columbia Debtor-Creditor Law and Precedents* (Toronto: Carswell, loose-leaf). Also useful is William D. Holder and John C. Fiddick's *Annotated British Columbia Court Order Enforcement Act* (Toronto: Canada Law Book).

The Continuing Legal Education Society of British Columbia publishes *British Columbia Creditors' Remedies—An Annotated Guide*, a comprehensive loose-leaf guide. Consult the CLE website at www.cle.bc.ca for other recent publications.

Over the years, the British Columbia Law Institute has produced several working papers and reports on debtor-creditor law; a list of all reports can be obtained from the Institute or through their website at www.bcli.org.

2. Statutes

Several provincial and federal statutes are important in collections law. These are the most important British Columbia statutes:

[1] **Kent Wiebe** and **Iman Hosseini**, Wiebe Wittmann Robertson LLP, kindly revised this chapter in November 2020 and previously in 2017 and 2018. Previously revised by Tanveer Siddiqui (2014); Robert A. Finlay (2010, 2012 and 2013); John C. Fiddick (2004–2008); Stella D. Frame (1997, 1998, 2000, 2002 and 2003); Cynthia Callison (2002, with commentary on the impact of the *Indian Act*); Kenneth M. Duke (2001); and Peter J. Reardon (1996). Prepared for PLTC by Allan A. Parker, QC, in 1988 and revised annually by the author to 1996.

(a) *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28—provides for enforcement of foreign judgments and arbitral awards.

(b) *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78—provides substantive and procedural law for garnishment, registering foreign judgments, and postjudgment execution against real and personal property. (As noted earlier in this chapter, this Act will be replaced by the *Enforcement of Money Judgments Act*, which is expected to be in bill form in 2022).

(c) *Court Order Interest Act*, R.S.B.C. 1996, c. 79—provides for prejudgment and postjudgment interest to be added to most creditor claims.

(d) *Creditor Assistance Act*, R.S.B.C. 1996, c. 83—modifies the common law to provide for equal sharing of execution proceeds among some judgment creditors.

(e) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2—provides for licensing collection agents and bailiffs. It limits debt collection tactics by all creditors, and regulates the collection and use of consumer credit information relating to debt.

(f) *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29—allows most judgments of a court or tribunal of a Canadian province or territory to be registered simply by paying a fee, filing a certified copy of the judgment, and providing material required by the SCCR (SCCR 19-2). The Act is not limited to monetary judgments. (See §9.06 for more.)

(g) *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155—provides for conversion dates of claims in foreign money amounts.

(h) *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163—provides a remedy for creditors if a debtor disposes of property in order to frustrate judgment execution.

(i) *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164—gives a remedy to creditors of an insolvent debtor who has preferred one creditor over another by transferring property to the preferred creditor to prejudice the other creditor.

(j) *Indian Act*, R.S.C. 1985, c. I-5—under s. 89(1), on-reserve real or personal property of an Indian or Indian Band (within the meaning of the *Indian Act*) is not subject to charges, pledges, mortgages, attachments, levies, seizures, distress or execution when the creditor is not an Indian or Indian Band. This is subject to some limitations. For instance, a creditor who has rights in a chattel under a conditional sales agreement may execute against the chattel even if it is on reserve (s. 89(2)). Other creditors may be able to pursue assets or chattels off reserve.

An Indian Band can enforce a debt or seize the on-reserve property of an Indian, including the on-reserve property of its own members, and an Indian may enforce a debt, commence garnishment proceedings, obtain execution against assets, or seize the on-reserve property of another Indian. The creditor must be a registered Indian or status Indian (entitled to be registered), but does not have to be a member of the same Band as the debtor (*Campbell v. Sandy*, [1956] 4 D.L.R. (2d) 754 (Ont. Co. Crt.)).

(k) *Law and Equity Act*, R.S.B.C. 1996, c. 253—says that all English law in effect before November 19, 1858 is the law in British Columbia (except where modified by the legislature) (s. 2). It establishes that rules of equity prevail over the common law (s. 44). It contains several substantive rules relevant to collections law, including relief from forfeiture (s. 24), relief from acceleration (s. 25), conditions under which writs of execution do not attach property (s. 35), assigning debts (s. 36), appointing receivers and issuing injunctions on interlocutory (pre-trial) applications (s. 39), proceedings against jointly and severally liable parties (s. 53), recovering property other than land (s. 57), and contracts that must be in writing to be enforceable (s. 59).

Of these statutes, the *Court Order Enforcement Act* and the SCCR govern the vast majority of recovery efforts, while the other statutes address discrete issues in the debtor-creditor relationship.

[§9.03] Opening a New File

1. Managing Client Expectations

The many principles for client relations covered in the *Practice Material: Professionalism* apply to collections clients, whether creditors or debtors. It is important at the outset to clarify client objectives, conflicts, fees, and any retainer conditions. See "Collections Procedure" in the Law Society's *Practice Checklists Manual* found on the website (www.lawsociety.bc.ca).

Creditors generally want to collect as much of their debt as possible, as quickly as possible, for the minimum legal cost. The reality of collections is that these goals may not be achieved easily.

When acting for a creditor it is important to be aware, at all times, of the value of the judgment in relation to the cost of the work being done. The escalating cost of legal services can quickly consume the value of the judgment and make the work eco-

nomically unfeasible. Also, clients need to understand that they may be among other creditors pursuing the same debtor. In that case, a creditor's monetary recovery may be limited if the debtor's assets end up being shared among creditors. Unsecured creditors may recover nothing if the debtor is petitioned into bankruptcy or receivership, so that other (secured) creditors recover first. Advising clients of those possibilities and keeping them aware of the costs throughout the legal process ensures that they are not surprised with the outcome.

When acting for a debtor, it is important to obtain a retainer (so as not to become the next creditor) and to communicate with the debtor regarding the merits (or lack of merits) of any defence, as soon as possible. Note that lawyers must not counsel debtors on how to defeat lawful execution against their assets. *BC Code* rule 3.2-7 says that a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

It is vital that clients understand the process and that they be given a realistic assessment of their situation. Clients who face paying an unexpected legal bill for unsuccessful collection efforts will be unsatisfied. Cost-effectiveness, efficiency and practicality are key to a successful collections practice.

2. Information Required

The lawyer needs to obtain complete information about the creditor-client, the other side, and the cause of action, as soon as possible. The lawyer needs to question the client thoroughly for details and to obtain copies of all relevant client documents (for example, credit applications, debt instruments, account ledgers, and correspondence). The lawyer should be satisfied that credit agreement documentation is consistent with account records, and there is a legally enforceable contract.

Sophisticated clients may be told how to carry out some or all of these preliminary investigations in order to minimize costs. With high-volume clients, standardized instruction forms are often used to ensure that all relevant information is provided in written form.

Where the client or debtor are corporations, the lawyer should always obtain searches of both the debtor and the client to ensure they are active and valid companies, and to determine whether there are other secured creditors that could assert a priority interest in the assets.

If a creditor has taken a secured interest in the debtor's assets, the lawyer should obtain a current search of the Personal Property Registry immediately on accepting the retainer, to verify that the security is valid and enforceable.

Where the creditor is claiming an interest in land, a preliminary search of the Land Title Office will be necessary to obtain the legal information necessary to assert the claim and determine legal ownership.

Records from credit bureaus or reporting agencies pertaining to the debtor might be available, although under the *Business Practices and Consumer Protection Act*, s. 107, a creditor must have the debtor's consent (in the credit application or elsewhere) to obtain the debtor's credit file.

Following judgment against a debtor, a creditor may obtain motor vehicle registration information from the Insurance Corporation of British Columbia pertaining to that debtor. Skip-tracing services may be used to locate debtors whose whereabouts are unknown.

If a creditor has reason to suspect that the debtor is insolvent or has declared bankruptcy, a search may be conducted of the Bankruptcy and Insolvency Records Search database maintained by the Office of the Superintendent of Bankruptcy Canada.

3. Assessment of the Action

When assessing the action, the lawyer must review carefully all the information they have gathered and consider the applicable law. The applicable law may go beyond routine collections procedures and include the common law of contract or consumer-oriented statute law.

In some cases it may be appropriate to render an opinion on the validity and enforceability of a client's debt or security instruments. This is a standard preliminary step in most enforcement actions related to security under the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for example. This is a specialized area of practice, particularly in relation to competing security interests. Before tendering such an opinion, take care to fully understand the *Personal Property Security Act* and its implications for certain classes of creditors and debts.

A review of all potential issues that may arise in a collection action is beyond the scope of this chapter. These are a few of the many important subjects not covered in any detail here:

(a) applicability of seize or sue laws when dealing with consumer goods:

- where the debtor is a consumer and the creditor has a secured interest in the debtor's assets, then if the creditor elects to seize the assets it may be precluded from pursuing the debtor in court;

(b) limits on seizure of consumer assets:

- if a consumer has paid more than 2/3 of the principal debt, then a creditor may not be

entitled to seize the asset, despite having a security interest;

(c) joint and several liability of defendants, and the doctrine of merger;

(d) indemnifiers, insurers, sureties or guarantors;

(e) common law and equitable defences;

(f) statutory or common law counterclaims;

(g) applicability of the *Infants Act*; and

(h) applicability of s. 89 of the *Indian Act*.

4. Contingency Fees

While contingency fee arrangements (no fees if no recovery) may be attractive to creditor clients, before entering into a contingency fee agreement for a collections matter, you should consider several factors:

(a) the history of the relationship between the law firm and the client;

(b) the credit-worthiness of the client;

(c) the exigible assets of the debtor;

(d) the claims from competing creditors and priorities; and

(e) the likelihood of a bankruptcy of the debtor;

(f) the length of time to obtain a recovery; and

(g) the risk of non-recovery.

Essentially, you must analyze the economic risks compared to the potential rewards of a particular contingency fee arrangement.

It is unusual for lawyers to agree to work on contingency in debtor-creditor files, since the outcome is so uncertain. It is impossible to predict what the debtor's financial situation will be by the time judgment is obtained, how many other creditors will be asserting claims against the debtor's assets at that time, and where they will rank in priority to your client's claim.

5. Demanding Payment

(a) Making the Demand

It is standard practice for a lawyer acting for a creditor to issue a demand letter for payment before commencing legal action. This letter usually contains these elements:

(i) the essence of the client's claim;

(ii) the nature of the default;

(iii) the interest rate (if applicable) charged;

(iv) the terms for resolution (for example, payment in full, or otherwise);

(v) directions for reply (usually to the lawyer); and

(vi) a specific deadline for reply.

A demand letter puts the other side on notice that a lawyer is involved, and demonstrates that the client "means business." This is a double-edged sword: clients should be aware that in terms of escalating action, there is nowhere to go once a lawyer sends a legal demand, and they run the risk of losing credibility with the debtor if they do not commence the promised legal action when the demand is not met.

Generally there should be a demand for payment sent by the client before a lawyer is engaged to send a final demand.

Settlement is almost always preferable to litigation, but even if settlement is not achieved, offering to settle in a demand letter can be useful. Send the demand letter by registered mail. The debtor's signed receipt of the demand letter may help if the debtor later evades service and an order for substituted service (also called "alternative service") becomes necessary. Also, the debtor's failure to accept the settlement offer might result in higher court costs being awarded later, pursuant to SCCR 15-1(16). The response may also reveal what defences (if any) the debtor relies on. An inappropriate response or no response will, at least, confirm the need for legal action. If the creditor offers to settle for less than the total amount owed, that offer should be made without prejudice and in separate correspondence.

When there is a contract, the lawyer should read it carefully to determine whether a demand is contractually required. If it is, does the contract specify the proper form for the demand, the prescribed method of service of the demand, or the grace period, if any?

If there is any doubt about the need for a demand, it is prudent to issue one so that you remove a potential defence. A demand may be a legal precondition for a cause of action, such as against some guarantors or in some actions on promissory notes: see *Waldron v. Royal Bank* (1991), 53 B.C.L.R. (2d) 294 (C.A.), which states that a debtor is generally entitled to reasonable notice before the collateral is seized.

A secured creditor who intends to enforce its security on the inventory, accounts receivable, or other property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person, must notify the insolvent person that the creditor intends to enforce its security, pursuant to

s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Once the notice is served, the creditor must wait 10 days (unless the debtor waives the waiting period in writing) before the creditor may act to enforce the security interest or seize the collateral. For more on secured interests, see *Practice Material: Business: Commercial*, Chapter 3.

In cases where a demand is a legal precondition, ensure that the prescribed form and method of service of the demand is followed exactly. Failing to properly issue a demand can be fatal to a breach of contract claim, so it is imperative that the demand conforms in all respects with any governing contractual provisions.

The demand letter should not refer to any privileged matters.

(b) Not Making a Demand

In some cases, it is *not* appropriate to issue a demand. It may be that your client is a sophisticated creditor who has already issued a clear and complete demand.

It is also important to determine, before sending a legal demand, whether the client knows of a bank account or receivable that could be garnished prior to judgment. In those circumstances, you may not want to alert the debtor that the creditor is taking enforcement steps. In rare cases, the creditor might want to pursue an order freezing assets (see §9.07(1) on *Mareva* injunctions). In cases like that, alerting the debtor could prompt the debtor to divert or remove assets. If it is clear that the debtor is about to leave the jurisdiction, it may be important to file and serve a notice of civil claim quickly.

(c) Prohibited Collection Practices

There are many limits on the conduct of a person demanding payment or collecting debts. Part 7 of the *Business Practices and Consumer Protection Act* lists prohibited collection practices (see ss. 113–124). Section 114 of the *Business Practices and Consumer Protection Act* prohibits creditors from harassing debtors. Harassment includes using threatening, profane, intimidating or coercive language, exerting undue, excessive or unreasonable pressure; and publishing or threatening to publish a debtor's failure to pay.

In addition to acts prohibited under the *Business Practices and Consumer Protection Act*, other conduct is prohibited under the *Criminal Code*, such as direct threats of harm to persons or property (s. 264.1), extortion (s. 346), and conveying false messages with intent to alarm (s. 372).

Section 115 of the *Business Practices and Consumer Protection Act* provides that a "collector," defined broadly as "a person, whether in British Columbia or not, attempting to collect a debt," must not attempt to collect payment of a debt until the collector has notified (or made a reasonable attempt to notify) the debtor in writing of:

(i) the name of the creditor;

(ii) the amount of the debt; and

(iii) the identity and authority of the collector to collect the debt from the debtor.

Section 121(2) of the *Business Practices and Consumer Protection Act* provides that if a collector intends to recommend to a creditor that they commence legal proceedings to recover a debt, the collector must first notify the debtor of this intention. Section 121(4) prohibits against threatening legal proceedings without written or lawful authority.

Section 116(4) of the *Business Practices and Consumer Protection Act* prohibits collectors from continuing to communicate with a debtor directly once the debtor has notified the collector to communicate with the debtor's lawyer and has provided an address for the lawyer.

Particularly important to lawyers are the *BC Code* rules against communicating directly with opposing parties represented by counsel (rule 7.2-6), and demanding payment while threatening either a prosecution or a complaint to a regulatory authority (see rule 3.2-5).

[§9.04] Initiating Proceedings

All aspects of commencing a legal action and proceeding through to trial are covered in detail in the *Practice Material: Civil*. A limited number of topics relevant to collections law are canvassed briefly here.

1. Limitations[2]

The *Limitation Act*, S.B.C. 2012, c. 13 provides for a "basic limitation period" of two years for all claims, including those for recovery of debts, damages, or other money.

[2] The *Practice Material* does not generally address temporary measures introduced during the COVID-19 pandemic. However, lawyers should be aware that in response to the COVID-19 pandemic, the provincial government temporarily suspended the limitation periods for commencing court proceedings. The suspension was in effect from March 26, 2020 until March 25, 2021. In calculating the end date of a limitation period, do not count the days on which the limitation dates were suspended (from the beginning of the day on March 26, 2020 until the end of the day on March 25, 2021). See the Law Society's *Guidelines for calculating BC limitation periods*, available on the Law Society website.

The *Limitation Act* represented a significant change in the limitations regime in British Columbia when it came into force in 2013. Limitation periods and the rules regarding start dates for the running of these periods are included, as well as a host of other changes. Practitioners would do well to familiarize themselves with the Act and make careful note of the new regime. Care should be taken to look at the history of the file if the debt originated in or before 2013, as the applicable limitation period may still be 6 years if the breach giving rise to the debt occurred before June 1, 2013.

To determine the relevant limitation date for a claim, it is necessary to ascertain the governing section in the *Limitation Act* and the date on which the cause of action arose. It is necessary also to consider if the cause of action has been confirmed because this may extend the limitation period.

(a) Specific Limitations

Most creditor claims will come under s. 6 of the *Limitation Act*, which provides a general two-year limitation on bringing actions, calculated from the date on which the right to bring the action arose as determined by the discoverability rules contained in s. 8.

Section 7 relates to proceedings to enforce or sue on a judgment and sets out a limitation period of 10 years for a local judgment. In the case of an extra-provincial judgment, the limitation period is limited to the expiry of the judgment in the original jurisdiction or 10 years, whichever comes first.

The limitation periods above are subject to the ultimate 15-year limitation period contained in s. 21, which begins to run the day after the act or omission on which the claim is based took place. As s. 21 refers to commencing court proceedings, it appears that steps to enforce a judgment may still be continued after the 15-year limitation period expires, provided the judgment is otherwise still valid and enforceable.

Earlier cases which allow a party to bring further actions to renew existing judgments, as in *Sign-O-Lite Plastics Ltd. v. Kennedy* (1983), 48 B.C.L.R. 130 (S.C.), appear to still be good law, subject to the ultimate 15-year limitation period for commencing proceedings (that is, suing on the existing judgment).

See also *Deol v. Shipowick*, 2008 BCSC 108, in which the court held that a judgment creditor may register a judgment against title to a debtor's property, and renew the registration, so long as the limitation period applicable to the judgment itself has not expired and the renewal takes place within two years of the date of the original registration or any renewal.

(b) Commencement Dates

After finding the governing *Limitation Act* section, consider the date on which the cause of action arose. The current approach is based on "discoverability" (s. 6). Divisions 2 and 3 of the *Limitation Act* contain general and specific rules setting out when certain types of claims are "discovered" for the purposes of the Act. Review each of these provisions and determine which applies to the specific facts of the case.

The limitation period for debt claims based on loans or obligations where payment is due on a specific date will typically start to run on the day after payment is due, which is the first day when payment is in arrears.

Debt claims based on demand loans will be discovered, pursuant to the *Limitation Act* (s. 14), "on the first day that there is a failure to perform the obligation after a demand for the performance has been made."

Note that, given the role of "discoverability" in the current *Limitation Act*, case authorities predating June 1, 2013 may not apply. Cases from other jurisdictions that have long included a discoverability component (particularly Ontario), may be of more assistance.

Discoverability has become a complex area of the law. While creditors continue to try to use it to avoid limitation dates, the courts have almost uniformly rejected this defence in the context of debtor-creditor relationships.

In practice, it is safest to work from the earliest possible commencement date and, where there is any doubt, file a notice of civil claim (SCCR 3-1) as a precaution.

(c) Confirming Cause of Action

Section 24(1) of the *Limitation Act* provides that the running period for a cause of action will, in effect, start again once the cause of action has been confirmed. However, see *Norman Estate v. Norman* (1990), 43 B.C.L.R. (2d) 193 (S.C.), where a confirmation was deemed ineffective because it came after the limitation period had expired. Confirmation can be in the form of making a payment, or in a written, signed acknowledgment from the party against whom there is a cause of action. The entirety of s. 24 should be considered in order to determine whether confirmation has occurred.

Case authorities on confirmation under the pre-2013 *Limitation Act* may still apply, taking into account some changes in the statutory wording

between s. 5(2)(a)(ii) in the former act, which now corresponds to s. 24. Consider decisions such as *Bank of Montreal v. Sheppard* (1989), 39 C.P.C. (2d) 67 (B.C.S.C.) and *Desrosiers v. Wharton*, [1986] B.C.D. Civ. 3388-03 (S.C.), in which the court held a partial payment accompanied by a disclaimer of liability still had the effect of confirming the cause of action.

In determining whether a claim is barred by the *Limitation Act*, the lawyer should examine all of the conduct and communication between the debtor and creditor to see if something that was said or done could be seen as an express or implicit waiver or agreement not to hold the other side to the limitation period. Such communication might amount to a variation of the contractual terms, which may be enforceable without fresh consideration: *Rosas v. Toca*, 2018 BCCA 191. Such communication might also amount to estoppel, preventing the debtor from asserting the limitation defence: *492621 BC Ltd. v. Bustin Farm*, 2010 BCCA 561.

Courts have applied the law of estoppel liberally to get around limitation periods where the effect of enforcing a strict limitation would be unjust due to the actions of one or more parties. In particular, where parties are engaged in settlement negotiations designed to avoid court proceedings, the courts have frequently found the parties are estopped from using the limitation period to dismiss claims. See *C.W. v. The Estate of M.N.W.*, 2017 BCSC 2603 (Chambers). Notably, in *Belanger v. Gilbert* (1984), 58 BCLR 191, 1984 CanLII 355 (C.A.), the court said that even communications marked "without prejudice" may be admissible to support a claim for confirmation.

(d) Completion of Enforcement Process and Stays of Execution

Notwithstanding the limitation periods set out in ss. 7 or 21, s. 23 permits the completion of outstanding enforcement processes set out in subsections 23(1) (a), (b) and (c), including those related to unexpired writs of execution, enforcement against land, and charging orders. Further, s. 23(2) provides that a court order staying execution on a judgment postpones or suspends the running of the limitation period for proceedings on the judgment.

2. Choice of Registry

There are two levels of trial court under provincial jurisdiction that hear debt actions: the Provincial Court–Civil (Small Claims) and the Supreme Court. Note that as of June 1, 2017, most claims in debt up to $5,000 must be resolved through the Civil Resolution Tribunal instead of in Provincial Court. See §1.22 for more information on Small Claims Court Procedures and §1.23 for more information on the Civil Resolution Tribunal.

Deciding which court to go to depends on factors such as what is the court's monetary jurisdiction, what is the most suitable venue, and are there any restrictions on causes of action that may be heard in that court. In addition, there are some matters that come within the exercise of the court's discretion (such as awarding costs and disbursements), which may affect where a party commences action.

(a) Monetary Jurisdiction

The monetary jurisdiction of the Small Claims Court is limited by statute (*Small Claims Act*, s. 3). The Small Claims Court has monetary jurisdiction over claims up to $35,000, exclusive of interest and costs (*Small Claims Act*, s. 3). "Interest" here means court-ordered interest, not contractual interest (see *Telus Services Inc. v. Hussey*, 2016 BCPC 41). The monetary limit of $35,000 came into effect on June 1, 2017, and is an increase from the previous monetary limit of $25,000.

A creditor may choose to abandon claims over the statutory limit, but in doing so abandons the right to collect the balance (Small Claims Rules 1(4) and (6)). Also, a creditor may not "split the claim," bringing one action for a sum within the statutory limit and another for the balance.

There is no upper monetary limit on a claim brought in the Supreme Court.

A plaintiff is not required to initiate an action for a sum within the small claims statutory limit in Small Claims Court. Reasons to consider initiating such claims in Supreme Court include the availability of a summary trial and other streamlined methods for conducting an action, as well as the options for enforcement. However, clients should be advised that if they win in Supreme Court but are awarded a sum within the jurisdiction of the Small Claims Court, the court will not grant costs, other than disbursements, unless the court finds there was sufficient reason for bringing the action in Supreme Court (see SCCR 14-1(10)). Delay in Small Claims Court is not considered sufficient reason to bring the action in Supreme Court, for the purpose of costs awards (*Rassak v. Addante*, [1992] B.C.W.L.D. No. 2226 (S.C.)).

On appeals from Small Claims Court decisions, the Supreme Court does have discretion to award costs for the appeal (*Small Claims Act*, s. 13). Appeal costs on Scale 1 were awarded in *Sign-O-Lite Plastics Ltd. v. Watts & Co.*, [1992]

B.C.W.L.D. No. 2548 (S.C.); appeal costs were refused in *Lochhead v. B.C.A.A. Insurance Corporation*, [1992] B.C.W.L.D. No. 1686 (S.C.).

(b) Venue

Small claims actions must be filed at the registry nearest to where the defendant lives or carries on business, or to where the transaction or event that resulted in the claim took place (Small Claims Rule 1(2)).

In credit contracts that call for payments to be made to the creditor at a specific location (e.g. a creditor's place of business or main credit office), a default in payment gives rise to a cause of action at that payment location (*Simpson-Sears Ltd. v. Marshall* (1979), 104 D.L.R. (3d) 302; *Sign-O-Lite Plastics Ltd. v. Szabo*, [1979] B.C.D. Civ. 3652-04 (S.C.)). This is important when acting for lenders, as it ensures that the claim will be heard near to their offices.

Because the Supreme Court is a court of general jurisdiction throughout the province, a plaintiff is entitled to commence an action in a registry of its choice, and to have the trial heard at the place named in the notice of civil claim (SCCR 12-1(5)), subject to a judge's discretion to order a change of venue. In addition, there are provisions in SCCR 8-2(1) for hearing applications in different locations by consent of the parties, order of the court or the normal location of the court's sitting in the applicable judicial district. Note that in foreclosure proceedings there are specific "local venue" rules (*Law and Equity Act*, s. 21). The same applies to builders lien actions. When dealing with claims against land, the venue is usually where the land is located.

For all actions, the safest practice is to check the governing statute.

(c) Causes of Action

While monetary limits and venue are the two main jurisdictional considerations in collections law, statutory provisions governing causes of action may also come into play. The causes of action over which a court has jurisdiction are governed both by the court statutes themselves, and by specific provisions in many other statutes which create or regulate causes of action.

The *Small Claims Act*, s. 3(1), sets out a non-exhaustive list of actions over which the Small Claims Court has jurisdiction. This includes actions for debt or damages, recovery of personal property, and specific performance of an agreement relating to personal property. Section 3(2) prohibits actions for libel, slander or malicious prosecution. Certain actions, such as builders lien actions, may not be brought in Small Claims Court either.

The Supreme Court of British Columbia is a court of inherent jurisdiction. It has general jurisdiction over actions unless authority is specifically removed by statute.

3. Fast Track Litigation—SCCR 15-1

An action can proceed under the fast track rule as long as one or more of the following four criteria in SCCR 15-1(1) are met (*Hemani v. Hillard*, 2011 BCSC 1381 at paras. 10-17):

- the only claims in the action are for one or more of money, real property, a builder's lien and personal property, and the total amount of damages sought is $100,000 or less, exclusive of interest and costs;
- the trial of the action can be completed within three days;
- the parties to the action consent; or
- the court so orders.

If any one of these criteria is met, a party can file a notice of fast track action in Form 61 (SCCR 15-1(2)) to have the action proceed under the fast track rule. The words "Subject to Rule 15-1" must be added to the style of proceedings (SCCR 15-1(2)).

SCCR 15-1 is designed to reduce oral discovery, allow the expedited setting of trial dates, and limit the cost of the proceedings. Once a party to an action applies for a trial date, the registrar must set the date for the trial within the next four months (SCCR 15-1(13)).

SCCR 15-1 includes procedures that are different from those applicable to regular actions, so it is important to read the rule carefully. Examinations for discovery are limited to two hours, unless the party being examined consents or the court orders a longer examination (SCCR 15-1(11)). A trial must be heard without a jury (SCCR 15-1(10)). If, as a result of a trial management conference, a judge is of the view that the trial will likely require more than three days, the judge may adjourn the trial to a date to be set (SCCR 15-1(14)).

Costs are fixed in accordance with SCCR 15-1(15) and the court may consider a settlement offer delivered under SCCR 9-1.

Fast track litigation is well-suited to debt claims, but before choosing fast track, consider the evidence you may need to prove your case. In particular, if you will need extensive discovery evidence or more than three days in trial to prove your case, fast track litigation might be too restrictive.

4. Initiating the Action

In Small Claims Court a debt action is begun by filing a notice of claim pursuant to Small Claims Rule 1.

In Supreme Court the plaintiff must file a notice of civil claim pursuant to SCCR 3-1. The process is the same even if SCCR 15-1 applies.

5. Service of Process

Service of process is a fundamental procedural step in all litigation. Generally, jurisdiction over the subject matter of the litigation arises from the initiation of the action, while jurisdiction over the defendant arises from service of process. After a proceeding is commenced, notice to the other side is an important precondition to virtually every step in the action.

A party usually has a choice of who may serve process. The general practice is to employ a private process server. Under s. 7 of the *Sheriff Act*, only a sheriff may "serve or execute a judgment summons, an order of committal or writ or warrant of execution." Sheriff services are contracted out to specific bailiff companies.

Service procedures (including substituted service and service outside British Columbia) are governed mainly by Small Claims Rules 2 and 18, and SCCR 4-2, 4-3, 4-4, and 4-5. There are service procedures in other statutes, such as the *Business Corporations Act*. Service procedures are sometimes more liberal under the Small Claims Rules. For example, Rule 2(2) allows service on an individual defendant by mailing a copy of the notice of claim by registered mail (with proof by photocopy of the signature obtained at the time of delivery or online confirmation of delivery). Finally, the debt instrument or the contract documents may provide for the method of service and stipulate the persons to be served.

[§9.05] Proceeding to Judgment

1. Default Judgment

Understanding default proceedings is important in collections matters, as debtors often fail to respond or to file a defence. It may be important to move quickly to secure a default judgment and enforce it.

When a party, properly served, fails to file the required defence documents within the times prescribed by the rules (of whichever court), then default judgment can be entered. Where the claim is for a liquidated amount (this will be the case in most collections-related actions), the plaintiff can enter a final judgment and then proceed to enforce the judgment. A "liquidated amount" has been defined by the courts as a sum that may be determined "as a mere matter of arithmetic" (see *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78).

Claims for non-liquidated amounts include any claims for non-pecuniary, punitive, aggravated or general damages. Where a creditor has a claim with these types of damages, be careful to advise that by asserting such claims the creditor will need to go through the added step of going to court to argue quantum.

In a small claims action, the only defence document that need be filed is a dispute form (Form 2) called a "reply" (Small Claims Rule 3(2)). A defendant can also use a reply form to admit the claim and ask a judge to set a payment schedule, or to make a counterclaim (Small Claims Rule 3(2)).

A defendant in a small claims action must file a reply within 14 days after service, if served within British Columbia (Small Claims Rule 3(4)). If the reply is not filed, default judgment can be entered (Small Claims Rule 6(4)). In debt actions, a plaintiff can obtain final judgment by submitting an application for default order (Form 5) and a certificate of service (Small Claims Rule 6(3)).

In Supreme Court actions, defendants must file a response to civil claim pursuant to SCCR 3-3 within the time limits set out in SCCR 3-3(3) (for example, within Canada, within 21 days after the party is served with a notice of civil claim).

As with small claims actions, if the claim is for a "liquidated" amount, final judgment can be entered in default of the defendant filing a response (SCCR 3-8). As part of the documentation for obtaining default judgment from the court registry, a plaintiff may submit a schedule showing how the interest, if any, has been calculated, and a bill of costs (SCCR 3-8(3)).

Pursuant to SCCR 3-8(2), a plaintiff seeking default judgment must file:

(a) proof of service;

(b) proof that a response has not been served;

(c) a requisition from the court confirming that a response has not been filed; and

(d) a draft default judgment order in Form 8.

The SCCR do not indicate how the second requirement (proof that no response has been delivered) is to be satisfied. Typical practice is to file an affidavit from the process server who served the notice of civil claim, the plaintiff, or the plaintiff's solicitor confirming this fact.

Certain professional courtesies are expected of lawyers who are in a position to file default judgment when the other side is represented by counsel. Before proceeding by default in a matter, a lawyer

must give reasonable notice to another lawyer who has been consulted (see rule 7.2-1, commentary [5] of the *BC Code*: "A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice"). See also *Henry v. Zurich Insurance Company*, 81 B.C.A.C. 284. Note also *Foreman v. Gerling*, [1991] B.C.W.L.D. No. 1703 (C.A.), where the court set aside a default judgment which plaintiff's counsel had kept secret from the defendant's counsel for several months; the court set aside the judgment as a "debt of justice" given the conduct of plaintiff's counsel.

2. Applications for Summary Judgment

As with default proceedings, applications for summary judgment are often an important part of the collections process. Most collections matters, even when defended, need not go to a conventional trial. The plaintiff has a number of alternatives.

In a small claims action when the defendant has filed a Form 2 reply defending an action, the parties must follow the procedures for a settlement conference and then trial, as set out in Small Claims Rules 7 and 10 respectively. Alternatively, when liability is admitted, the defendant can use the Form 2 reply to ask for a payment hearing under Small Claims Rule 12. Presently there is no authority under the Small Claims Rules to use summary procedures to obtain judgment (see §9.05(2)(f)).

Under the SCCR, there are several ways for plaintiffs to obtain judgments before trial when filing a default judgment is not an option (that is, when a response has been filed). These are detailed in the earlier chapters of the *Practice Material: Civil*. Note that the Notice to Mediate (General) Regulation pursuant to the *Law and Equity Act* (B.C. Reg. 4/2001) applies to a proceeding for a debt claim. The Regulation outlines the procedure to be followed.

For collections matters in the Supreme Court, note the following SCCR provisions and practice points.

(a) Consent Judgment

As an alternative to a judgment being entered, there has been a past practice of the parties negotiating an instalment payment arrangement, with the plaintiff taking, but not entering, a consent order to hold as security. If an instalment was missed, the order was entered and judgment taken. SCCR 8-3 authorizes such consent arrangements.

(b) Striking Out Pleadings

Under SCCR 9-5 the court may order that a pleading be struck on various grounds, including that it discloses no reasonable claim or defence. This rule can be useful when non-lawyers have drafted and filed spurious pleadings, although other summary judgment applications may be more appropriate depending on the nature of the pleadings and the allegations contained in them. The legal test for succeeding in such applications is extremely high and requires the applicant to show that even if all the facts pleaded were found to be true, that the pleading would still almost certainly fail. Even when such a finding is made, the offending party is typically granted at least one opportunity to amend, provided the court does not conclude the action was an abuse of process.

(c) Defendant Non-Compliance

Under SCCR 22-7(5), the court may order proceedings to continue as if no response had been filed, if there has been a failure to comply with certain rules. In practice, a single failure will generally not attract this sanction, whereas repeated breaches may.

(d) Withdrawal of Defence

Sometimes a response may be filed simply to preserve a defendant's position. When subsequent developments dictate that a defendant allow default judgment to be signed, the defendant may file a notice of withdrawal in Form 37. Once Form 37 has been filed, the plaintiff may file a judgment in default of defence (SCCR 9-8(7)).

(e) Summary Judgment

SCCR 9-6 gives the court authority to grant judgment on application (with supporting affidavit) in chambers, on the ground that there is "no genuine issue for trial." There is extensive case law on the application of the predecessor to SCCR 9-6, former Rule 18. Essentially, the plaintiff must show that a judgment is clearly and obviously justified, while the defendant, to successfully defend, need only show there is a triable issue. Debt actions are one of the causes of action more likely to be successful under this rule, but there is a very low threshold for the defendant.

A master has jurisdiction to hear these applications (see Supreme Court Practice Direction PD-50—*Masters' Jurisdiction*).

(f) Summary Trial

The more common summary method for proceeding is to apply for judgment by summary trial. SCCR 9-7 gives the court two broad powers on a summary trial application: to grant judgment on the whole of the affidavit evidence which has been presented; or, when the court

cannot give judgment on the evidence, to make several directions to expedite the proceeding. Only a judge has jurisdiction to hear these applications (see Practice Direction PD-50—*Masters' Jurisdiction*). The predecessor to SCCR 9-7 is Rule 18A. There is extensive judicial interpretation of the principles in SCCR 9-7 and former Rule 18A. See *Practice Material: Civil*, Chapter 4 for a review of some of this case law.

Pilot projects are underway for a form of summary trial and simplified trial in Provincial Court:

- At Robson Square Small Claims registry in Vancouver, Rule 9.2 provides for a summary trial process to claimants who are commercial lenders. The claimant must be "in the business of lending money or extending credit" and the debt must arise from a loan or extension of credit in the course of that business. Common examples are credit card and loan debts. If Rule 9.2 applies, a 30-minute streamlined trial before a judge is scheduled. At the end of the trial, the judge will make a payment order, dismiss the claim, or order that the claim be set for mediation or a trial conference.
- At the Richmond Small Claims and Robson Square registries, a simplified trial process applies to certain claims under Small Claims Rule 9.1. Such claims are scheduled for a one-hour simplified trial before an experienced lawyer, called a "justice of the peace adjudicator." The value of the claim must be between $5,001 and $10,000 (the court will hear a claim under $5,001 only if it is outside the jurisdiction of the Civil Resolution Tribunal or if a notice of objection to the decision of the Civil Resolution Tribunal has been filed).

3. Canadian Currency

The *Currency Act* (Canada), s. 12, provides in part that "any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada."

The *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155, s. 1(1) provides:

> If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

The "conversion date" is tied to the date that payments are actually made on the judgment. The bank refers to the currency values on the last day before the day on which the judgment debtor makes a payment to the judgment creditor under the order.

The *Foreign Money Claims Act* is not mandatory. A plaintiff may seek to convert its claim to the Canadian-dollar equivalent as at the date of judgment. As a practical matter, having a judgment expressed in Canadian currency can simplify execution proceedings, such as postjudgment garnishment, and is generally preferred.

4. Judgment Interest

(a) Interest Before Judgment

While a creditor's right to prejudgment interest is usually not in doubt, arriving at the appropriate rate can become complicated. Determining the rate in British Columbia is governed by the federal *Interest Act* and the provincial *Court Order Interest Act*.

Under the *Interest Act* (Canada), parties are generally at liberty to contract for a stipulated rate of interest (s. 2). If by agreement of the parties, or by law, interest is payable but no rate is stipulated, the rate is fixed at 5% per annum under s. 3. This section will rarely be applicable given judicial interpretation of when there is an agreement and when a rate applies by operation of law.

In the great majority of credit contracts, the parties will explicitly agree on a set rate. In addition, it has been held that an agreement can be implied (*Makin Mailey Advertising Ltd. v. Budget Brake & Muffler Distributors Ltd.*, [1987] B.C.D. Civ. 2061-01 (C.A)).

If no agreement is found, then s. 1 of the *Court Order Interest Act* applies. Under s. 1, a judge may award interest "on the amount ordered to be paid at a rate the court considers appropriate in the circumstances." Generally, the rate will be approximately 2% below the prime lending rate, although that is only a guideline (see *Jasmine Construction Ltd. v. Adam*, 2010 BCSC 1507 at para. 23). In *Domtar Inc. v. Univar Canada Ltd.*, 2012 BCSC 510 at para. 14, the court said:

> [T]he purpose of prejudgment interest is not to redress inequities by punishing or rewarding a party. The purpose is to ensure that the earning capacity of money awarded accrues to the successful party and puts that party in the position

it would have been in if the award had been paid on the date the cause of action arose.

Section 4 of the *Interest Act* requires written contracts (other than those involving real property mortgages), where interest is calculated over a period of less than a year (e.g. monthly), to contain an express statement of an equivalent yearly rate. Failing the statement of that equivalent, only 5% per annum is chargeable. The threshold issue in invoking this section appears to be how the rate is expressed, not when the interest itself is actually payable (*Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd*. (1991), 83 Alta. L.R. (2d) 289 (C.A.)). Failure to expressly state the rate of interest as a monthly rate generally renders that part of a contract unenforceable under the *Interest Act* and forces the creditor to use the lesser rates under the *Court Order Interest Act* to obtain interest.

(b) Interest After Judgment

The *Court Order Interest Act* is divided into two parts: Part I governs prejudgment interest, and Part II governs postjudgment interest.

In Part II, under s. 7 of the Act, pecuniary judgments bear interest at a rate equal to the prime lending rate of the banker to the government. The rate is fixed semi-annually on January 1 and July 1.

Under s. 8, the court has authority to vary the rate or fix a different date from which interest is to be calculated. Under s. 9, postjudgment interest is deemed to be included in the judgment for enforcement purposes, and a partial payment on a judgment is to be applied first to outstanding interest.

(c) Criminal Interest Rates

The *Criminal Code*, s. 347, prohibits agreements for interest at an effective annual rate over 60%. Most reported decisions under this section involve litigation over financing for large property development projects.

When calculating the actual rate of interest to determine if it exceeds the criminal rate, courts have broadly interpreted the definition of "interest" in s. 347 of the *Criminal Code*. For example, "interest" may include penalties or charges for late payment of an account or bill (*Garland v. Consumers' Gas Co*., [1998] 3 S.C.R. 112).

In practice, the determination of whether interest is actually being charged at the criminal rate can be a complex accounting exercise requiring expert evidence.

The Supreme Court of Canada (in *Transport North American Express Inc. v. New Solutions Financial Corp*., 2004 SCC 7) said that courts have discretion to read down an illegal rate of interest and enforce the parties' bargain at a lower interest rate, subject to four factors:

(i) whether the purpose or policy of s. 347 would be subverted by severance;

(ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention;

(iii) the relative bargaining position of the parties and their conduct in reaching the agreement; and

(iv) the potential for the debtor to enjoy an unjustified windfall.

[§9.06] Registration and Actions on Foreign Judgments

A "foreign judgment" is a judgment from any jurisdiction outside British Columbia. Hence, judgments from other Canadian provinces or territories, United States courts, and elsewhere are all considered foreign.

A foreign money judgment can be enforced in British Columbia in one of three ways:

1. by complying with the simplified registration and filing system for Canadian judgments under the *Enforcement of Canadian Judgments and Decrees Act*;
2. through the registration procedures set out in ss. 28 to 39 (and Schedules) of the *Court Order Enforcement Act* and SCCR 19-3; or
3. at common law, by suing to initiate a claim in British Columbia, with the outstanding foreign judgment as the cause of action in the new court action.

If the money judgment is from another Canadian province or territory, it can be registered as a judgment of the British Columbia Supreme Court under the *Enforcement of Canadian Judgments and Decrees Act*. The statute sets out a simplified procedure for registration (s. 3): the judgment can be registered simply by paying a fee and filing a certified true copy of the judgment, along with a requisition pursuant to SCCR 17-1(1)(b), and a certified translation of the judgment, if it was made in a language other than English (SCCR 19-2(2)). Once the Canadian judgment is registered in British Columbia, it may be enforced as if it were a judgment of the British Columbia Supreme Court (s. 4). Note that for a money judgment to be registered under the *Enforcement of Canadian Judgments and Decrees Act*, it must be a final judgment.

Parties can apply under the *Enforcement of Canadian Judgments and Decrees Act* for directions relating to the enforcement of the judgment. At that application, the court may limit enforcement of the judgment if there is

evidence that a party affected by it plans to make an application to set it aside, a stay is in effect in the province or territory where the judgment was made, or enforcement of the judgment would be contrary to public policy in British Columbia. If the Canadian judgment was obtained without notice to the persons bound by it, an application for directions must be made prior to any attempts to enforce it after registration in British Columbia (s. 6).

The *Enforcement of Canadian Judgments and Decrees Act* provides that the Supreme Court will not entertain as grounds for staying or limiting the enforcement of a judgment from another Canadian province or territory an argument that the originating court lacked jurisdiction over the defendant or the dispute or that the British Columbia court might have come to a different view of the merits of the decision (s. 6(3)). A party wishing to raise those sorts of matters must seek relief in the province or territory where the judgment was originally made, either through appeal or further application to the court that made the judgment.

Under s. 7 of the *Limitation Act*, the limitation period for the enforcement of any judgment from another Canadian province or territory is prior to the expiry of the original judgment, or 10 years, whichever is sooner.

Registration under the *Court Order Enforcement Act* is available only if the foreign judgment was granted in a "reciprocating state." Several jurisdictions are declared to be reciprocating states for the purposes of the *Court Order Enforcement Act*, and are listed in the Schedule to that Act. They include all Canadian provinces and territories except Quebec, the United Kingdom, Germany, Austria, several states and territories in Australia, and several states in the United States (including the State of Washington, State of Oregon, and the State of California). Judgments from those jurisdictions may be registered pursuant to a simplified process under the *Court Order Enforcement Act*, and then become enforceable in the same way a local judgment would be.

The application for registration of a reciprocally enforceable judgment under the *Court Order Enforcement Act* must be supported by an affidavit attaching a certified copy of the judgment under seal of the original court; a certified translation, where applicable; and a statement similar to that included in Schedule 2 of the *Court Order Enforcement Act*. Finally, the affidavit must state that the judgment is not one that is disqualified from registration under s. 29(6) of the *Court Order Enforcement Act* (for example, a judgment would be disqualified from registration if it was obtained by fraud, was contrary to public policy, or an appeal on the judgment was pending).

Judgments from non-reciprocating jurisdictions can be pursued in British Columbia, but it is necessary to commence an action on the foreign judgment and obtain judgment in British Columbia prior to enforcement (see *Owen v. Rocketinfo Inc.*, 2008 BCCA 502). As set out in *Wei v. Mei*, 2018 BCSC 1057 (citing *Beals v. Saldanha*, 2003 SCC 72), the British Columbia court will recognize a foreign judgment in such an action provided three conditions are met:

1. the foreign court had jurisdiction over the subject matter of the foreign judgment;
2. the foreign judgment is final and conclusive; and
3. there is no available defence.

The jurisdiction of the foreign court will be recognized if there is a "real and substantial connection" between the cause of action and the foreign court (*Beals* at para. 19).

Defences to a common-law action to recognize or enforce a foreign judgment are limited to fraud, public policy, and lack of natural justice, all of which are narrow in application (*Beals v. Saldanha*, 2003 SCC 72 and *Kriegman v. Dill*, 2018 BCCA 86).

Counsel for a foreign judgment creditor must take care to ensure sufficient evidence is before the court in order to succeed on an action to enforce the foreign judgment (see e.g. *Wei v. Mei*, 2018 BCSC 1057; *Xu v. Yang*, 2018 BCSC 393; and *Liu v. Luo*, 2018 BCSC 1237).

[§9.07] Prejudgment Execution

Generally, a creditor must start a debt action and obtain a judgment before the creditor can proceed against the assets of a debtor. In British Columbia, there is authority for two significant exceptions to this rule: *Mareva* injunctions (available only in Supreme Court actions and exceptional as a remedy) and prejudgment garnishment (available in both Supreme Court and Small Claims Court). Garnishment law and procedure will be dealt with under the postjudgment remedy heading.

1. *Mareva* Injunctions

(a) Extraordinary Remedy

Mareva injunctions are a form of interlocutory injunction which prohibits the defendant from transferring or disposing of its assets pending the outcome of the action between the parties. The name comes from the English decision *Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A.*, [1980] 1 All E.R. 213 (C.A.). The injunction can apply to assets within British Columbia or held worldwide. Usually, the injunction will still allow the debtor to deal with the assets in order to meet legitimate debt payments accruing in the ordinary course of business (see e.g. *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C.)). In most cases, the application is made without notice.

The court's authority to grant *Mareva* injunctions is rooted in the equitable jurisdiction of

the courts, though there is specific statutory authority in the *Law and Equity Act*, s. 39. Section 39 grants authority to make the order when "it appears to the court to be just or convenient that the order should be made." It continues to fall to established equitable principles for the court to decide when an injunction will be granted. SCCR 10-4 governs the procedure for pre-trial injunctions.

A *Mareva* injunction is an extraordinary and draconian remedy, and is therefore not granted readily. The court will demand a high standard of proof and will scrutinize the evidence. The court will also expect full and frank disclosure from counsel seeking the order, given that the application is typically brought without notice, and it will be incumbent upon counsel to alert the court to any facts which may adversely affect their application. Many orders without notice have been set aside for failure to disclose all relevant evidence.

The leading case on *Mareva* injunctions in Canada is *Aetna Financial Services Limited v. Feigelman*, [1985] 2 W.W.R. 97 (S.C.C.), in which the court approved the use of the *Mareva* injunction in Canada and generally agreed with the principles for granting *Mareva* injunctions as they had evolved in Britain and Canada. The threshold issues are whether the plaintiff has a strong *prima facie* case and whether the balance of convenience favours the plaintiff.

Historically, the *Mareva* injunction would only be granted following a stringent assessment of the evidence to establish it had met several stringent tests demonstrating, among other things, that:

- the object of the relief is not simply to provide the applicant with security for the amount of its claim before judgment;
- there is a real risk (factually substantiated) of assets being disposed of or dissipated;
- the purpose of such dissipation is wrongful or untoward; and
- the applicant will suffer irreparable harm unless the court grants the relief.

The case authority in British Columbia has diverged somewhat from these rigid rules and developed a "flexible approach" to applications for *Mareva* injunctions. This approach was first set out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335; confirmed by the BC Court of Appeal in *Silver Standard Resources Inc. v. Joint Stock Company Geolog*, 1998 CanLII 6468 (BC CA) and (by a five-judge panel) in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd*, 2007 BCCA 481; and applied in *ICBC v. Patko*, 2008 BCCA 65. Under this approach, the fundamental question in each case is "whether the granting of an injunction is just and equitable in all the circumstances of the case" and the legal test is as follows (*ICBC* at para. 25):

> To obtain the injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the parties must be balanced, having regard to all the relevant factors, to reach a just and equitable result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment[.]

See also *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 for a recent statement of this test. The flexible approach has been applied in cases such as *Blue Horizon v. Ko Yo Development Co*., 2012 BCSC 58, where the court confirmed that there is no requirement that the applicant show anything "untoward" in the respondent's conduct in order to succeed in obtaining an injunction.

For a discussion of the procedure on an application to set aside a *Mareva* injunction, see *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41.

(b) Model Order for Preservation of Assets

BC courts have adopted a "model order" for asset preservation (see the model orders at www.bccourts.ca/supreme_court/practice_and_procedure/model_orders.aspx). When applying for a *Mareva* injunction, the judge will expect you to confirm that you are using the model order, without changes. If you have altered it in any way, explain to the judge why and what authority you have for doing so. The model order seeks to balance the interests of the applicant and the respondent (who is not given notice). It permits the respondent to access funds for living expenses and ordinary business expenses.

The applicant for an interlocutory injunction must give an undertaking to pay damages for any loss suffered by the defendant as a result of the granting of the injunction if, at trial, it appears that the injunction was wrongly granted: SCCR 10-4(5).

For a more complete discussion of *Mareva* injunctions, see *British Columbia Creditors' Remedies—An Annotated Guide* (Vancouver: CLEBC), Chapter 5.

2. Prejudgment Garnishment

(a) The Process

A plaintiff in an action claiming judgment for a liquidated amount may apply, without notice, for an order that amounts due from the garnishee (a third party) to the defendant be attached (*Court Order Enforcement Act*, s. 3). Garnishing orders before judgment are available in both Small Claims Court and Supreme Court actions. The requirements for the contents of the affidavit that supports the application are set out in s. 3(2) of the *Court Order Enforcement Act*. Also, Schedule 1 to the Act contains forms to follow (Form A or Form C, depending on the circumstances). An applicant for a prejudgment or postjudgment garnishing order must also file a requisition in Form 17 (see Supreme Court Civil Practice Direction PD-10—*Garnishing Orders*).

Counsel must take great care to ensure that the amount claimed is a liquidated claim, the supporting materials comply with the *Court Order Enforcement Act*, and appropriate full disclosure is made to the court, otherwise the prejudgment garnishing order may be subsequently set aside.

A creditor-plaintiff cannot garnishee itself, (for example, a bank that has a cause of action against one of its customers) (*Bank of Montreal v. Big White Land Development Ltd.* (1982), 17 B.L.R. 257 (B.C.S.C.)). However, such a creditor may have other remedies, such as set-off rights at common law, or if a bank or financial institution has multiple current accounts, a right to "consolidate" the current accounts and regard them as a single obligation.

A garnishing order can be obtained from a registrar at a court registry. The usual practice in Supreme Court is to file a notice of civil claim and simultaneously seek a garnishing order. There is no hearing before a judge or master. The registrar decides whether the formalities have been met, and may confirm or reject the order. This is one of the more difficult legal areas that registrars are authorized to deal with. Counsel should look carefully at any rejection to determine if the law has been followed. If the order is rejected, the applicant may appeal the decision to a master or judge under SCCR 23-6(8).

The order is directed at a person within the province who owes the defendant money. The order is then served on the garnishee immediately. The garnishee is obligated to pay into court any amounts owing to the defendant, up to the value of the claim.

Note that the applicant is obligated to serve the garnishing order and supporting materials on the defendant "at once, or within a time as allowed by the judge or registrar" after the order is served on the garnishee (s. 9 of the *Court Order Enforcement Act*).

Banks are frequently the target of garnishing orders. Accordingly, the specific rules governing the attachment of bank accounts are important. The primary rule, as set out it in the federal *Bank Act*, is that the specific **branch** where the bank account is located must be served with the garnishing order (ss. 462(1)(d)). However, as long as the bank has a business presence in British Columbia, the branch of the bank need not be located in British Columbia to be subject to a prejudgment garnishing order, provided an order for *ex juris* service is obtained. See *Univar Canada v. PCL Packaging Corp.*, 2007 BCSC 1737.

As a practical matter, if a debtor has made any payments to the creditor by cheque, that cheque will identify the branch at which at least one of the debtor's accounts are located.

Prejudgment garnishment does not give the creditor a proprietary interest over the funds paid into court. The funds must remain in court pending judgment or settlement by the parties. Nonetheless, it can be strategically advantageous for the creditor. It provides security against asset removal, and it can provide a very strong bargaining tool.

Notably, wages cannot be garnished before judgment (*Court Order Enforcement Act*, s. 3(4)). Wages include commission salary.

(b) Setting Aside Prejudgment Garnishing Orders

Because garnishing orders are obtained without notice, the defendant is entitled to apply for a rehearing or a trial *de novo* to argue that the order should be set aside. Regardless of the merits of any defence, a defendant may decide to make such an application as a matter of tactics. The application is made by notice of motion in the proceeding, frequently on short notice.

British Columbia courts have consistently held that the exceptional nature of prejudgment garnishment demands meticulous adherence to the requirements of the *Court Order Enforcement Act*. Where the creditor (plaintiff) fails to observe the statutory requirements, the order will be set aside and the funds in court will be returned to the defendant. A plaintiff cannot rectify a defective first order by unilaterally attempting to withdraw it and obtaining a second order—both will be set aside (*Richardson Green-*

shields of Canada Ltd. v. McKim and Bank of BC (1987), 14 B.C.L.R. (2d) 101 (S.C.)).

Applications to set aside prejudgment garnishing orders usually involve an attack on the formalities and substance of the affidavit sworn in support of the order. The applicant in *Coast Tractor & Equipment Ltd. v. Halliday* (1987), 13 B.C.L.R. (2d) 66 (S.C.) was unsuccessful in arguing that s. 8 of the *Canadian Charter of Rights and Freedoms* was a ground to set aside an order.

Evidence allowed at the hearing is limited. When the affidavit in support is found insufficient, the difficulty generally cannot be cured by reference to other (unsworn) material (*Brent Koop Yachts Inc. v. Fraser Valley Bus Service Ltd.*, [1982] B.C.D. Civ. 1722-03 (S.C.)), nor can it be corrected by a supplementary affidavit by the plaintiff (*Vitek v. Poh*, [1984] B.C.D. Civ. 1720-02 (S.C.)). A defendant's mere denial of liability will not be sufficient to set aside an order (*Findlay v. Boyd*, [1983] B.C.D. Civ. 1723-01 (S.C.) and *Weber v. D5 Enterprises Ltd.* (1983), 51 B.C.L.R. 172 (S.C.)). For a discussion of the test for leave to appeal pre-trial orders such as garnishing orders, see *Lenec v. Mallinson*, [1995] B.C.W.L.D. No. 2190 (C.A. Chambers).

There is extensive case law on attempts to set aside a garnishing order; a sampling of cases follows.

(i) Cause of action not succinctly stated

Under s. 3(2)(d)(iii) the claimant must set out in the affidavit "the nature of the cause of action." This is a threshold issue. The benchmark case on inadequacy of a statement of the nature of the cause of action as set out in the affidavit is *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.). In that case the court held as defective a cause of action described as "for debt on a chattel mortgage."

It is difficult to extract general principles on this ground since most cases turn on the specific language of the particular affidavit. In some instances, the courts also appear to merge this ground with the requirement that the claim be for a liquidated amount.

One example of satisfactory language is contained in *Pro-Conic Electronics Limited v. Pro Quality International Limited* (1985), 63 B.C.L.R. 279 (C.A.), where the claim was described as for "electronic products sold by the plaintiff to the defendant [between particular dates] pursuant to contracts made in British Columbia whereby the sum of $598,900.85 (US $453.129.19) was due on December 4, 1984 and remains unpaid." In *Co-operators Gen. Ins. Co. v. Billett* (1988), 27 B.C.L.R. (2d) 367 (C.A.), the Court of Appeal held as sufficient a cause of action described in the supporting affidavit as for "monies of the Plaintiffs had and received by the Defendants."

The cases are divided on the practice of appending the notice of claim to the affidavit as an exhibit as a substitute for or in addition to a statement of the nature of the claim in the affidavit itself. The practice of appending the notice of claim to the affidavit appears satisfactory in view of the Court of Appeal decision in *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1985), 65 B.C.L.R. 79 (C.A.). However, in a case where the affidavit in support alleged more than one cause of action, the court set aside the garnishing order on the basis that not all the causes of action were liquidated and the court would not speculate on which cause of action the plaintiff intended to rely (*Knowland v. C.E.L. Industries Ltd.* (1988), 32 B.C.L.R. (2d) 381 (S.C.)).

Still, the vast majority of prejudgment garnishing orders are for matters of simple debt between creditors and debtors, and in such cases the attachment of the pleading as an exhibit setting out that sole cause of action will generally be sufficient.

(ii) Cause of action not for a liquidated sum

The cause of action must be for a liquidated sum (*Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd.*, [1977] 3 W.W.R. 481 (B.C. C.A.)). A "liquidated sum" is defined as "a liquidated demand in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. The amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic" (*Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78).

In *Zhang v. 0906825 B.C. Ltd.*, 2018 BCSC 13, the court held that a prejudgment garnishing order may be made provided it is clear that one of the causes of action described in the affidavit is for a liquidated amount. If unliquidated claim forms part of the overall cause of action described in the affidavit, a prejudgment garnishing order

will be set aside unless the affidavit clearly delineates separate causes of action and the liquidated sum arising from that cause of action for which the remedy is being sought (*K.M. Simon Enterprises Ltd v. Canadian Pacific Airlines Limited* (1983), 48 B.C.L.R. 250 (S.C.)).

Many cases have considered which causes of action are liquidated claims. Essentially, when the basis for the amounts claimed cannot be ascertained with any precision, or any part of the judgment will require a judge to determine damages, a court may find the claim is not for a liquidated amount. A claim for damages rather than a fixed sum is not a liquidated claim.

If the price is calculable, then a claim for professional services may be liquidated. The claim must be sufficiently clear to put the defendant on notice that the plaintiff seeks a liquidated amount, otherwise the garnishing order will be set aside (*Bazargan v. Milinx Business Services Inc.*, 2001 BCSC 907).

A claim for prejudgment interest in addition to the principal debt is defective, since there is no entitlement to such interest until there is a judgment (*Brown Farris & Jefferson Ltd. v. Diligenti* (1979), 17 B.C.L.R. 220 (S.C.)). However, a plaintiff can make a claim for interest as part of an otherwise liquidated claim if the interest was provided by contract (*Daleco Resources v. Loredi Resources Ltd*., [1983] B.C.J. No. 108 (S.C.)), and if the interest portion of the claim is clearly set out in the affidavit (*Nevin Sadlier-Brown Goodbrand Ltd. v. Adola Mining Corp* (1988), 24 B.C.L.R. (2d) 341 (Co. Ct.)). An assertion on an invoice is not sufficient if the defendant has not agreed to it (*Kalicum Drilling Ltd. v. Orca Estates Ltd*., 1997 CanLII 4113 (B.C.C.A.)).

Whether legal fees, accountants' fees, and other fees based on hourly rates or subject to bonus contingencies are liquidated claims is a matter of some dispute. See *Nathanson, Schacter & Thompson v. Sarcee Band of Indians and Others* (1992), 70 B.C.L.R. (2d) 253, reviewed on other grounds at (1994), 90 B.C.L.R. (2d) 13; but see also *Eades v. Kootnikoff* (1995), 13 B.C.L.R. (3d) 182 (S.C.). The notice of claim should sufficiently describe how the amount of the claim is calculated. For example, it should describe information such as the contractual hourly rate, the number of hours worked, taxes, disbursements, costs of supplies, and any other amounts that are included in the claim (see *Eades*). Master Horn further concluded that the *Court Order Enforcement Act* "does not require a deponent to set out the basis upon which a fee for services was calculated."

(iii) All just discounts not made

Section 3(2)(d)(v) of the *Court Order Enforcement Act* requires the plaintiff to affirm that an amount is "justly due and owing, after making all just discounts." "All just discounts" is not defined in the *Court Order Enforcement Act*, but has been interpreted to mean the party seeking a prejudgment garnishing order must reduce the amount claimed by the amount of any valid and liquidated claims of the other party advanced by way of "set-off or counterclaim" (see *Ohman v. Sync Access + Security Technology Ltd.*, 2018 BCSC 1001).

In practice, this issue is cited in the majority of applications to set aside garnishing orders. A court may consider evidence from the defendant that genuine claims and counterclaims exist between the parties to the proceeding, evidence that would undermine the plaintiff's claim to have given effect to all just discounts (*Ridgeway-Pacific Construction Limited v. United Contractors Ltd*., [1976] 1 W.W.R. 285 (B.C. C.A.)).

In *Design Sportswear Ltd. v. Goodmark Apparel Inc.* (1994), 26 C.P.C. (3d) 279 (B.C.S.C.), the court held that a just discount could only be made for an ascertained or liquidated amount. The court later clarified this concept in *Eagle Crest Explorations Ltd. v. Consolidated Madison Holdings Ltd.* (1995), 14 B.C.L.R. (3d) 336 (S.C.). In that case, the court confirmed that a valid, liquidated claim means evidence of a claim, which, "if ultimately accepted at trial, will establish that the sum, or at least some part of it is due to the defendant."

In practice, if the defendant sought a discount or claimed an offsetting charge before the litigation started, counsel should carefully consider the evidence supporting that claim. If there is substance to the claim, counsel should consider reducing the order sought.

This is particularly important in construction law matters where most claims are offset by claims from the other side for things like defective work or unpaid holdbacks.

Generally, it is advisable to be cautious when applying for this remedy. If parts of the claim are not easily quantified, or if the defendant has made an offsetting claim, it is often better to pursue only the clearly liquidated amounts that are not subject to any "just discount."

(iv) Failure to follow formalities

Counsel attacking garnishing orders have been most creative in arguing that the procedural formalities for an order have not been complied with. The cases can be difficult to reconcile.

Failure of the official swearing the affidavit to indicate capacity (for example, notary or commissioner) was fatal in *Vitek v. Poh*, *supra*. A failure to have alterations and deletions initialed by the person before whom the affidavit was sworn was fatal in *Langley Stainless Prod. Ltd. v. 2051 Investments Ltd.*, [1987] B.C.D. Civ. 1720-02 (S.C.). However, additions and filling in spaces need not be initialed (*Bel Fran Investments Ltd.,* [1975] 6 W.W.R. 374 (B.C. S.C.)).

There is divided authority on the sufficiency of a solicitor, as opposed to the plaintiff, being the deponent for the affidavit. Such a practice was held insufficient in *Caribou Construction Ltd. v. Cementation Co. (Can.)* (1987), 11 B.C.L.R. (2d) 122 (S.C.). However, later cases have doubted this decision: see *Samuel and Sons Travel Ltd. v. Right On Travel (1984) Inc.* (1987), 19 B.C.L.R. (2d) 199 (Co. Ct.), and *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.* (1994), 89 B.C.L.R. (2d) 132 (S.C.). Furthermore, s. 3(2)(b) of the *Court Order Enforcement Act* specifically contemplates that the supporting affidavit may be sworn by the solicitor for the plaintiff. Nevertheless, the risk is that the solicitor may be cross-examined on the affidavit, so the recommended practice is to have the client swear the affidavit in support of any prejudgment garnishing order in all but the most urgent situations. If a lawyer must swear the affidavit, it is advisable to have another lawyer at your firm swear it.

(v) Timing of the order

The times at which a garnishing order is issued and subsequently served are important for the validity of attachment attempts both before and after judgment. The cases on this issue are not easily reconciled. The strictest interpretation is that there must be "obligations and liabilities owing, payable or accruing" (excepting wages) at the time the order is issued and when the order is served (*Vater v. Styles* (1930), 42 B.C.L.R. 463 (C.A.); *Canadian Bank of Commerce v. Dabrowski* (1954), 13 W.W.R. (N.S.) 442 (B.C.S.C.); *BC Land and Insurance Agency (CR) Ltd. v. MacDonald*, [1987] B.C.D. Civ. 1723-02, (Co. Ct. Master); *Ahaus Developments Ltd. v. Savage* (1994), 92 B.C.L.R. (2d) 307 (C.A.)).

In cases in which a debt will accrue and is due in the future, and where attempting to intercept funds involves difficult questions of timing, it is best to apply under s. 15 of the *Court Order Enforcement Act* for payment of a claim or demand into court at maturity. The application is made after a garnishing order is issued and should detail why serving the garnishing order in the ordinary course is impractical.

(vi) Section 5 applications

There is an additional ground for applying to set aside a prejudgment garnishing order, beyond alleging defects in the affidavit. The *Court Order Enforcement Act*, s. 5, provides the defendant with a right to apply to have the order set aside where the court considers it "just in all the circumstances." The leading case on the exercise of discretion under this section is *Webster v. Webster* (1979), 12 B.C.L.R. 172 (C.A.). Where a judge has exercised discretion to set aside an order under s. 5, the Court of Appeal will not lightly vary that decision (*Bartle & Gibson Co. Ltd. v. Deakin Equipment Ltd.*, [1985] B.C.D. Civ. 1720-02 (C.A)).

There have been several decisions on s. 5 applications since *Webster*. Essentially, each case will be decided on its own merits, but it will be up to the defendant to show that the order is unnecessary, an abuse of process, or that it creates an undue hardship. The burden is on the defendant to adduce compelling evidence supporting the application.

To show the order is "unnecessary," the applicant must show that the applicant has substantial unencumbered assets that would be available after judgment, making the garnishing order unnecessary. If you seek to advance this argument on behalf of a corporation, the court will generally require financial statements showing the assets are not encumbered, and a statement from the company's accountant on the corporation's net worth.

If the defendant is arguing undue hardship, the defendant must show substantial and compelling evidence of unusual hardship, as the unpaid creditor is also suffering hardship. Successful arguments for undue hardship tend to focus on prejudice to innocent third parties who will be affected by the order.

[§9.08] Acting for Debtors Before Judgment

1. General

Some substantive and procedural law and professional responsibility matters are especially important to lawyers acting for debtors. These matters are in addition to the general comments made in §9.03.

As noted earlier, plaintiff creditors want full payment quickly and with as little expense as possible. Defendant debtors might seek delay, or seek to make the proceedings costly so as to encourage the plaintiff to settle for a reduced amount. The lawyer should be wary if a debtor client whose case has limited merit wants to litigate.

Lawyers have a duty under the *BC Code*, rule 5.1-2, not to knowingly assist a client to do anything dishonest or dishonourable. Commentary [8] to *BC Code* rule 5.1-1 says:

> [A] lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections […] or tactics that will merely delay or harass the other side.

In general, debtors are likely to be under a variety of pressures and it may be important for the lawyer to work towards a quick but fair resolution.

Lawyers' fees are an obvious problem for many debtor clients. If a satisfactory arrangement cannot be worked out, then the lawyer should consider what services can be given *pro bono*, or the lawyer should refer the debtor to a not-for-profit debt counselling service.

It is important that lawyers fully review with debtors not only the specifics of the claim by the other side, but all details of the parties' dealings. For example, there may not be a defence to the claim, but there may be a counterclaim.

A discussion of common law, equitable and statutory defences, and causes of action for debtors is beyond the scope of this chapter. Some of the more important defences at law and equity are mistake, lack of consideration, and unconscionable bargain (unequal bargaining power and unfairness of the bargain). There are also statutory defences set out in the *Personal Property Security Act*, *Business Practices and Consumer Protection Act*, and the *Bills of Exchange Act* (Canada). See the "Collections Procedure" checklist in the Law Society's *Practice Checklists Manual*, and "Debtor Remedies" in the CLEBC course publications. For procedural and other strategies for defending a claim, see Chapter 14, "Acting for a Debtor" in *British Columbia Creditors' Remedies—An Annotated Guide* (Vancouver: CLEBC).

It is important that the lawyer review a debtor's entire financial picture. Besides the immediate problem that brings the client to the lawyer, there may be other unsecured (or secured) creditors pressing for payment as well. While it is beyond the scope of this chapter to discuss the federal *Bankruptcy and Insolvency Act*, lawyers should remember that a debtor might have remedies under that statute, including assignment in bankruptcy, consumer proposals (Part III, Division 2), commercial proposals (Part III, Division 1), and orderly payment of debts (Part X). In some cases it may be prudent to refer the debtor to someone who is experienced in assisting people who are in financial trouble, such as a trustee in bankruptcy.

There are many settlement alternatives to litigating a collections matter. A creditor may be satisfied with reinstatement of instalment payments, perhaps in a smaller amount. A debtor may have security to give, either over property or from a guarantor. Where a creditor insists on having judgment, it may be possible to negotiate an instalment payment clause as part of the judgment order. It may be open to the parties to agree to allow the debtor to liquidate some assets voluntarily to pay the creditor, as an alternative to potential loss of value to both sides through forced seizure and sale.

If liability and quantum of the debt are not in issue, but repayment terms cannot be settled, there are still remedies open to the debtor. SCCR 13-2(31) gives the court authority to make instalment payment orders on judgments. That rule also empowers the court to make orders suspending execution. There is authority in Small Claims Rules 11 and 12 for the Small Claims Court to order judgments payable by instalments.

2. Ethical Concerns

There are special ethical concerns for lawyers when acting for debtors. In collection matters, of special concern to the Law Society is the potential for counsel to become involved in fraudulent preferences and fraudulent conveyances (see rule 3.2-7 of the *BC Code*). There may be risks both for the client and for the lawyer. Before acting in situations where there is any possibility of these allegations being raised against a client, the lawyer should thoroughly review the Law Society commentaries, and possibly seek the opinion of a practice advisor.

Rule 3.2-7 of the *BC Code* describes some of the limits on the advice a lawyer can give:

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Commentary [1] to rule 3.2-7 states:

> A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

The August 1987 *Discipline Digest* warns lawyers to resist temptations that can arise in debtor situations:

> It is the lawyer's duty to protect his or her client within the bounds of the law. The temptation to push beyond those bounds is never more intense than when the client is a harried debtor in search of relief. Yet assisting in any attempt to remove assets from the reach of lawful creditors, whether for the benefit of the lawyer or the client, exposes the lawyer to serious criminal and civil liability, and professional discipline risks.

The following warnings from the February 1985 *Discipline Digest* address fraudulent conveyances specifically:

> [M]embers who are asked to advise client in this type of situation should thoroughly review the case law on fraudulent conveyances.
>
> [. . .]
>
> [M]embers should exercise extreme caution in accepting instructions to effect a transfer in circumstances which *may* constitute a fraudulent conveyance.

Determining the validity of a debtor client's proposed course of conduct can be difficult. The difference between valid and invalid transactions may eventually turn on fairly narrow legal principles.

Lawyers are frequently called upon to give advice to debtors who have already filed for bankruptcy and remain undischarged. In those circumstances it is important to note that the debtor cannot offer to pay a lawyer's fee without permission from the trustee, and accepting a payment from an undischarged bankrupt can often result in a preference claim where the trustee can claw back the retainer or fees.

For a thorough review of the distinctions between fraudulent conveyances and fraudulent preferences, and of those transfers that are within the scope of the relevant acts, see *British Columbia Creditors' Remedies—An Annotated Guide* (Vancouver: CLEBC); and Robinson's *British Columbia Debtor-Creditor Law & Precedents* (Toronto: Carswell).

[§9.09] Postjudgment Execution

Once a creditor obtains a judgment, the creditor is able to use a variety of payment enforcement methods. There is no practice requirement that the creditor make a further demand for payment. Under the *Bankruptcy and Insolvency Act* a judgment is considered continuing demand for payment.

As a practical matter, while a collection agent must not charge fees and disbursements to a debtor except as authorized by legislation, a bailiff's reasonable fees and disbursements are deemed to be part of the amount owing by the debtor. Therefore, it may in some circumstances be prudent to use the services of a bailiff rather than a collection agent.

1. Debtor Examinations

In situations where the judgment creditor has insufficient information with which to attempt judgment execution, there are two procedures under the SCCR that can be used to compel judgment debtors to appear personally and answer questions, under oath, about their ability to pay. Aside from providing the creditor an opportunity for questioning, the debtor and creditor may be able to use the occasion to come to an agreement on repayment, thus avoiding the unnecessary expense and delay associated with asset execution procedures.

(a) Examination in Aid of Execution

SCCR 13-4 allows a judgment creditor to examine a debtor in aid of execution. The process is similar to examinations for discovery. The process is initiated by serving an appointment and sufficient conduct money on the debtor.

Service on counsel for an officer of a company to be examined was held sufficient in *Bank of Montreal v. Quality Feeds Alberta Ltd*., 1995 CanLII 3189 (B.C.S.C.), aff'd (1996), 49 C.P.C. (3d) 8 (C.A.).

No court order for attendance is required. The debtor, the creditor and counsel are the only parties to the hearing, though a reporter may be brought in to record the proceedings. SCCR 13-4 lists the range of subjects on which the debtor can be examined; see the "Collections—Examination in Aid of Execution" checklist in the Law Society's *Practice Checklists Manual* for a suggested list of questions. This should be modified to suit the circumstances.

The examination in aid of execution process can be used concurrently with judgment execution attempts (unlike the subpoena to debtor process, discussed later). The existence of an outstanding writ of execution is not a valid ground for refusing to appear at the examina-

tion (*Kendall and Dolphin Ventures Ltd. v. Hunt* (1978), 9 B.C.L.R. 332 (S.C.)).

In *Haywood Securities Inc. v. Inter-Tech Resource Group* (1985), 68 B.C.L.R. 145 (C.A.), affirming (1985), 62 B.C.L.R. 183 (S.C.), the Court of Appeal, with dissent, held that s. 13 of the *Canadian Charter of Rights and Freedoms* could not be used as a defence for refusing to answer questions in examinations in aid of execution.

The court has discretion under SCCR 13-4(5) to order attendance and examination of any other person who may have knowledge of the debtor's circumstances. This provision was used to compel a spouse to attend (*Dezcam Industries Ltd. v. Kwak* (1983), 38 B.C.L.R. 121 (S.C.) and *Advance Magazine Publishers Inc. v. Fleming*, 2002 BCSC 995), and the manager of a financial institution to attend (*Hrabcak v. Hrabcak* (1982), 44 B.C.L.R. 22 (S.C.)). In *Royal Bank of Canada v. Scheinberg*, [1995] B.C.J. No. 2013 (B.C.S.C. Master), the court refused to order an examination of a defendant's counsel on the basis that the plaintiff had not reasonably exhausted alternatives for obtaining financial information about the defendant. In *Edelweiss Credit Union v. Waschke* (1986), 8 B.C.L.R. (2d) 392 (Co. Ct.), the court disapproved of a judgment creditor applying under former Rule 26(11) (discovery of documents) as a method of obtaining a judgment debtor's address from a person who was not a party to the action.

Because judgment debtors often fail to appear at the examination, counsel should always remember to obtain an affidavit of service from the process server who served the appointment. Counsel will also require the appointment to be endorsed for non-appearance. The reporter attending will provide this after a 30-minute grace period to the debtor. Note that the examination must be held at the registry nearest to where the debtor resides.

Although the failure to attend at an examination in aid of execution is punishable by contempt, the courts have held that the "usual practice" requires the creditor to obtain an order requiring the debtor to attend which makes clear that the failure to attend may constitute contempt: *Sears, Roebuck & Co. v. Eadie*, 1984 CanLII 308 (B.C.C.A.). This is despite the fact that this provision is typically included on the appointment previously served upon the debtor.

(b) Subpoena to Debtor

SCCR 13-3 sets out the procedure for subpoenas to debtors. The process begins with the debtor being served with the subpoena, which contains a hearing date (substituted service is possible per *Margetish v. Gildemeester*, [1985] B.C.D. Civ. 3717-01 (Co. Ct.)), and sufficient conduct money.

There are a number of distinctions between an examination in aid of execution and a subpoena to debtor: in the latter, the hearing is held before an examiner (usually a registrar or a master), and the examiner has the authority to make an order for repayment of the judgment, on terms. The range of subjects on which the debtor can be questioned is narrower for a subpoena to debtor hearing (SCCR 13-3(4) and see *Kareena (B.C.) Services v. Superstar Holding Inc.* (1983), 44 B.C.L.R. 96 (Co. Ct. Registrar)).

A subpoena to debtor cannot be issued while a writ of execution is outstanding against the debtor (SCCR 13-3(1)). Also, a subpoena to debtor hearing (but not an examination in aid of execution) should be dismissed when a monthly repayment order (in lieu of garnishment) under s. 5(2) of the *Court Order Enforcement Act* exists (*Bank of BC v. Joulie* (1982), 29 C.P.C. 273 (B.C. Co. Ct.)). However, the parties may seek a variation of the order (SCCR 13-3(11) and see *Armstrong Spallumcheen Savings & Credit Union v. McKinlay*, [1992] B.C.W.L.D. No. 1338 (S.C. Master)).

The subpoena to debtor process generally is more advantageous to the debtor than the creditor. For the creditor, it is a method by which a debtor can be forced to disclose financial information but the likely result will be small periodic payments, with committal as a penalty for failure to either disclose or pay.

Debtors can expect that an examiner's repayment order will be reasonable and tailored to the debtor's financial circumstances. Debtors are protected against writs of execution and garnishment from that creditor so long as the payment order is not in default. Even if there is default, but an order has not been rescinded, execution can only issue for the amount in default (*Bank of Montreal v. Monsell* (1985), 58 B.C.L.R. 11 (S.C.)). Rule 42(21)(b) under the former Rules, which provided for acceleration when there is default on instalment orders made under that rule, was held not to govern instalment orders made under Rule 42(33) (*McKay v. McKay*, [1992] B.C.W.L.D. No. 2497 (S.C. Master)). These rules have been replaced by SCCR 13-2(32) and 13-3(11), respectively.

(c) Committal for Contempt

Section 51 of the *Court Order Enforcement Act* states: "a person must not be taken in execution on a judgment." However, imprisonment for contempt of orders arising from SCCR 13-2, 13-3, and 13-4 is still a remedy that a creditor may seek (*Microwave Cablevision Ltd. v. Harvard House Capital Ltd.* (1982), 37 B.C.L.R. 101 (C.A.), decided under former Rules 42 and 42A), although the practical value of the remedy is questionable.

In examinations in aid of execution, a debtor may risk contempt proceedings, for example, by failing to attend at all, or by attending but failing to bring relevant documents or answer relevant questions. Such actions are subject to a contempt application and punishment by fine or committal under SCCR 22-8 (*Sears, Roebuck & Company v. Eadie*, 1984 CanLII 308 (B.C.C.A.)). However, as noted above, in *Sears*, the Court of Appeal held that a precondition to such a contempt application was an application for an order of the court specifically directing the debtor to attend or answer as required. If the debtor failed to obey that order, then contempt proceedings could be brought.

On subpoenas to debtors, the authority for committal is specifically set out in SCCR 13-3. Under SCCR 13-3(8) a failure to attend, to be sworn, or to give satisfactory answers, among other actions, can lead to a committal order. Under SCCR 13-3(10), an unreasonable failure to pay on an instalment order, among other actions, can also lead to committal. The SCCR require a specific court hearing for committal if, as is usually the case, the original subpoena hearing was before a registrar.

When a client wants counsel to proceed with any form of contempt application, it is vital that the SCCR (which have only been summarized here) be strictly followed. Failure to do so will lead to dismissal of the application. The absence of contempt warning language in the hearing notice and an affidavit of service of the application sworn on information and belief have each been considered to be fatal defects (*Winch v. Western Cedar Products Ltd*. (1977), 3 B.C.L.R. 198 (Co. Ct.)). Failure of strict proof of personal service of the application is fatal also (*Dow Chemical v. Coast Plastics*, [1986] B.C.D. Civ. 906-02 (S.C.)).

(d) Small Claims Court

Small Claims Rules 12 to 15 set out an examination and payment order process for judgments made in Small Claims Court. A first step that is open to either debtor or creditor is to apply for a payment hearing under Small Claims Rule 12. At that hearing, the court has authority to order repayment by instalments, or it can confirm a date for full payment.

If a debtor does not make payments ordered under a payment hearing, or if payments are not made as can be ordered at a settlement conference or trial, the creditor can apply for a default hearing under Small Claims Rule 13. At that hearing, the court may confirm or change payment terms. Failure by the debtor to make payments or reasonably explain that failure, or failure by the debtor to attend the hearing, can eventually lead to committal.

2. Garnishment

Garnishment, or attachment of debts, is a statutory remedy. The provisions for garnishing debts, both before and after judgment, are set out in the *Court Order Enforcement Act*, Part I. Garnishment is usually directed against bank accounts or wages, though many other funds are subject to garnishment.

(a) The Process

A judgment creditor can obtain a garnishing order after judgment on application without notice, at the court registry (see Supreme Court Practice Direction PD-10—*Garnishing Orders*). An affidavit is submitted in support. An applicant for a pre or postjudgment garnishing order must also file a requisition in Form 17. The applicant files a draft garnishing order along with the affidavit and requisition and filing fee. The order binds the obligations due to the debtor from the garnishee, from the time of service of the order on the garnishee (s. 9(1)).

Garnishment is available in both Small Claims Court and Supreme Court actions. The form of order and supporting affidavits are nearly identical at both levels of court. Note that most Small Claims Court forms are printed in specific formats; where such prescribed forms are available, they must be used.

In British Columbia, garnishing orders do not continue to attach subsequent funds (except in some maintenance enforcement situations). The order attaches to wages that become owing, payable, or due within seven days from the date the affidavit in support was sworn. The order must be timed to coincide with the debtor's pay period and a new order obtained for a subsequent pay period. For this reason, wage garnishment for a relatively large judgment will be a cumbersome process.

When the garnishee is obligated to the judgment debtor, the garnishee must pay into court the lesser of the amount stated in the order, or the amount of the garnishee's obligation to the judgment debtor (s. 11). The Act sets out a process for resolving disputes over garnishee liability or amount due; see ss. 11 and 16 to 20.

As a matter of discretionary practice, garnishees who deny any debt, obligation, or liability to the defendant often address a letter to the court registry (with a copy to plaintiff's counsel) advising of that position. This often prevents follow-up phone calls and possible court applications.

The garnishing order is to be served on the judgment debtor "at once, or within a time as allowed by the judge or registrar" (s. 9(2)). In practice, service on the debtor may take several days to accomplish. This will not be fatal in a later application to set aside, provided that the attempt is underway shortly after service is effected on the garnishee. While there are a small number of cases where the court, in the interest of fairness and equity, stretched the term "at once" to allow for service much later, counsel should, as a matter of practice, serve the defendant immediately after serving the garnishee to ensure compliance with s. 9(2).

Once the garnishee pays money into court, a notice is sent from the registry to the creditor or the creditor's lawyer. Alternatively, the lawyer can simply contact the garnishee immediately after service to confirm if there will be payment in or not, or if there will be a dispute. If money is not to be paid in, then the lawyer can dispense with serving the order on the judgment debtor. The Act does not stipulate that the affidavit in support must be served but the common practice is to do so. The garnishing order can be served by substituted service, upon order of the court (s. 9(5)).

Payment of money out of court is governed by ss. 12 and 13. The creditor has a number of options. An application can be made to court for an order for payment out, but the debtor must be notified of the application, unless an order is also obtained dispensing with service (or ordering substituted service). If written consent is obtained from the debtor for payment out (for example, where the parties have come to a settlement), then no court order is necessary and the money can be paid out upon a requisition to the registry. In this instance, proof of service of the original garnishing order is not required (*Sears Canada Inc. v. Naswell* (1987), 20 C.P.C. (2d) 97 (B.C. Co. Ct.)).

The creditor can also have the money paid out by requisition if the debtor is served with a notice of an intention to apply for payment out, and if the debtor does not file a notice within ten days disputing the payment out. In order to save service costs and time, a lawyer may serve the debtor with the garnishing order and the notice of intention to apply for payment out simultaneously.

(b) Funds Subject to Garnishment

The essential issue in garnishment after judgment is whether a garnishee's obligation to the debtor is subject to attachment under the *Court Order Enforcement Act*. Section 3 provides that the "debt, obligations, and liabilities" must arise from a trust or contract obligation (unless it is itself a judgment due to the debtor). Wages and salaries are included (s. 1).

A great deal of case law exists around what funds can be garnisheed, and under what conditions. In addition, timing of the service of the order is often crucial.

Wages are subject to garnishment only **after** judgment. "Wages" include salary, commission, and fees, and any money payable by an employer to an employee for work or services performed in the course of employment, but do not include deductions from wages made by an employer under federal or provincial legislation (s. 1). This definition includes wages payable to the debtor within seven days after the day on which the affidavit in support of the order is sworn (s. 1).

A garnishing order for wages is not continual—a new application and garnishing order must be sought for each pay period, unless you are acting for the Crown and are relying on specific statutory authority that allows for "continuous" garnishment of wages. Section 3 of the *Court Order Enforcement Act* limits the amount of wages that can be garnished; usually, the maximum is 30% of the net income after statutory deductions.

Wages of provincial government employees are subject to garnishment (s. 6). Federal public servants are subject to garnishment through a separate federal statute—the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, C. G-2.

Wages and salaries received on reserve by Indigenous people registered as Indians for the purposes of the *Indian Act* cannot be garnished unless all of the proceeds of the garnishment are in favour of a creditor who is an Indian (s. 89(1) of the *Indian Act*). An Indian devel-

opment corporation is not an Indian and cannot garnish the wages owed by a band to an Indian (*Tsilhqot'in Economic Development Corp. v. Johnny*, [1995] B.C.J. No. 2896 (Prov. Ct.)).

Garnishment of real estate commissions is possible, but very problematic. A garnishing order cannot be issued on monies that the debtor *may* become entitled to in the future. The creditor would need to monitor the realtor's sales to determine at what point a commission became payable to the realtor, and garnish it immediately: *First Pac. Credit Union v. Dewhurst*, 1987 CanLII 2649 (B.C. S.C.).

Funds held by financial institutions, such as chequing or savings accounts, are usually subject to garnishment so long as they are not held jointly with someone who is not indebted to the creditor. Term deposits can be garnisheed (*Bel Fran Investments Ltd. v. Pantuity Holdings*, [1975] 6 W.W.R. 374 (B.C.S.C.)). As of November 2008, DPSPs, RRIFs and RRSPs are protected against garnishment (s. 71.3 of the *Court Order Enforcement Act*). A bank line of credit was held not garnishable in *Yakir v. March Films B.C. Ltd.* (1980), 19 B.C.L.R. 211 (S.C.). A debtor's funds put aside by a bank into a "suspense" account to cover possible dishonoured cheques was held garnishable in *Bank of Montreal v. Redlack supra*; see also *Garon Realty & Insurance Ltd. v. James and Royal Bank of Canada*, [1978] 6 W.W.R. 694 (B.C.S.C.). Bankers' acceptances were held to be attachable in *Knowland v. C.E.L. Industries Ltd*, *supra*.

Garnishing orders against banks (as garnishees) only attach funds in judgment debtor accounts at the branch served (*Bank Act* (Canada), s. 462(1)). There is case authority that this section does not apply to bank employees whose wages are being garnisheed (*Bank of Nova Scotia v. Mitchell and Mitchell*, [1981] 5 W.W.R. 149 (B.C.C.A.)).

If the financial institution's branch that is served is on a reserve, then a garnishing order cannot attach to an Indian's account. Funds held on deposit (on or off reserve) for Indians or Indian Bands are also not exigible if they are "deemed to be situated on a reserve" under s. 90 of the *Indian Act*: this section applies to personal property that was "purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands" (s. 90(1)(a)) or "given to Indians or bands under a treaty or agreement between a band and Her Majesty" (s. 90(1)(b)).

While the general principle of non-exigibility pursuant to the *Indian Act* remains in force, the Supreme Court of Canada in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 significantly qualified the application of such exemption by narrowly construing the word "agreement" in ss. 90(1)(b) of the *Indian Act*. The impact of *McDiarmid Lumber* can be seen in recent decisions granting more liberal execution against funds not physically located on reserve property (see e.g. *Joyes v. Louis Bull Tribe #439*, 2009 ABCA 49).

The exemption from garnishment also may not apply to incorporated companies such as Tribal Councils or Indigenous organizations (*R. v. National Indian Brotherhood*, [1979] 1 F.C. 103 (Fed. T.D.); *Johnson v. West Region Tribal Council*, [1994] 1 C.N.L.R. 94 (Fed. T.D.)).

An Indian can effectively waive the protection of s. 89 of the *Indian Act* with respect to a commercial transaction on a reserve. In *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, 2009 MBCA 72, the court ruled that an Indian may waive the s. 89 exemption in contract or loan arrangements with creditors, opening up the prospect that, with pre-existing waivers in place, a creditor may now be able to attach to assets situated on a reserve.

Money stored physically in an off-reserve safety deposit box is not protected by s. 89 of the *Indian Act.*

Rent payments are garnishable, but the order must apparently be served on the tenant on the day the rent is due and before payment has been forwarded: *Access Mortgage Group Ltd. v. Stuart* (1984), 49 B.C.L.R. 260 (C.A.).

Money paid into court may not be garnisheed (*Provincial Treasurer of Alberta v. Zen*, [1981] 5 W.W.R. 188 (B.C.S.C.)) but it may be subject to charging orders. Money payable by the federal Crown to third parties cannot be attached under the Act (*Selness v. Luk* ([1990] B.C.D. Civ. 1724-02 (B.C. Co. Ct.)). That portion of funds held by a garnishee on statutory trusts for GST, employment insurance, Canada Pension Plan, and income tax cannot be garnisheed because they do not belong to the debtor (*Bhattacharjee v. Strong Western Holdings Ltd.*, [1993] B.C.J. No. 6 (S.C.)).

Pensions and annuities may be subject to garnishment, depending on their nature. A private annuity was subject to garnishment in *Bank of Montreal v. Freedman* (1984), 58 B.C.L.R. 289 (S.C.). In *Crosson v. Crosson* (1985), 14 C.C.L.I. 246 (B.C.S.C.), a disability pension was garnisheed. Welfare payments are not sub-

ject to garnishment for reasons of public policy (*Constantini and Company v. Fischer* (1982), 34 B.C.L.R. 363 (S.C.)). Old Age Security and Canada Pension Plan benefits are exempt from garnishment except by the government (*Old Age Security Act*, s. 36; *Canada Pension Plan Act*, s. 65).

Shareholder loans are subject to garnishment, so long as they are due and payable (*R. v. Big White Developments Ltd.*, [1984] B.C.D. Civ. 1724-05 (S.C.)), although in practice it is difficult if not impossible to determine when a debt owed to a shareholder is due and payable without inside knowledge of the affairs of the company, and so such loans are rarely garnished. A demand loan between businesses was held garnishable, despite an allegation that there was a postponement understanding which would make the obligation conditional, in *Roe v. Mr. Build (Can.) Ltd*., [1988] B.C.W.L.D. No. 845 (Co. Ct.).

Builders lien trust funds may be subject to garnishment, but the funds remain subject to the claims of the trust beneficiaries whose statutory trust claims under s. 10 of the *Builders Lien Act* will generally have priority over the claims of most creditors (*A & M Painting v. Byers* (1981), 28 B.C.L.R. 43 (C.A.). See also *Aebig v. Miller Contracting Ltd.* (1993), 81 B.C.L.R. (2d) 221 (S.C. Master)).

Lawyers' trust accounts may be subject to garnishment but may also be subject to offsetting claims by the lawyer for monies due and owing (see *Capozzi Enterprises Ltd. v. Tower Enterprises Inc.* (1983), 50 B.C.L.R. 100 (S.C.)). However, funds held in client transactions generally are not garnishable, depending on conditionality or entitlement (*Ahaus Developments Ltd. v. Savage*, *supra*).

Funds assigned as security are not subject to garnishment, so long as the security instrument is valid and in place before the garnishment. For a case on this point, see *Tyrer Enterprises Ltd. v. Lytton Lumber Ltd*., [1992] B.C.W.L.D. No. 2452 (C.A. Chambers). However, a mere direction to pay will not constitute an assignment, and a garnishing order will succeed (*Weber v. D5 Enterprises Ltd.* (1983), 51 B.C.L.R. 172 (S.C.)). A receiver appointed under a debenture took priority in *Weldon Metal Products Ltd. v. First Food Corporation*, [1987] B.C.D. Civ. 1727-01 (S.C.).

(c) Release of Garnishment

As with prejudgment garnishing orders, there is authority in the *Court Order Enforcement Act* for garnishing orders after judgment to be released, on conditions (s. 5). This is a discretionary remedy. However, if there is a judgment, instalment repayment terms must be set if the order is released.

3. Execution Against Real Property

If a creditor holds a mortgage registered against real property owned by a debtor, the creditor may execute against that property through foreclosure proceedings. Mortgage enforcement through foreclosure proceedings is governed by specific procedures set out in SCCR 21-7 and other applicable statues such as the *Law and Equity Act*. A detailed discussion of foreclosure practice is beyond the scope of this chapter. For further information see the resource materials listed in §9.02 above.

An unsecured creditor who seeks to recover monies by execution against real property must generally do so under the enforcement mechanisms of the *Court Order Enforcement Act*. Only a creditor who has a registered mortgage on title is entitled to use the foreclosure proceedings set out in the SCCR and the *Law and Equity Act*. All other creditors must use the enforcement provisions in sections 80 to 113 of the *Court Order Enforcement Act*.

Lawyers and clients alike should recognize that this process is lengthy, cumbersome, and therefore costly. Accordingly, before initiating this form of execution, a judgment creditor should consider all relevant factors carefully, particularly whether there is any realistic potential for recovery by forcing a sale of the property. In many instances, recovery by the creditor through execution will be doubtful. However, the execution process can be used creatively and cost-effectively to provide a creditor with leverage to assist in a negotiated settlement of a judgment, as discussed below.

The first step in executing against real property is for the judgment creditor to register the judgment against the debtor's title. The debtor might own the real property as a tenant in common or in joint tenancy, but that part of the title that the debtor owns is an interest that the creditor can pursue. If all the registered owners are debtors the creditor is pursuing, the creditor can register against the full title. If the debtor only owns a part interest, the creditor's charge only affects that part of the title owned by the debtor. If the creditor is planning to force a sale of a fraction of the title, another owner registered on title might be an interested buyer. Alternatively, the creditor might buy the debtor's interest, or the creditor might look for a prospective buyer among third parties.

When you get a judgment in Small Claims Court, the registrar will give you a Certificate of Judgment. In Supreme Court, the form of the order

is governed by SCCR 13-1. It is important to note that the registration of a judgment on land title expires after two years unless it is renewed (s. 83).

Regardless of whether the judgment was obtained in Supreme Court or Small Claims Court, proceedings must be brought in the Supreme Court for sale of that interest. If the original judgment was obtained in the Supreme Court, the process is simpler, and can be initiated by notice of application under the judgment action (*Young v. Battiston* (1983), 50 B.C.L.R. 139 (S.C.)).

Once registered against the title, the judgment becomes a charge against the property. From a practical perspective, such a charge can cause significant difficulties for a debtor who wishes to sell or remortgage the property, depending upon the purchaser or lender in question. Depending upon the circumstances of the debtor, registering the judgment might be enough to prompt the debtor to pay the outstanding judgment in full, in order to remove the charge on title. If a creditor can wait for recovery on its judgment, registration alone without any further execution steps can be a feasible and cost-effective recovery strategy.

If the property is the principal residence of the debtor and the debtor's equity in it is less than $12,000 in Vancouver or Victoria, or $9,000 elsewhere in the province, it is exempt from forced seizure or sale. If the equity of the debtor in the principle residence exceeds the exemption on a sale, the debtor is entitled to the amount of the exemption and the creditor receives the balance of the equity.

The process of selling the property to satisfy the judgment involves three hearings:

(1) an initial show-cause hearing before the court (s. 92);

(2) a registrar's hearing to determine details of the title (s. 94); and

(3) a confirmation hearing before the court for a sale order (s. 94).

A court bailiff carries out any order for sale. A creditor cannot circumvent the sale process by bringing an offer directly to court (*Hunter v. Hunter*, [1976] B.C.D. Civ. (S.C.)), nor can a creditor avoid having sale proceeds paid into court as required under s. 110 (*Minister of National Revenue v. Bival Holdings Qualicum Ltd*. (1993), 79 B.C.L.R. (2d) 137 (S.C. Master)). However, in *Hongkong Bank of Canada v. R. in Right of Canada* (1989), 36 B.C.L.R. (2d) 373 (C.A.), the Court of Appeal excused the omission of several steps in a sale ordered under the authority of the *Court Order Enforcement Act*. There is no prohibition against the creditor bidding on the property in the course of the auction.

Despite the apparently mandatory provisions in the *Court Order Enforcement Act* governing the sale of land, it has been held that the *Court Order Enforcement Act* is not a "complete code" and that a chambers judge has discretion to incorporate the provisions of former Rule 43 (now SCCR 13-5) in granting orders for the sale of real property pursuant to execution proceedings: *Instafund Mortgage Management Corp. v. 379100 British Columbia Ltd.*, 1998 CanLII 5841 (B.C.S.C.).

As mentioned above, the debtor's interest in land that a creditor can pursue may be limited by the interests of other persons in the land. In *Lumley v. Lacasse*, 1992 CanLII 2151 (B.C. S.C.), the court held that it was open to a co-owner, who was not a judgment debtor, to seek a declaration concerning the interest against which a judgment had been registered. The court held that this right was consistent with the *Court Order Enforcement Act*, s. 86(2), and could be brought by petition under former Rule 10(1)(g) (now SCCR 2-1(2)).

A creditor may execute against land if it can prove that the debtor is the beneficial owner: *RGC Forex Service Corp. v. Chen* (2000), 72 B.C.L.R. (3d) 113 (C.A.).

A debtor's title interest may prove illusory. In *Kish Equipment Ltd. v. A.W. Logging Ltd.* (1986), 2 B.C.L.R. (2d) 141 (S.C.), the court found a judgment debtor was not the beneficial owner of lands where a relative had transferred title to the judgment debtor without consideration, in order to frustrate a third party's claim to the lands. (Notably, this is a form of fraudulent conveyance, for which creditors have separate remedies.) In practice, obtaining such orders is often very difficult and requires clear and cogent evidence that the registered owner is knowingly holding title for the benefit of the debtor so that the debtor may avoid creditors.

Evaluating the charges registered against the property may show that the debtor has no significant equity in the property after claims of mortgagees and other priority charge holders are met. In proceedings under the *Court Order Enforcement Act*, existing mortgages on the title take priority and are paid out in order of registration. After those claims are met, where there is more than one judgment holder registered against the title, those judgment holders share equally, with no preference and not in priority of registration (*Rutherford, Bazett & Co. v. The Penticton Pub Ltd.* (1983), 50 B.C.L.R. 21 (S.C.)). A subsequent party with a judgment for a very large amount can diminish a first judgment holder's return considerably.

Where multiple judgments are registered on property and the property is sold pursuant to foreclosure proceedings, judgments are paid in

order of registration, instead of the proceeds being divided amongst all creditors: *Hallmark Homes Ltd. v. Crown Trust Company* (1983), 49 B.C.L.R. 250 (S.C.) and *Land Title Act*, s. 28. However, if the sale is done through a court bailiff, creditors may apply under s. 6 of the *Creditors Assistance Act* and serve notice of their claim to any sheriff or bailiff selling the debtor's assets to share rateably in the proceeds of sale among other unsecured judgment holders.

The court has the discretion to dismiss the process at the show-cause stage (*Jones v. Jones*, [1975] B.C.D. Civ. (S.C.)). At the time of the confirmation hearing, the court has the discretion to defer a sale order where the property is the home of the debtor (s. 96(2)).

The real property of an Indian or Indian Band (as defined in the *Indian Act*) will be exempt from execution (*Indian Act*, s. 89). Sections 29, 87, 89 and 90 of the *Indian Act* acknowledge the Crown's duty to protect the property of Indians from dispossession by non-Indians (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.)). However, off-reserve fee simple holdings of an Indian or Indian Band are not protected by s. 89 (*Canada (Attorney General) v. Giroux* (1916), 53 S.C.R. 172).

4. Execution Against Personal Property

(a) The Process

The *Court Order Enforcement Act*, s. 55, provides that all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution, except as exempted under the Act. Section 58 covers seizing property such as money, cheques and promissory notes; s. 64.1 covers seizing stocks, shares and dividends.

The procedure for obtaining a writ of execution is set out in SCCR 13-2. A writ is obtained by applying to the court registry. The writ remains in force for one year, and can be renewed.

The writ is then placed with a court bailiff for execution. In practice, it is important that the judgment creditor provide as much information as possible in order to aid execution. For motor vehicles, searches should confirm registered ownership (though this does not necessarily confirm beneficial ownership), and to identify encumbrances. For shares, information should be provided on their nature and location.

A judgment debtor is liable for the taxable costs of the judgment creditor under SCCR 13-2(22) to (26), but only where assets are realized in execution (*Uram v. Uram* (1985), 66 B.C.L.R. 236 (S.C.)). However, if there is asset seizure but no sale (for example, where the parties come to a settlement), the court bailiff is entitled to costs (*Court Order Enforcement Act*, s. 113(3)).

Under Small Claims Rule 11(11), a judgment of the Small Claims Court can be enforced by an order for seizure and sale. By virtue of the *Court Order Enforcement Act*, s. 47, a writ of execution includes a Small Claims Court order for seizure and sale.

If an order for seizure and sale is wrongfully executed, damages may flow. For example, in *Hamilton v. British Columbia (Workers' Compensation Board)* (1992), 65 B.C.L.R. (2d) 96 (C.A.), the sheriff seized and sold chattels that were not owned by the debtor.

(b) Specific Property Interests

Tangible personal property of the judgment debtor, such as motor vehicles and household furnishings, are exigible under the *Court Order Enforcement Act*, s. 55. However, determining and executing upon the interest that the debtor has in the property may prove problematic. For example, a debtor may be the registered owner of a motor vehicle, but not the beneficial owner. It may fall to the court to decide ownership, and hence exigibility.

According to s. 71.3 of the *Court Order Enforcement Act*, DPSPs, RRIFs and RRSPs are exempt from any enforcement procedures commenced after November 1, 2008.

The procedure for seizure and sale of company shares is set out in ss. 47-51 of the *Securities Transfer Act*, S.B.C. 2007, c. 10 and sections 63.1, 64.1 and 65.1 of the *Court Order Enforcement Act*. Exigibility of shares and actually realizing on their value may be difficult. There may be no market if the shares are insignificant in volume or are in a small non-reporting company. Nevertheless, in a family-owned company other family members may offer to purchase the shares to keep the creditor out. Shares that were owned subject to an option to purchase by a third party are not exigible (*Guaranty Trust Company v. International Phasor Telecom Ltd.*, [1985] B.C.D. Civ. 764-01 (S.C.)).

A judgment debtor's equitable interest in chattels subject to a security agreement is exigible (*Court Order Enforcement Act*, s. 62). However, as a practical matter, executing against that interest may not be worthwhile because the secured creditor must be paid in full first before the judgment creditor (*Re Ottaway* (1980), 20 B.C.L.R. 313 (C.A.)).

Executing against personal property held by Indigenous people involves considerations under the *Indian Act*, s. 89. Generally, personal property held by an Indian or Indian Band (as defined in the *Indian Act*) and situated on a reserve is exempt from seizure by a non-Indian. A non-Indian can only commence garnishment proceedings against an Indian or Indian Band's personal property if it is situated off reserve. Prior to the Supreme Court of Canada's decision in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846, the exemption from execution was given a broad interpretation. However, in *McDiarmid Lumber* the court found that the meaning of "situated on a reserve" in s. 89 was to be given a "concrete common law interpretation" and the term "on the reserve" should be given "its ordinary and common sense" meaning (at para. 19). As well, the court narrowly construed the word "agreement" in ss. 90(1)(b) of the *Indian Act* (which deems property to be situated on a reserve if it was "given to Indians or to a band under a treaty or agreement between a band and Her Majesty"). As noted earlier in this chapter, the impact of *McDiarmid Lumber* can be seen in recent decisions granting more liberal execution against funds not physically located on reserve property (see e.g. *Joyes v. Louis Bull Tribe #439*, 2009 ABCA 49).

Chattel property owned by an Indian and located on reserve can be vulnerable to seizure pursuant to s. 89(2) of the *Indian Act*. If a vendor keeps a right of possession in personal property that is sold under the terms of a conditional sales agreement, that property is not protected by s. 89 against seizure, execution, or enforcement. If there is a default of payment and a court order is granted for recovery of the property, a sheriff is entitled to enter into reserve land and execute the order.

(c) Exemptions

Section 71 allows a debtor an exemption of goods and chattels to the value set by regulation. Current exemptions (B.C. Reg. 28/98) are as follows:

(i) $4,000 household items;

(ii) $10,000 work tools;

(iii) $5,000 car;

(iv) $12,000 equity for a principal residence in Greater Vancouver and Victoria, $9,000 equity for a house elsewhere (s. 71.1);

(v) essential clothing;

(vi) essential medical aids.

Sections 73 to 78 set out the procedure for asset seizure, exemption claims by the debtor, and valuation of the assets.

A debtor must make the exemption selection within two days of the seizure (s. 73(2)). Failure to do so will mean loss of the exemption right (*Lee v. Colonial Cabinets and Plastic Laminates Ltd.*, [1978] 5 W.W.R. 27 (B.C. C.A.)).

In practice, where there is any question about an exemption claim for property such as household furnishings, the court bailiff generally will leave the judgment debtor temporarily in possession of the property. In these instances, the judgment debtor may be required to sign a "notice of seizure and person in possession" to confirm that the seizure has not been abandoned.

Where counsel knows the debtor has high-value items that may fall within one of the exemption categories, it is prudent to send an expert valuator along with the bailiff for the seizure. The expert can advise the bailiff on the value of those items. This is done most often in relation to the exemption category for "tools of trade."

A debtor may include in an exemption claim any equity in secured goods. Where a debtor claims an exemption over an asset which is worth more than $5,000, the asset is to be sold but the debtor receives the exemption amount in priority to the judgment creditor (*Yorkshire Guarantee & Securities Corporation v. Cooper* (1903), 10 B.C.R. 65 (C.A.); *Pacific Produce Co. Ltd. v. Chow*, 1990 CanLII 1296 (B.C. Co. Ct.)).

5. Equitable Execution

Execution remedies arose in equity where existing remedies at law were unavailable to reach certain judgment debtor assets. In addition, statute laws were enacted which gave additional authority for equitable-type execution orders. In British Columbia, at least two forms of equitable execution continue to be available to enforce Supreme Court judgments, though in relatively limited circumstances.

(a) Charging Order

The authority for the court to make a charging order arose from British statute law and the court's equitable jurisdiction (*C.I.B.C. v. Smith*, [1976] 5 W.W.R. 643 (B.C.S.C.)). Consequently, all equitable principles, including the "clean hands doctrine," apply (*Re Farkas* (1983), 50 B.C.L.R. 94 (S.C.)).

Modern execution laws that permit judgment creditors to execute against debtor interests,

which previously could only be reached by a charging order, have largely eclipsed charging orders.

The main remaining circumstance for granting a charging order is to attach funds that are in court in another action in favour of the judgment debtor. The funds may be in court through garnishee proceedings in the other action, or through settlement payment. Generally, the charging order will be subject to existing legal or equitable claims on the funds.

Some earlier British Columbia decisions held that the procedure for charging orders was that there must be a charging order nisi granted first, followed by an order absolute (and payment out of money in court) in six months. The current British Columbia practice is that, while it is within the authority of the court to make an immediate charging order absolute, an order nisi will be made, unless it is clear there are no competing interests for the funds (*Rennison v. Sieg* (1979), 10 B.C.L.R. 30 (S.C.); *Regner v. Dvorak* (1983), 51 B.C.L.R. 158 (S.C.)).

(b) Equitable Receiver

The modern authority for judgment execution through the appointment of an equitable receiver arises from the *Law and Equity Act*, s. 39, and SCCR 13-2(5) and 10-2. As with the authority for granting *Mareva* injunctions, the authority for appointing equitable receivers is stated in general language. It falls to the court, applying equitable principles, to exercise its discretion in granting an order. The role of a receiver appointed in these circumstances is to stand in the place of the judgment debtor and obtain or receive assets for the benefit of the judgment creditor. Such an appointment is not a remedy that can be used before judgment (*Vancouver City Savings Credit Union v. Welsh*, [1988] B.C.D. Civ. 3874-01 (S.C.), but see *Grenzservice Speditions Ges. m.b.H. v. Jans*, (1995), 15 B.C.L.R. (3d) 370 (S.C.)).

Where a creditor has the contractual right to appoint a receiver over the assets of the debtor, counsel must take great care when applying to court to distinguish whether the creditor is applying in whole or in part to enforce the rights it has in contract, or whether it is seeking an equitable remedy from the courts, or a combination of both, as the law diverges significantly when it comes to the powers and duties of a receiver appointed by contract and one appointed pursuant to the *Law and Equity Act.*

Current British Columbia case law suggests equitable receivers will be appointed in two situations: where the judgment creditor seeks to execute against an equitable interest (that is, where execution by writ or other statutory methods is not available); or where the court deems there to be "special circumstances" which justify an order. See *NEC Corporation v. Steintron International* (1985), 67 B.C.L.R. 191 (S.C.).

An equitable receiver was appointed in the following "special circumstances":

(i) to liquidate an RRSP so as to avoid devaluation and negative tax consequences (*National Trust Co. v. United Services Funds*, [1986] B.C.D. Civ. 3867-04 (S.C.) and *Robson v. Robson, supra*; and

(ii) when the conduct of the debtor indicated efforts to make away with assets (*NEC Corporation v. Steintron International*), *supra*, and (*Warren v. Warren*, 2008 BCSC 731.

Appointment of an equitable receiver was refused in the following situations:

(i) when the judgment creditor had not demonstrated the difficulty of enforcing the judgment by other means against the judgment debtor (*First Western Capital Ltd. v. Wardle* (1984), 54 C.B.R. (N.S.) 230 (B.C.S.C.)); and

(ii) when there was no evidence of evasion or attempts to leave the jurisdiction by the judgment debtor, and the creditor had other options to secure payment (*First Pacific Credit Union v. Dewhurst* (1987), 16 B.C.L.R. (2d) 371 (S.C. Master)).

For further discussion, see Chapter 9, "Equitable Remedies" in *British Columbia Creditors' Remedies—An Annotated Guide* (Vancouver: CLEBC).

[§9.10] Execution Priorities

Often there is more than one judgment creditor attempting to collect from the debtor. There are several principles governing the priorities among, and shared entitlement of, those competing creditors.

The *Creditor Assistance Act* is the starting point for considering creditor priorities. Under the *Creditor Assistance Act*, the court bailiff recovers money for a judgment creditor under the writ of seizure and sale. Once it is collected, the bailiff must promptly enter a notice in a book stating that a levy of money on a writ of seizure and sale against the property of a debtor has been made. The entry must detail the amount collected and the date on which it was collected. The notice book must be open to the public and there must be no charge to look at it.

The money collected by a court bailiff must be distributed rateably among all execution creditors and

other creditors whose writs or certificates under the *Creditor Assistance Act* are in the court bailiff's hands at the time of the levy, or within one month from when the notice was entered (s. 3). If a creditor misses that time limit, they lose the entitlement to a share (*Totem Welding Supplies Ltd. v. Johnston, Wilkinson Company Limited* (1986), 8 B.C.L.R. (2d) 17 (S.C.)).

While s. 46 of the *Creditor Assistance Act* provides that there is no priority among execution creditors, there are many exceptions that may give the Crown, or Crown agencies (among others) a priority over funds. Indeed, many priority-type cases involve issues of priority as between the federal and provincial Crowns. For example, see the *Workers Compensation Act*, s. 52, and *W.C.B. v. Attorney General/Canada* (1984), 57 B.C.L.R. 338 (S.C.). In another decision in the same case, (1984), 57 B.C.L.R. 21 (S.C.), the court also held the federal Crown had a priority based on prerogative rights.

[§9.11] Acting for Debtors After Judgment

In many instances a debtor will only seek a lawyer's help after judgment, when a creditor is attempting to enforce. It is important to consider immediately if it is realistic to attack the judgment itself, such as where it was entered in default.

Factors to be considered in an application to set aside a default judgment were established in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. P-58 (Co. Ct.) at 61 (followed in *O'Krane v. Braich*, 1999 BCCA 296 and *Huang v. Tseng*, 2001 BCCA 370). A defendant applying to set aside a default judgment must show that:

- the defendant did not wilfully or deliberately fail to file a response to civil claim;
- the defendant applied to set aside the default judgment as soon as reasonably possible after learning of it, or can explain any delay in the application; and
- the defendant has a meritorious defence, or at least a defence worthy of investigation.

The affidavit in support should address all three points (*Kalfon v. Kalfon*, 2006 BCSC 994 at para. 7), and the onus is on the applicant to prove them (*British Columbia v. Ismail*, 2006 BCSC 1552, leave to appeal refused 2007 BCCA 55 (Chambers)). In *Andrews v. Clay*, 2018 BCCA 50 at para. 28, the court confirmed that these are "factors rather than tests," and are not intended to be either mandatory or exhaustive of the relevant considerations, though they will in most cases be "appropriate indicators of whether it is in the interests of justice to set aside the default judgment."

If it is not possible to set aside the judgment, then consider remedies that affect enforcement. A debtor may be judgment-proof if the debtor has no exigible assets. It may be possible to have the enforcement steps ended simply by informing the creditor or the creditor's counsel of the debtor's circumstances.

When the creditor persists, and when there are extenuating circumstances, a court may order a stay of execution under the authority of the *Court Order Enforcement Act*, s. 48. Two cases where the courts found special circumstances justifying a stay are *Bank of Montreal v. Price*, [1983] B.C.D. Civ. 591-01 (Co. Ct.), and *Bank of Nova Scotia v. Pilling*, [1984] B.C.D. Civ. 3423-02 (C.A.). The court refused an application for a stay in *Caisse Populaire Maillardville v. Frigon*, [1988] B.C.D. Civ. 3872-02 (S.C.). In that case, the court found no special circumstances that warranted a stay, despite the defendant's claim that he would be able to pay the creditors judgment when a related court action between the same parties resolved in his favour.

The parties may be able to negotiate a repayment by instalments as an alternative to execution. When the debtor does have some ability to pay, but the creditor is not willing to agree to such an arrangement, it may be possible for the debtor to apply to the courts, even after judgment, for an instalment payment order. However, as with stays of execution, instalment payment orders should be made only in special circumstances (*Royal Bank v. McLennan* (1918), 41 D.L.R. 27 (B.C.C.A.); *Canadian Imperial Bank of Commerce v. Pegg*, [1994] B.C.J. No. 182 (S.C.)). Note also that instalment payment orders can be made under the *Court Order Enforcement Act*, s. 5 (setting aside garnishing orders after judgment) and s. 96 (deferring judgment execution against a debtor's home), and under SCCR 13-3(11) and SCCR 13-2 (31) to 13-2 (33).