

**Civil Procedure**

Professor Karen Drake

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# How a Civil Action is Initiated

1. Decide: Application or Action?
	1. Default is Action (14.02)
	2. Does it fall within parameters of Application (14.05(3))?
2. the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
3. an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
4. the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
5. the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
6. the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
7. the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
8. an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or

1. in respect of any matter where it is unlikely that there will be any material facts in dispute.
2. If not an Application, then an action
3. Three Types of actions:
	1. Ordinary procedure
	2. Simplified Procedure (76.01)
	3. Class Procedure (*Class Proceedings Act*)

# Statutory Interpretation

## Interpretive Frames

### Application of Rules: Court of Appeal and Superior Court of Justice

1.02(1) These rules apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice, subject to the following exceptions:

1. They do not apply to proceedings in the Small Claims Court, which are governed by Ontario Regulation 258/98 (Rules of the Small Claims Court).

2. They do not apply to proceedings governed by Ontario Regulation 114/99 (Family Law Rules), except as provided in those rules.

3. They do not apply if a statute provides for a different procedure.

### Orders on Terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

### Effect of Non-Compliance

2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(Example: flexibility in applying the rules, Drake’s side said never seen something, rules said couldn’t use it but court said had probative value and allowed it)

### Attacking Irregularity

2.02 A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,

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

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

### Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

### Interpretation: General Principle

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

## Proportionality

**1.04(1.1)** In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

**(2)** Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

#### RULE for Proportionality

##### *Moosa v. Hill Property Management Group* (2010, ONSC)

1. Couple owned townhouse, property company managed building, tenant created meth lab, ruined property, owners went to insurance to try to get money for damage
2. Would have had to pay a high security cost to be applied if they lost, this restricted their access to justice
3. Judge cites Lord Woolf’s article “Access to Justice” to establish the intent of the requirement of proportionality
4. Concluded that high security payments for plaintiffs not proportional, not just, ordered lower payments - **if plaintiff is to have a trial, the court is charged with the duty of reducing delay and ensuring progress towards an “equality of arms”** (para 115)

##### Lord Woolf, “Access to Justice” (1995)

para 103

3. In considering the problems of the civil justice system I have had in mind the basic principles which should be met by a civil justice system so that it ensures access to justice

(a) It should be just in the results it delivers.

(b) It should be fair and be seen to be so…

(c) **Procedures and cost should be proportionate to the nature of the issues involved.**

(d) It should deal with cases with reasonable speed.

(e) It should be understandable to those who use it.

(f) It should be responsive to the needs of those who use it.

(g) It should provide as much certainty as the nature of particular cases allows.

(h) It should be effective: adequately resourced and organized so as to give effect to the previous principles.

##### The Honourable Coulter Osborne, “Civil Justice Reform Project”

"The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the parties must deal with the case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding." (para 106)

## Statutory Interpretation Steps

### [1] First Impression Meaning

* Ordinary and grammatical sense
	+ Ordinary purpose over technical, unless purpose is technical
* Bilingual legislation
	+ Both have to express same meaning - if possible different meaning, preferred is one that can be shared between the two
* Principle of complementarity
	+ Both common and civil law
* Evolution over time

### [2] The Larger Context

**(Even if words not ambiguous, need to look at larger context because might introduce some ambiguity)**

* Legislative context
* Legal context
	+ Constitution, Indigenous law, Aboriginal treaties, etc.
* External context
	+ Social, cultural, and economic context - what is the issue the legislation is trying to address?
* Extrinsic aids
	+ Anything outside legislation can help shed light on purpose: law reform commission reports, legislative history of a bill, transcripts, previous versions of legislation, guidelines

#### RULE: The Larger Context

##### *Rizzo & Rizzo Shoes Ltd (1998 - SCC)*

* Below quote by Driedger chosen as preferred method by SCC
* Held that employers who went bankrupt had to pay termination, although plain language bankruptcy doesn’t fall under termination, looked to scheme, object, and purpose of Act and found that it must be paid
* Elmer Driedger, “Construction of Statutes”
	+ “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

### (a) Textual Analysis

* Linguistic Competence
	+ Legislature knows how to use language properly, means what it says
	+ just saying they made a mistake not persuasive
* Drafting Competence
	+ Understand expectations about how legislation will be set out (one idea only per provision)
	+ Know these rules and drafted with them in mind
* Encyclopedic Knowledge
	+ Knowledge of existing law, knowledge of the world
	+ (just saying didn’t understand context not persuasive)
* Straightforward Expression
	+ Legislature prefers simple and clear expression, if didn’t say in clear way, assumption that that’s not what they meant
* Orderly Arrangement
	+ Related ideas grouped together, more persuasive to apply them to same subject matter, nature of connection suggested by headings:
	+ *Legislation Act, 2006, SO 2006*
		- Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation for convenience of reference only and do not form part of it.
* Coherence
	+ Legislature doesn’t contradict itself - not going to have one part and other contradicts it
* No Tautology
	+ Every word must be given meaning - no word to fluff, don’t make same point twice
* Consistent Expression

#### Other principles of Textual Analysis:

* Associated Words Rule
	+ Group of words together, read with regard to rest of words
* Limited Class Rule
	+ Sets out list, scope of general term can be limited in light of what went before
		- Example: A municipal bylaw that prohibits the consumption of beer, wine, gin, whiskey, and other beverages on municipal playgrounds.
		- ‘beverages’ → alcoholic beverages
* Implied Exclusion Rule
	+ Example: A municipal bylaw that prohibits the consumption of alcoholic beverages on municipal playgrounds.
	+ The bylaw does not apply to non-alcoholic beverages.

### (b) Purposive Analysis

#### Legislation Act, 2006, SO 2006

* 64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.
* 69 (1) A preamble to a new Act is part of that Act and may be used to help explain its purpose.
	+ (2) A preamble to an Act that amends one or more other Acts is part of the amending Act and may be used to help explain the purpose of the amendments.

### (c) Consequential Analysis

* Look to see what is the likely outcome of the interpretation that you’re considering
* Goes back to *Rizzo v. Rizzo Shoes*

### (d) Legal Policy Analysis

* Presumption not trying to change common law or violate Indigenous Rights (if trying to change common law will say so expressly)
* Principle of legislation being interpreted consistently with the Charter
* Doctrine of strict construction
	+ Above two only apply in times of ambiguity (*Bell ExpressVu v Rex*)

#### RULE: Ambiguity

##### *Bell ExpressVu Limited Partnership v. Rex* (2002 - SCC)

* Rex selling US coding, undercutting Bell service, Bell tries to get injunction to stop Rex from selling to Canadians
* Rex arguing 2 things:
	+ If it applies to them (says doesn’t but if it does) violates 2b freedom of expression (statutes should be interpreted as consistent as possible with the Charter)
	+ Statute restricting rights should be interpreted narrowly
* Court says will not apply either of these rules of statutory interpretation because there is no ambiguity
* Statutory interpretation rules only apply in situations of ambiguity
* When looking for ambiguity, look at words in entire context

# The Parties

## Standing

### Rationales for limiting **standing**:

* prevent courts from being overburdened with marginal or redundant cases and screen out “busybodies”
* ensure courts have the benefit of contending points of view of those most directly affected
* ensure courts play their proper role within our democratic system of government

### Private Interest Standing

* standing as of right

### Public Interest Standing

* the principle of legality:
	+ state action should conform to the Constitution
	+ there must be practical and effective ways to challenge the legality of state action

#### TEST: Public Interest Standing

The Borowski Test, altered in:

##### *Canada v Downtown Eastside Sex Workers Against Violence Society* (2012, SCC)

1. Is there a serious justiciable issue raised?
* a justiciable issue
* a serious issue
1. Does the plaintiff have a real stake or a genuine interest in it?; and
* reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody
1. Is the proposed suit a reasonable and effective way to bring the issue before the courts?
* this factor is to be applied purposively
* this factor is to be applied flexibly
* other considerations:
* plaintiff’s capacity
* is the case of public interest?
* are there realistic alternative means that would be more efficient or suitable?
* the potential impact of the proceedings on the right of others who are equally or more directly affected

## Disability

Onus of proving disability is on the party alleging disability.

### Rules of Civil Procedure

#### Definitions

1.03 (1) In these rules, unless the context requires otherwise, “disability,” where used in respect of a person, means that the person is,

* a minor,
* mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act*, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not, or
* an absentee within the meaning of the *Absentees Act*.

#### TEST: Disability

##### *Murray v. Children’s Centre Thunder Bay & Murray* (2010, ONSC)

 “Disability occurs when a party is unable to understand information relevant to making a decision in respect to an issue in the litigation or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision” (para 16)

#### Substitute Decisions Act, 1992

##### Incapacity to manage property

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

##### Incapacity for personal care

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

#### Absentees Act, RSO 1990

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

### Rules of Civil Procedure

#### Representation by Litigation Guardian

##### Party Under Disability

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.

#### Litigation Guardian for Plaintiff or Applicant

##### Court Appointment Unnecessary

7.02 (1) Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to sub-rule (1.1).

Affidavit to be Filed

7.02 (2) No person except the Children’s Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

consents to act as litigation guardian in the proceeding;

* confirms that he or she has given written authority to a named lawyer to act in the proceeding;
* provides evidence concerning the nature and extent of the disability;
* in the case of a minor, states the minor’s birth date;
* states whether he or she and the person under disability are ordinarily resident in Ontario;
* sets out his or her relationship, if any, to the person under disability;
* states that he or she has no interest in the proceeding adverse to that of the person under disability; and
* acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

#### Litigation Guardian for Defendant or Respondent

##### Generally must be Appointed by Court

7.03 (1) No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the court, except as provided in sub-rule (2), (2.1) or (3)

#### Representation of Persons Under Disability

##### Litigation Guardian for Party

7.04 (1) Unless there is some other proper person willing and able to act as litigation guardian for a party under disability, the court shall appoint,

* the Children’s Lawyer, if the party is a minor;
* the Public Guardian and Trustee, if the party is mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding and there is no guardian or attorney under a power of attorney with authority to act as litigation guardian;
* either of them, if clauses (a) and (b) both apply to the party.

#### Powers and Duties of Litigation Guardian

7.05 (3) A litigation guardian other than the Children’s Lawyer or the Public Guardian and Trustee shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding.

#### Application of Rule 7.05 (3): Litigation Guardian and Lawyer

##### *Swan v Toronto District School Board* (2017, ONSC)

* **Facts:** Mr. Swan, a lawyer, brought application for judicial review as litigation guardian on behalf of his daughter, who is a minor
* A person under disability (i.e. minor daughter) must be represented by a litigation guardian under **Rule 7.01**, and a litigation guardian must be represented by a lawyer under Rule **7.05 (3)**
* There are good reasons for this requirement; as noted in Weidenfeld (Re), 2007, “Rule 7.05 (3) protects persons under a disability from unscrupulous representatives, as well as from friends and family members who mistakenly believe they are acting in the best interests of a minor”
* There is no exception in the Rules that would permit court to relieve against the requirement that a litigation guardian must be represented by a lawyer
* **Ratio:** One cannot be both the litigation guardian and the lawyer for the litigation guardian. There cannot be a combining or melding of the two roles.

**Decision:** Application dismissed

### Rules of Civil Procedure

#### Approval of Settlement

##### Settlement Requires Judge’s Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

#### Representation by Lawyer

##### Where Lawyer is Required

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer.

### Rules of Professional Conduct

3.2-9 When a client’s ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

#### Commentary

* [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client’s ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client’s ability to make decisions may change, for better or worse, over time.
* [3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.

# Joinder

#### Courts of Justice Act, RSO 1990

**138** As far as possible, multiplicity of legal proceedings shall be avoided

### Rules of Civil Procedure: Joinder of Claims and Parties

#### Joinder of Claims

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

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

### Joinder of Parties

#### Multiple Plaintiffs or Applicants

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

1. they assert, whether jointly, severally or in the same alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
2. a common question of law or fact may arise in the proceeding; or
3. it appears that their joining in the same proceeding may promote the convenient administration of justice.

#### Multiple Defendants of Respondents

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

1. there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
2. a common question of law or fact may arise in the proceeding;
3. there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
4. damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
5. it appears that their being joined in the same proceeding may promote the convenient administration of justice.

### Joinder of Necessary Parties

#### General Rule

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

#### Claim by Person Jointly Entitled

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

#### Power of Court to Add Parties

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

#### Party Added as Defendant or Respondent

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

#### Relief Against Joinder of Party

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

### Relief Against Joinder

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

1. order separate hearings;
2. require one or more of the claims to be asserted, if at all, in another proceeding;
3. order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;
4. stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

make such other order as is just.

# Limitations Period

## Justifications for Limitation Period

##### *Peixeiro v Haberman*

1. Potential defendant should be secure in his r**easonable expectation that he will not be held to account for ancient obligations**
2. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the **preservation of evidence**
3. **Plaintiffs are expected to bring suit in a timely fashion**

## Informing Clients of Errors and Omissions

### Rule of Professional Conduct

7.8-1 When the lawyer **discovers an error or omission** **that is or may be damaging to the client** and that cannot be rectified readily, the lawyer shall:

1. **promptly inform the client** of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance,
2. **recommend that the client obtain independent legal advice** concerning any rights the client may have arising from the error or omission; and
3. **advise** the client that in the circumstances, **the lawyer may no longer be able to act for the client**.

Commentary [1] the **lawyer has the contractual obligation to report to the lawyer's insurer.**

### Limitations Act

#### Application

**2(1)** This **Act does not apply to** (a)proceedings to which the ***Real Property Limitations Act***applies;

#### Basic Limitations Period

4 Unless otherwise stated, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

### Rules of Civil Procedure

#### How a Proceeding is Commenced

**14.01(1)** A proceeding shall be commenced by the issuing of an **originating process.**

#### Definition: Originating Process

1.03(1) **“originating process”** means a document whose issuing commences a proceeding under these rules, and includes,

1. a **statement of claim**,
2. a **notice of action**,
3. a **notice of application**,
4. **an application for a certificate of appointment** of an estate trustee,
5. a counterclaim against a person who is not already a party to the main action, and
6. a third or subsequent party claim, but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion.

# Discovery of a Claim

### Limitations Act

**5(1) A claim is discovered** on the **earlier** of,

1. **the day on which the person with the claim first knew**, **(Subjective)**
	1. that the injury, loss or damage had **occurred**,
	2. that the injury, **loss or damage was caused by or contributed to by an act or omission**,
	3. **that the act or omission was that of the person** against whom the claim is made, and
	4. that, having regard to the nature of the injury, loss or damage, a proceeding would be an **appropriate means to seek** to remedy it; and
2. the day on which a **reasonable person** with the abilities and in the circumstances of the person with the claim first **ought to have known** of the matters referred to in clause (a). (Discoverability Principle) **(Objective)**

#### TEST: 5(1)(a)(i – iii) Discoverability

##### *Chimienti v Windsor* (1997 - SCC)

* A cause of action arises not when the negligent act is committed, but rather when the harmful consequences of the negligence result.
* A cause of action for malicious investigation is discoverable only once it is clear the investigation was malicious

#### TEST: 5(1)(a)(iv) Reasonable means

##### *407 ETR Concession Company LTD v Day* (2016 - ONCA)

* When an action is appropriate will depend on the specific factual or statutory setting of each individual case.
	+ Can the claim be remedied by another and more effective method provided for in statute? If so, a claim will not be appropriate until that method has been used without success.
		- Legislatures want deter needless litigation (*Hare v. Hare*)
	+ Consider the circumstances of the person with the claim and whether the civil action is appropriate given the circumstances.

#### TEST: 5(1)(b) – Discoverability Principle

(When should a reasonable person ought to have known?)

##### *Peixeiro v Haberman* 1997 SCC

* Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed with reference to the discoverability principle.

#### Application of 5(1)(b)

##### *Galota v Festival Hall Developments LTD* (2016, ONCA) – Republik Injury adds landlord case

* A plaintiff ought to have known of the claim when the plaintiff has enough evidence or information to support an allegation of negligence, including facts about an act or omission that may give rise to a cause of action.
* Allows for the limitation period to run from a date later than date of injury
* Onus on the plaintiff to show that the rule of discoverability in 5(1)(b) applies

### Limitations Act

#### Presumption

**5(2)** A person with a claim shall be **presumed to have known** of the matters referred to in clause (1) (a) **on the day the act or omission took place**, **unless the contrary is proved.** **(Onus on the plaintiff to prove they did not know on the day of the act)**

#### Demand Obligations

**5(3)** For the purposes of subclause (1) (a) (i), **the day on which injury, loss or damage occurs** in relation to a demand obligation is the **first day on which there is a failure to perform the obligation,** once a demand for the performance is made.

### Legislation Act, 2006

#### Computation of Time

**89(6)** If a period of time is described as a number of months before or after a specified day, the following rules apply

1. The number of months are counted from the specified day, excluding the month in which the specified day falls.
2. the period includes the day in the last month counted that has the same calendar number as the specified day, or if that month has no day with that number, its last day.

### Rules of Civil Procedure

#### Computation of Time – Holidays

3.01(1)

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday…Rule 1.03 includes Saturday or Sunday in the definition of “holiday.”

### Holidays – Different than in *Legislation Act*

**1.03(1)** In these rules, unless the context requires otherwise, “**holiday**” means,

* (a) **any Saturday or Sunday**,
* (b) New Year’s Day,
* (b.1) Family Day,
* (c) Good Friday,
* (d) Easter Monday,
* (e) Victoria Day,
* (f) Canada Day,
* (g) Civic Holiday,
* (h) Labour Day,
* (i) Thanksgiving Day,
* (j) Remembrance Day,
* (k) Christmas Day,
* (l) Boxing Day, and
* (m) any special holiday proclaimed by the Governor General or the Lieutenant Governor, and where New Year’s Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday;

### Limitations Act

#### Relief from Strict Enforcement of the Limitation Period

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

#### Application to Minors

6 The limitation period established by section 4 does not run during any time in which the person with the claim,

1. is a minor; and
2. is not represented by a litigation guardian in relation to the claim.

#### Application to Incapable Persons

**7(1)** The limitation period established by section 4 does not run during any time in which the person with the claim,

1. is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and
2. is not represented by a litigation guardian in relation to the claim.

**(2)** A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

#### Attempted Resolution­—STOPS THE CLOCK

**11(1)** If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,

1. the date the claim is resolved;
2. the date the attempted resolution process is terminated; or
3. the date a party terminates or withdraws from the agreement.

#### Acknowledgements will Constitute Discovery and Allow the Limitation to Run

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

**(2)** An acknowledgment of liability in respect of a **claim for interest** is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.

**(9) This section does not apply unless the acknowledgment is made to the person with the claim,** the person’s agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada) before the expiry of the limitation period applicable to the claim.

**(10)** Subsections (1), (2), (3), (6) and (7) **do not apply unless the acknowledgment is in writing** and signed by the person making it or the person’s agent.

**(11)** In the case of a claim for payment of a liquidated sum, **part payment** of the sum by the person against whom the claim is made or by the person’s agent **has the same effect as the acknowledgment referred to in subsection (10).**

#### Ultimate Limitations Period (15 years)

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

**(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.**

#### No Limitations Period

**16(1)** There is **no limitation period** in respect of,

1. a proceeding for a declaration **if no consequential relief is sought**;
2. a proceeding **to enforce an order of a court,** or any other order that may be enforced in the same way as an order of a court;

…

1. **a proceeding based on a sexual assault**;

**h1)** a **proceeding based on any other misconduct of a sexual nature if** at the time of the incident the person was a minor or if:

* 1. the other person **had charge** of the person with the claim,
	2. the other person was in a **position of trust or authority** in relation to the person with the claim,
	3. the **person with the claim was financially, emotionally, physically or otherwise dependen**t on the other person;

**h2)** a proceeding based on an assault if at the time of the incident the person was a minor or any of the following applied:

1. they had an intimate relationship,
2. the person with the claim was financially, emotionally, physically or otherwise dependent on the other person;
3. **a proceeding to recover money owing in respect of student loans, medical resident loans,** awards or grants made under the *Ministry of Training, Colleges and Universities Act, the Canada Student Financial Assistance Act or the Canada Student Loans Act*.

**(1.1)** Clauses (1) (h), (h.1) and (h.2) apply retroactively.

**(1.2)** Subsection (1.1) applies to a proceeding that was commenced before the day subsection 4 (2) of Schedule 2 to the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016* came into force, **unless the proceeding,**

1. was dismissed by a court and no further appeal is available; or
2. was settled by the parties and the settlement is legally binding.

**(1.3)** For greater certainty, clauses (1) (h), (h.1) and (h.2) **may be extended to include claims against a third party for:**

1. Negligence
2. Breach of fiduciary or any other duty
3. Vicarious liability

 **(4)** This section and section 17 prevail over anything in section 15.

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

#### Application of 16(1)(h) and 16(1.3)

##### *Fox v Narine* (2016, ONSC) – sexual assault women’s shelter limitations

* Case had to do with a sexual assault in a womens shelter
* Victim brought motion in negligence against shelter
* Shelter said the limitations period of the *Trustees Act* had run out
* Court ruled that the specialized nature of the *Limitations Act* held sway, and that 16(1)(h) meant that there was no limitations period for any proceeding based on sexual assault and, via 16(1.3), that lack of limitations period could be extended to a claim of negligence

### Limitations Act

#### Other Acts – This is explained in Fox v Narine, above – general statute yields to specialized statute

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

1. the provision establishing it is listed in the Schedule to this Act; or
2. b) the provision establishing it,
* is in existence on January 1, 2004, and
* incorporates by reference a provision listed in this Act.

(2) Subsection (1) applies despite any other Act.

#### Limitation Periods Apply Despite Agreements

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

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

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

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

**(5)** The following exception applies only to **business agreements:**

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

**(6)** “Business Agreement” Means an agreement made by parties none of whom is a consumer as defined in the consumer protection act.

“Vary” includes extend, shorten and suspend.

#### TEST: for Agreement under Section 22

##### *Boyce v The Co-operators General Insurance* (2013, ONCA)

* Consider whether the provision in clear language describes a limitation period,
* Identifies the scope of the application of that limitation period,
* And excludes the operation of other limitation periods.

### Limitations Act, 2002

#### Can’t Add Person to Existing Proceeding

**21(1)** If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding. 2002, c. 24, Sched. B, s. 21 (1).

**(2)** Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

# Jurisdiction

Jurisdiction refers to the authority of a court to decide a case

### Courts of Justice Act

11 (2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

* The Superior Court is the court of inherent jurisdiction, meaning it is the default court—other courts are the proper court via statute

## Four Ways to determine Jurisdiction for Private International Law

* Presence based jurisdiction
	+ Discussed in *Van Breda*
	+ The defendant is served with the originating process in the jurisdiction of the court
* Consent based jurisdiction
	+ The defendant consents to the court’s jurisdiction (sometimes by showing up)
* Assumed jurisdiction
	+ The court can’t meet the first two criteria, but goes through the real and substantial connection test to assume jurisdiction
* *Forum non conveniens*
	+ Jurisdiction is established, but a court can choose not to exercise its jurisdiction

### Rules of Civil Procedure

#### Determination of an Issue Before Trial

21.01 (3) A defendant may move before a judge to **have an action stayed or dismissed on the ground that**,

1. **the court has no jurisdiction over the subject matter of the action** …and the judge may make an order or grant judgment accordingly.

#### Service Outside Ontario Without Leave (Jurisdiction Established)

17.02 A party may, without a court order, be served outside Ontario where the proceeding against the party consists of a claim or claims,

1. in respect of real or personal property in Ontario;
2. in respect of the administration of the estate of a deceased person, in respect of real property in Ontario, or where the deceased person was resident in Ontario;
3. for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,
	* + real or personal property in Ontario, or
		+ the property of a deceased person was resident in Ontario;
4. against a trustee in respect of the execution of a trust where the assets of the trust include real or personal property in Ontario;
5. for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;
6. in respect of a contract where,
	1. the contract was made in Ontario,
	2. the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,
	3. the parties have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
	4. a breach of the contract has been committed in Ontario, even if the breach was preceded or accompanied by a breach outside Ontario
7. in respect of a tort committed in Ontario; …
	1. (i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario; …
* on a judgment of a court outside Ontario;
* authorized by statute to be made against a person outside Ontario by a person outside Ontario by a proceeding commenced in Ontario;
* against a person ordinarily resident or carrying on business in Ontario

#### Rules about applying 17.02(p)

1. Company must have some direct or indirect presence in the state asserting jurisdiction accompanied by a degree of business activity which is sustained for a period of time (*Wilson v Hull*)
2. Maintenance of physical business premises is a compelling jurisdictional factor (*Adams v Cape Industries*)
3. Carrying on business requires some form of actual, not only virtual, or advertising

#### Defendant Can Argue the Court has no Jurisdiction

21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**(a) the court has no jurisdiction over the subject matter of the action**;

…

and the judge may make an order or grant judgment accordingly.

#### TEST: Real and Substantial Connection, to assume jurisdiction

##### *Club Resorts v Van Breda* (2012, SCC) – Cuban accident – sue in ON

* The test is presumptive: if one or more of the following factors is present, the jurisdiction will be presumed proper (only for tort cases):
	+ The presence of the DEFENDANT in the jurisdiction (real or corporate person)
	+ The DEFENDANT carries on business in the jurisdiction
		- Advertising won’t count, it must be more substantial, likely a physical presence
		- In the Charron case, the presence of a satellite office for Club Resorts made the connection
	+ The jurisdiction is where the tort happened
	+ A contract connected to the dispute was made in the jurisdiction
		- Due to the contract between Van Breda’s partner (a tennis pro) and a person representing Club Resorts (contracted to provide tennis lessons), this contract is connected to the dispute
* These presumptions can be rebutted—burden is on the party rebutting the presumption
	+ They must show how the presence of a presumptive factor has only a weak connection, or no connection, to the subject matter of the dispute
* Not presumptive connecting factors:
	+ Presence of the plaintiff in the jurisdiction
	+ The location where the DAMAGE was sustained
		- Especially because a tort can happen and the injuries can manifest later and elsewhere

#### Forum Non Conveniens

* The doctrine of *forum non conveniens* can only be invoked AFTER jurisdiction is proven
	+ The burden is on the defendant to show that another appropriate forum exists, that it has a real and substantial connection to the dispute (using the preceding test) and show WHY the proposed alternative is more appropriate
	+ Factors the court can consider: cost of transferring the case, location of parties or witnesses, impact of a transfer on the conduct of the litigation or on related or parallel proceedings, possibility of conflicting judgements, problems related to the recognition and enforcement of judgements, relative strengths of the connections of the two parties (non-exhaustive list)
* The ultimate goal of all these tests is fairness to both parties

## Enforcing a Foreign Judgment

* When it’s simply the case that Canada is being asked to ENFORCE a foreign judgement, the real and substantial connection test to assume jurisdiction is not necessary (*Chevron Corp v Yaiguaje*)
	+ It’s only necessary to show that the court that made the judgement had jurisdiction AND that the person being served in Canada is served properly, according to our rules
	+ Here the court goes back to presence-based jurisdiction:
		- Chevron Canada was properly served under Rule 16, so the court has jurisdiction

# Pleadings

## Purpose of Pleadings

* Not the place for the entire theory of the case
* Designed to define clearly and precisely the issues in controversy between the parties
* To give fair notice of the precise case which is required to be met and precise remedies sought
* The assist the court in its investigations of the truth of the allegations made
* The pleadings define, for the whole rest of the proceedings, the parameters of the action: the judge can’t address issues outside of the pleadings
* The court CAN grant relief that isn’t specifically pleaded, if this phrase is in the pleadings: “Such other further relief as this court deems just”

## General Pleadings (Rules of Civil Procedure)

### Pleadings Required Or Permitted

#### Action Commenced by Statement of Claim or Notice of Action

**25.01 (1)** In an action commenced by statement of claim or notice of action, pleadings shall consist of the statement of claim (Form 14A, 14B or 14D), statement of defence (Form 18A) and reply (Form 25A), if any.

#### Notice Of Action

14.03 (2) Where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action (Form 14C) that contains a short statement of the nature of the claim.

### Counterclaim

#### Against the Plaintiff

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

#### Against the Plaintiff and Another Person

**(2)** A defendant who counterclaims against a plaintiff may join as a defendant to the counterclaim any other person, whether a party to the main action or not, who is a necessary or proper party to the counterclaim.

#### Form of Counterclaim

**25.01(2)** In a counterclaim, pleadings shall consist of the counterclaim (Form 27A or 27B), defence to counterclaim (Form 27C) and reply to defence to counterclaim (Form 27D), if any.

### Crossclaim

**28.01(1)** A defendant may crossclaim against a co-defendant who,

* (a) is or may be liable to the defendant for all or part of the plaintiff’s claim;
* (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
	+ (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
	+ (ii) a related transaction or occurrence or series of transactions or occurrences; or
* (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

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

#### Crossclaim

**25.01(3)** In a crossclaim, pleadings shall consist of the crossclaim (Form 28A), defence to crossclaim (Form 28B) and reply to defence to crossclaim (Form 28C), if any.

### Third Party Claim

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

* (a) is or may be liable to the defendant for all or part of the plaintiff’s claim;
* (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
	+ (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
	+ (ii) a related transaction or occurrence or series of transactions or occurrences; or
* (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

#### Third Party Claim

**25.01(4)** In a **third party claim**, pleadings shall consist of the third party claim (Form 29A), third party defence (Form 29B) and reply to third party defence (Form 29C), if any.

### Form Of Pleadings

**25.02** Pleadings shall be divided into paragraphs numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph.

#### Material Facts Only

**25.06(1)** Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

#### Pleading Law

**25.06(2)** A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

#### Striking Out a Pleading

**25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

### Inconsistent Pleadings

**25.06(4)** A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

**(5)** An allegation that is inconsistent with an allegation made in a party’s previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

**(6)** Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

#### Documents or Conversations

**25.06(7)** The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

#### Nature of Act or Condition of Mind

**25.06(8)** Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

#### Claim for Relief

**25.06(9)** Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

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

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

### Rules of Pleading — Applicable To Defences

#### Admissions

**25.07(1)** In a defence, a party shall admit every allegation of fact in the opposite party’s pleading that the party does not dispute.

#### Denials

**25.07(2)** Subject to subrule (6), all allegations of fact that are not denied in a party’s defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact.

#### Different Version of Facts

**25.07(3)** Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party’s own version of the facts in the defence.

#### Affirmative Defences

**25.07(4)** In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party’s pleading.

### RULE: Application of 25.06(1), 25.11(b) and 26.02(c)

##### *Jacobson v Skurka* (2015, ONSC)

* Contentious case: Jacobson sues his lawyer, Skurka defence and counterclaim
* Skurka’s pleadings are evidence, argument and ad hominem attacks to try to discredit Jacobson—NOT simply the material facts (25.06(1))
* Lawyers should know the difference between material facts and evidence
* Statement of Defence struck entirely (25.11(b)), with leave to deliver a Fresh as Amended Statement of Defence and Counterclaim (26.02(c))
* See Amendment of Pleadings below

### Where a Reply is Necessary

#### Different Version of Facts

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

**(2)** A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06 (5) (inconsistent claims or new claims).

#### Reply Only Where Required

**25.08(3)** A party shall not deliver a reply except where required to do so by subrule (1) or (2).

#### Deemed Denial of Allegations Where No Reply

**25.08(4)** A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party.

#### Leave to Plead Required after a Reply

**25.01(5)** No pleading subsequent to a reply shall be delivered without the consent of the opposite party or leave of the court.

### Particulars

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

#### Purpose of Particulars

(From the slides)

* 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;
* to prevent the other side from being taken by surprise at the trial;
* to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
* to limit the generality of the pleadings;
* to limit and decide the issues to be tried, and as to which discovery is required; and
* to tie the hands of the party so that he or she cannot without leave go into any matters not included.

### Amendment of Pleadings

#### General Power of Court

**26.01** On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

#### When Amendments May Be Made

**26.02** A party may amend the party’s pleading,

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

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

(c) with leave of the court.

#### How Amendments are Made

**26.03(1)** An amendment to a pleading shall be made on the face of the copy filed in the court office, except that where the amendment is so extensive as to make the amended pleading difficult or inconvenient to read the party shall file a fresh copy of the original pleading as amended, bearing the date of the original pleading and the title of the pleading preceded by the word “amended”.

**(2)** An amendment to a pleading shall be underlined so as to distinguish the amended wording from the original, and the registrar shall note on the amended pleading the date on which, and the authority by which, the amendment was made.

**(3)** Where a pleading has been amended more than once each subsequent amendment shall be underlined with an additional line for each occasion.

### Issuance Of Originating Process

#### How Proceedings Commenced

**14.01(1)** A proceeding shall be commenced by the issuing of an originating process.

##### Definitions:

**1.03(1)** “originating process” means a document whose issuing commences a proceeding under these rules, and includes,

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

(d) an application for a certificate of appointment of an estate trustee,

(e) a counterclaim against a person who is not already a party to the main action, and

(f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion;

### Issuing And Filing Of Documents

#### Issuing Documents

**4.05(1)** A document may be issued on personal attendance in the court office by the party seeking to issue it or by someone on the party’s behalf, unless these rules provide otherwise.

#### Electronic Issuing

**4.05(1.1)** If these rules permit or require a document to be issued electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the issuance.

#### Deemed Issuing

**4.05(1.2)** A document issued under subrule (1.1) shall be deemed to have been issued by the Superior Court of Justice.

#### Notice — Document Issued

**4.05(1.3)** After a document is issued electronically, notice that it was issued shall be sent to the party that had it issued.

### How Originating Process Issued

**14.07(1)** An originating process is issued by the registrar’s act of dating, signing and sealing it with the seal of the court and assigning to it a court file number.

# Service

### Who is to be Served?

**25.03(1)** Every pleading shall be served,

**(a)** initially on every opposite party and on every other party who has delivered a pleading or a notice of intention to defend in the main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action; and

**(b)** subsequently on every other party forthwith after the party delivers a pleading or a notice of intention to defend in the main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action.

##### Which means:

25.03(1)

* Every pleading is delivered to every other party
* If a party is added, they need to be served ALL the pleadings

### Manner of Service

#### Originating Process

16.01(1) An **originating process** shall be served personally as provided in rule 16.02 or by an alternative to personal service as provided in rule 16.03.

(2) A party who has not been served with the originating process but delivers a defence, notice of intent to defend or notice of appearance shall be deemed to have been served with the originating process as of the date of delivery.

##### Which means:

16.01(1)

* Originating processes must be served personally, but there are exceptions

16.01(2)

* If you were served an originating process incorrectly, but you still answer it, you’ll be deemed to have been served

**See Definition of Originating Process, above**

### All Other Documents

(3) No other document need be served personally, or by an alternative to personal service, unless these rules or an order require personal service or an alternative to personal service

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

* (a) shall be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in rule 16.05;
* (b) may be served on a party acting in person or on a person who is not a party,
	+ (i) by **mailing** a copy of the document to the last address for service provided by the party or other person or, if no such address has been provided, to the party’s or person’s last known address,
	+ (ii) by **personal service** or by **an alternative to personal service**,
	+ (iii) by use of an **electronic document exchange** of which the party or person is a member or subscriber, but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day, or
	+ (iv) if the **parties consent** or the **court orders** under subrule 16.06.1 (2), by **e-mailing** a copy to the party or person in accordance with subrule 16.06.1 (1), but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day.

### Personal Service

**16**.02 (1) Where a document is to be served **personally**, the service shall be made,

* a) on an **individual**, other than a person under disability, by leaving a copy of the document with the individual;
* b) on a **municipal corporation**, by leaving a copy of the document with the chair, mayor, warden or reeve of the municipality, with the clerk or deputy clerk of the municipality or with a lawyer for the municipality;
* c) on any other **corporation**, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;
* d) on a **board or commission**, by leaving a copy of the document with a member or officer of the board or commission;

\*\*\*

1. i) on an **absentee**, by leaving a copy of the document with the absentee’s **litigation guardian**, if there is one or, if not, with the **Public Guardian and Trustee**;
2. j) on **a minor**, by leaving a copy of the document with the **litigation guardian** if one has been appointed or, if not, with the minor and, where the minor resides with a parent or other person having the care or lawful custody of the minor, by leaving another copy of the document **with the parent or other person**, but, where the proceeding is in respect of the minor’s interest in an estate or trust, the minor shall be served by leaving with **the Children’s Lawyer** a copy of the document bearing the name and address of the minor;
3. k) on a **mentally incapable person**,
	1. i) if there is a guardian or an attorney acting under a **validated power of attorney for personal care with authority to act in the proceeding**, by leaving a copy of the document with the **guardian or attorney**,
	2. ii) if there **is no guardian or attorney acting under a validated power of attorney for personal care** with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, by leaving a copy of the document with the **attorney** and leaving an additional copy with **the person**,
	3. iii) if there is neither a guardian nor an attorney with authority to act in the proceeding, by leaving a copy of the document bearing the person’s name and address with the **Public Guardian and Trustee** and leaving an additional copy with **the person**;

### Alternatives To Personal Service

**16.03(1)** Where these rules or an order of the court permit service by an **alternative to personal service**, service shall be made in accordance with this rule.

#### Acceptance of Service by Lawyer

**16.03(2)** Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer’s office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.

**16.03(3)** By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service.

#### Service by Mail to Last Known Address

**16.03(4)** Service of a document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16A) by mail to the last known address of the person to be served, but service by mail under this subrule is only effective as of the date the sender receives the card.

#### Service at Place of Residence

**16.03(5)** Where an attempt is made to effect personal service at a person’s place of residence and for any reason personal service cannot be effected, the document may be served by,

* + - a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and
		- b) on the same day or the following day mailing another copy of the document to the person at the place of residence, and service in this manner is effective on the fifth day after the document is mailed.

### Substituted Service or Dispensing With Service

#### Where Order May Be Made

**16.04(1)** Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

#### Effective Date of Service

**16.04(2)** In an order for substituted service, the court shall specify when service in accordance with the order is effective.

**16.04(3)** Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

### Where Document Does Not Reach Person Served

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

* (a) did not come to the person’s notice; or
* (b) came to the person’s notice only at some time later than when it was served or is deemed to have been served.

#### Validating Service

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

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

### Service Outside Ontario

#### Service Outside Ontario Without Leave

**17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

* (a) in respect of **real or personal property** in Ontario;
* (b) in respect of the **administration of the estate** of a deceased person,
	+ (i) in respect of real property in Ontario, or
	+ (ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;
* (c) for the **interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument** in respect of,
	+ (i) real or personal property in Ontario, or
	+ (ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;
* (d) against a **trustee** in respect of the execution of a trust contained in a written instrument **where the assets of the trust include real or personal property in Ontario**;
* (e) for foreclosure, sale, payment, possession or redemption in respect of a **mortgage**, charge or lien on real or personal **property in Ontario**;
* (f) in respect of a **contract** where,
	+ (i) the contract was made in **Ontario**,
	+ (ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,
	+ (iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
	+ (iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;
* (g) in respect of a **tort committed in Ontario**;
* …
* (i) for an **injunction** ordering a party to do, or refrain from doing, anything **in Ontario** or affecting real or personal property in Ontario;
* …
* (m) **on a judgment of a court outside Ontario**;
* (n) **authorized by statute** to be made against a person outside Ontario by a proceeding commenced in Ontario;
* (p) against a person **ordinarily resident** or carrying on business in **Ontario**;
* (q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or
* (r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality.

#### Service Outside Ontario WITH Leave

**17.03(1)** In any case to which rule **17.02 does not apply**, the court may grant leave to serve an originating process or notice of a reference outside Ontario.

### Manner Of Service Outside Ontario

#### Definitions

**17.05 (1)** In this rule,

* **“contracting state”** means a contracting state under the Convention; (“État contractant”)
* **“Convention”** means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965. (“Convention”)

#### General Manner of Service

**17.05(2)** An originating process or other document to be served outside Ontario in a jurisdiction that is **not a contracting state** may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served.

#### RULE: Application of 17.05(2)

##### *Xela Enterprises Ltd v Castillo* (2016 - ONCA)

* Family dispute, Xela served in Guatemala (not a contracting state)
* Xela moves to quash service: not in keeping with the laws of Guatemala, interference with state sovereignty
* Judge rules that 17.05(2)—which offers option between ON and foreign rules—holds: Ontario action, Ontario rules

#### Contracting State

**17.05(3)** An originating process or other document to be served outside Ontario in a contracting state shall be served,

* (a) through the central authority in the contracting state; or
* (b) in a manner that is permitted by the Convention and that would be permitted by these rules if the document were being served in Ontario.

#### RULE: Application of 17.05(3)

##### *Khan Resources Inc v Atomredmetzoloto JSC* (2013 - ONCA)

* Dispute over mining interests between Cdn and Russian companies
* Khan tried to serve Defendants through central authority of Russian state—refused
* Moved to validate or dispense with service under rules 16.04 and 16.08
* Court refused: 17.05(3) is the complete code for service on foreign defendants in a contracting state.

### Motion to Set Aside Service Outside Ontario

**17.06(1)** A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

* (a) for an order setting aside the service and any order that authorized the service; or
* (b) for an order staying the proceeding.

**17.06(2)** The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

* (a) service outside Ontario is not authorized by these rules;
* (b) an order granting leave to serve outside Ontario should be set aside; or
* (c) Ontario is not a convenient forum for the hearing of the proceeding.

**17.06(3)** Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

**17.06(4)** The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

### TIME FOR SERVICE

**14.08(1)** Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued.

**14.08(2)** Where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued.

#### Time for Delivery of Statement of Defence

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

* (a) within twenty days after service of the statement of claim, where the defendant is served in Ontario;
* (b) within forty days after service of the statement of claim, where the defendant is served elsewhere in Canada or in the United States of America; or
* (c) within sixty days after service of the statement of claim, where the defendant is served anywhere else.

#### Notice of Intent to Defend – buys an extra ten days in addition to above

**18.02(1)** A defendant who is served with a statement of claim and intends to defend the action may deliver a notice of intent to defend (Form 18B) within the time prescribed for delivery of a statement of defence.

**18.02(2)** A defendant who delivers a notice of intent to defend within the prescribed time is entitled to ten days, in addition to the time prescribed by rule 18.01, within which to deliver a statement of defence.

**18.02(3)** Subrules (1) and (2) apply, with necessary modifications, to,

* (a) a defendant to a counterclaim who is not already a party to the main action and who has been served with a statement of defence and counterclaim; and
* (b) a third party who has been served with a third party claim.

### Time for Delivery of Pleadings

#### Reply

25.04 (3) A reply, if any, shall be delivered within ten days after service of the statement of defence **except** where the defendant counterclaims, in which case a reply and defence to counterclaim, if any, shall be delivered within twenty days after service of the statement of defence and counterclaim.

### Close of Pleadings

25.05 Pleadings in an action are closed when,

* (a) the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired; and
* (b) every defendant who is in default in delivering a defence in the action has been noted in default.

### Computation Of Time

**3.01(1)** In the computation of time under these rules or an order, except where a contrary intention appears,

* (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words “at least” are used;
* (b) where a period of seven days or less is prescribed, holidays shall not be counted;
* (c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and
* (d) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday.

### Holidays – FYI: different than in *Legislation Act*

**1.03(1)** In these rules, unless the context requires otherwise, “**holiday**” means,

* (a) **any Saturday or Sunday**,
* (b) New Year’s Day,
* (b.1) Family Day,
* (c) Good Friday,
* (d) Easter Monday,
* (e) Victoria Day,
* (f) Canada Day,
* (g) Civic Holiday,
* (h) Labour Day,
* (i) Thanksgiving Day,
* (j) Remembrance Day,
* (k) Christmas Day,
* (l) Boxing Day, and
* (m) any special holiday proclaimed by the Governor General or the Lieutenant Governor, and where New Year’s Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday;

### Extension or Abridgement

#### General Powers of Court

**3.02(1)** Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

**3.02(2)** A motion for an order extending time may be made before or after the expiration of the time prescribed.

# Motions

## Purpose

The **purpose** of a motion is to:

1. Argue that a party has not complied with the *Rules of Civil Procedure*
2. Seek permission to take a procedural step where the court’s authorization is required
3. Obtain an interim remedy in the action
4. Raise an issue of legal or factual substance before trial.

## Who Can Hear a Motion?

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

**(2)** A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

* + 1. where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
		2. to set aside, vary or amend an order of a judge;
		3. to abridge or extend a time prescribed by an order that a master could not have made;
		4. for judgment on consent in favour of or against a party under disability;
		5. relating to the liberty of the subject;
		6. under section 4 or 5 of the Judicial Review Procedure Act; or
		7. in an appeal.

**(3)** The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

* the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
* the consent states that no party affected by the order is under disability; and
* the order sought is for,
	+ amendment of a pleading, notice of application or notice of motion,
	+ addition, deletion or substitution of a party,
	+ removal of a lawyer as lawyer of record;
	+ setting aside the noting of a party in default,
	+ setting aside a default judgment,
	+ discharge of a certificate of pending litigation,
	+ security for costs in a specified amount,
	+ re-attendance of a witness to answer questions on an examination,
	+ fulfilment of undertakings given on an examination, or
	+ dismissal of a proceeding, with or without costs.

#### Explanation

(3) If there are consenting parties of a motion, it is not necessary to go before a judge or a master. The registrar will grant a motion if all parties consent, none of the consenting parties or anyone affected is under disability, and it is specifically about one of the issues listed in (c).

## Requirements for a Motion

### Motion Record Applicant

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. …

#### Explanation

1. Must file both motion record and proof of service 7 days before the actual motion.
2. Must either include everything that you want to refer to in the motion in your notice of motion, or be sure to requisition it. (Judge will not have your file before them unless you requisition it.)

### Motion Record Respondent

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party’s motion record…

#### Explanation

* Responding party must file both a motion record and proof of service 4 days before the motion

### Refusals and Undertakings Chart

37.10(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

* the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, **at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out**,
	1. the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,
	2. the question number and a reference to the page of the transcript where the question appears, and
	3. the exact words of the question; and
1. the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,
	1. the answer provided, or
	2. the basis for the refusal to answer the question or satisfy the undertaking.

#### Explanation

* Specific format/chart that the motion record has to take in order to bring this motion.
* If you are engaged in examination, in civil procedure, the parties do this on their own
* If you don’t want to answer questions in an examination for discovery, you can refuse (no obligation to answer—doesn’t go towards a relevant matter), give an undertaking (say you will get the answer at a later date), or take it under advisement (if you’re not sure a question is legitimate)
* Purpose of this section is that you are alleging that a refusal was improper or an undertaking was not fulfilled.
* Same rules as 37.10(1) and (3) apply, with added requirement of Form 37C

# No Reasonable Cause of Action or Defence

1. A statement of claim must disclose a legally valid action, and a statement of defence must disclose a legally valid defence—it is possible to bring a motion to argue that this hasn’t been done
2. Purpose for bringing a motion for no reasonable cause of action or defense is **efficiency** – no point in getting to trial just to find out there was no legal cause of action in the first place

### Motion to Strike Pleadings

* 1) A party may move before a judge…
1. to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion…

b - under clause (1)(b).

#### Explanation

1. (2) NO EVIDENCE IS ADMISSIBLE FOR THIS MOTION—Court will assume all allegations are true, and if they are true, ask if there is a cause of action or defence based on the facts alleged
2. THIS IS THE ONLY PROVISION THAT A COURT ASSUMES ALL FACTS ALLEGED ARE TRUE

#### TEST for Striking a Claim: Plain and Obvious

##### *Choc v Hudbay* (2013, ONSC)

1. **Is it “plain and obvious,” assuming the facts set out in the statement of claim are true, that there is no reasonable cause of action set out in the statement of claim.**
2. The plaintiff’s claim is only dismissed in the clearest of cases.
3. ONUS IS ON THE DEFENDANT to demonstrate that the Anns Test cannot be made on the facts.
	1. Anns Test:
		* + Foreseeability
			+ Proximity
			+ Policy consideration
4. The following are NOT reasons to dismiss a plaintiff’s claim:
	* 1. Complex or lengthy reasons
		2. Novelty
		3. A strong defence against the claim

##### *Choc v Hudbay* (2013, ONSC)

1. Guatemalan Mayans bring tort against Hudbay subsidiary alleging human rights abuses
2. Hudbay attempts to strike under 21.01(1)(b)
3. Court applies test: plain and obvious
4. Finds there is a reasonable cause of action, motion dismissed

# Determination of Questions of Law and Other Grounds

21.01 (1) A party may move before a judge,

* + 1. for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs;…

(2) No evidence is admissible on a motion

* + - under clause (1)(a), except with leave of a judge or on consent of the parties;…

#### Explanation

* There can be minor disputes with respect to facts here, differing from 21.01(1)(b).
* E.g., expiration of limitation periods, which substantive law should be applied (e.g., foreign law)

### Frivolous or Vexatious Actions, Abuse of the Court’s Process

21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that…

D) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

#### Explanation

* Onus is on the defendant to satisfy the test.
* Comparable to 25.11 (BELOW)
	+ Similarities
		- Onus is on the moving party
		- If motion made by a defendant, it is possible to dismiss the entire action
		- (under 25.11, can be dismissed if the plaintiff does not get leave to amend)
* Differences
	+ 25.11 is available to both plaintiffs and defendants, but 21.01(3) is only available to defendants
	+ 21.01(3) is about the action; 25.11 is about the pleading

# Frivolous or Vexatious Abuse of Process

### Court May Dismiss on its Own Initiative

**2.1.01 (1)** The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

### Striking Out a Pleading or Other Document

**25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

* + 1. may prejudice or delay the fair trial of the action;
		2. is scandalous, frivolous or vexatious; or
		3. is an abuse of the process of the court.

## SLAPP: Strategic Lawsuits Against Public Participation

**TEST FOR EARLY DISMISSAL OF A SLAPP IS BELOW**

Three recommendations for Anti-SLAPP Legislation from “Breaking the Silence, The urgent need for anti-SLAPP legislation in Ontario”, Ecojustice and CELA, 2010:

* Right to public participation
	+ There should be legislation that recognizes and affirms this right.
	+ At many stages of the environmental legislation evaluation process, there are many stages for the public to get involved, so there should be more recognition and encouragement of public engagement on this.
* Early dismissal mechanism
	+ There should be an early dismissal mechanism that can be applied to SLAPPs that are stronger, in favour of individuals and advocates who have been sued with a SLAPP lawsuit.
	+ **KEY:** recommendation is that there should be a reverse onus in these summary dismissal proceedings
		- Shouldn’t be on the moving party (defendant) to show that the SLAPP lawsuit is not meritorious
		- Onus should be on corporation to show that there is some merit going forward
* SLAPP Disincentives
	+ There should be more disincentives than there are already to bring SLAPP lawsuits
		- Full indemnity costs if the suit can be dismissed
		- Addition of punitive damages for dismissal of the action

e.g., environmental issues—advocacy groups advocating against corporations causing environmental damage, corporations threatening to sue for defamation

Corporations lose 77-82% of cases, so the goal is to chill advocacy, and this objective of intimidation is achieved.

***The Protection of Public Participation Act, 2015*—Amends the *Courts of Justice Act* in response to this report.**

## Incorporating Report’s Three Recommendations

### Recommendation 1: Right to Public Participation

***Courts of Justice Act***

### Purposes

**137.1 (1)**The purposes of this section and sections 137.2 to 137.5 are,

* + 1. to encourage individuals to express themselves on matters of public interest;
		2. to promote broad participation in debates on matters of public interest;
		3. to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
		4. to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

#### Explanation

* This is not protecting the right of public participation, but acknowledging the importance of it, and that this is the purpose of the added provisions. Embodies the first recommendation.

### Recommendation 2: Early Dismissal Mechanism

***Courts of Justice Act***

No Dismissal

137.1 (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

* + - there are grounds to believe that,
* the proceeding has substantial merit, and
* the moving party has no valid defence in the proceeding; and
* the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

#### Explanation

* Onus is on responding party (the plaintiff corporation, since the defendants will be bringing the motion) to prove that their case does have merit. Embodies the second recommendation.

#### TEST: Early dismissal of a SLAPP lawsuit

Used in *McLaughlin v Maynard* (2017 ONSC)

* Does the expression relate to a matter of public interest? (onus on defendant/moving party)
	+ Must invite public attention, have substantial public concern because it affects the welfare of public citizens, to which considerable public controversy has attached
* Plaintiff must show that the proceeding has substantial merit
* Plaintiff must show that the defendant does not have a valid defence.
* Plaintiff must show that the harm suffered by the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.

##### *McLaughlin v Maynard* (2017 ONSC)

* Maynard makes Facebook posts out of concern about his mayor and town counsellor.
* Mayor and town counsellor bring a defamation lawsuit asking for an injunction
* Maynard wins a motion under these new provisions claiming that it was a SLAPP lawsuit

### Recommendation 3: SLAPP Disincentives

***Courts of Justice Act***

### Full Indemnity for Moving Party

137.1 (7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

### Respondent Costs if Motion to Dismiss Denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

### Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

#### Explanation

* Subsection (7) provides for the recommendation for full indemnity costs.
* Subsection (8) provides strong incentives for defendants (the advocates) to use this because they will not be penalized.

# Intervention

* Those who aren’t parties to the litigation but want to have a role
* Two types:
	+ Intervene as a party
	+ Intervene as friend of the court (amicus curiae)

## Rules of Civil Procedure

#### TEST: Leave to Intervene as Added Party

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

* + 1. an interest in the subject matter of the proceeding;
		2. that the person may be adversely affected by a judgment in the proceeding; or
		3. that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

**(2)** On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just

1. Intervenors as a party have all the rights of a party: can file evidence, examine witnesses, put forward evidence

#### TEST: Leave to Intervene as Friend of the Court

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

## Factors to Determine Intervenor Status

1. Based on *Peel*, the factors to be considered in determining whether or not to grant intervenor status are:
	* + - 1. the nature of the case;
				2. the issues which arise; and
				3. the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.
2. the focus is on them providing an argument
3. **Friend of the court doesn’t have the rights of a party:** cannot file pleadings, examine witnesses, put forward evidence
4. The traditional approach has been to not allow intervenors: party control over litigation has been seen as important
5. Now, however, courts are more likely to allow for intervenors, especially if public policy is engaged
	1. They want that public interest represented in the court
	2. The Charter opened up the doors for intervention

## Supreme Court Rules

### Motion for Intervention

**55** Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

**56** A motion for intervention shall be made

* **(a)** in the case of an application for leave to appeal, within 30 days after the filing of the application for leave to appeal;
* **(b)** in the case of an appeal, within four weeks after the filing of the appellant’s factum; and
* **(c)** in the case of a reference, within four weeks after the filing of the Governor in Council’s factum.

**57** **(1)** The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person’s interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

**(2)** A motion for intervention shall

* + **(a)** identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
	+ **(b)** set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

#### Test for Intervenor Status - Trial

Used in *Bedford* (2009)

* The test for intervenor status is one of (Dielman criteria):
	+ a real substantial and identifiable interest in the subject matter of the proceedings; OR
	+ an important perspective distinct from the immediate parties; OR
	+ a well recognized group with a special expertise and a broadly identifiable membership base
* Most importantly, the court says, the intervenor must be “able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties”

##### *Bedford v Canada* (2009, ONCA)

* Appeal of a motion by REAL Women of Canada and Catholic Civil Rights League, asking for intervenor status in the *Bedford* case
* **Based on *Peel*, the factors to be considered in determining whether or not to grant intervenor status are:**
	+ **(a) the nature of the case;**
	+ **(b) the issues which arise; and**
	+ **(c) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.**
* **The test for intervenor status is one of (Dielman criteria):**
	+ **a real substantial and identifiable interest in the subject matter of the proceedings; OR**
	+ **an important perspective distinct from the immediate parties; OR**
	+ **a well recognized group with a special expertise and a broadly identifiable membership base**
* **Most importantly, the court says, the intervenor must be “able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties”**
* Motion judge had dismissed the motion, but ONCA reverses
* Bedford et al had argued there wasn’t a moral dimension to the case, therefore the arguments of the intervenors wouldn’t make a meaningful contribution
	+ ONCA disagreed, saying that the intervenors intended to *make* morality an issue, therefore it was an issue and they would make a contribution on that basis.
* Motions judge said they had no special knowledge
	+ ONCA says that intervenors don’t have to meet ALL the factors, not having special knowledge is fine
* Motions judge said it could disrupt the hearing
	+ ONCA said they can limit the time for the argument, limit the disruption
* Appeal allowed, intervenor status granted.

##### *Choc v Hudbay Minerals* (2013, ONSC)

* Amnesty International sought intervenor status in a case regarding a Canadian company’s subsidiary doing human rights abuses in Guatemala
	+ The test is “meaningful contribution that does not cause injustice to either party”
* Amnesty argued its experience in human rights internationally could offer a unique perspective and contribution to the court
* Plaintiffs argued that they were arguing on common law principles, so Amnesty’s contribution on international law grounds would be a unique and meaningful contribution
* Defendants argued that this was a private dispute, not a public one, so Amnesty’s intervention was inappropriate
* They further argued that Amnesty was not impartial, and would cause injustice to them
* The Court decreed that:
	+ **the threshold is higher for intervenor status in private law cases, but where public policy is engaged it can be relaxed somewhat**
	+ **intervenors need not be impartial**
	+ **Amnesty’s perspective was different than the parties’**
	+ **Amnesty would only be allowed to make legal arguments, not grandstand politically**
	+ **The case involved public policy considerations**
* For these reasons, the Court granted intervenor status

## Rules of Civil Procedure

### Leave to Intervene in Divisional Court or Court Of Appeal

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

#### Test for a New Argument on Appeal:

Used in *Bedford* (2011)

* **You can only make a new argument on appeal if all of the facts required to make that new argument were already put forward at the trial or hearing at first instance**

##### *Bedford v Canada* (2011, ONCA)

* Appeal by Maggie’s: The Toronto Sex Workers’ Action Project who were denied intervenor status in the *Bedford* case
* The *Bedford* case had to do with s. 7 and s 2b grounds, these intervenors wanted to bring a s. 15 argument
* The Court denies intervenor status:
	+ Intervenors must be “able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties”
* In this case they wouldn’t have made a useful contribution
	+ The case was about s 7, not s 15
* TEST FOR A NEW ARGUMENT ON APPEAL:
	+ You can only make a new argument on appeal if all the facts required to make that new argument were already put forward at the trial or hearing at first instance
* Maggie’s argued they had the evidence, but the court says that other evidence would have been put forward by the parties if they had KNOWN they needed to make s 15 arguments:
	+ Neither side was prepared to make s 15 arguments using the material already filed
	+ There was a lot of evidence missing
	+ If Maggie’s was allowed to intervene with regard to s 15 at this time, it would be unfair to the parties
		- Even if all the evidence had been there, it would still be unfair because it would cause a significant delay to have to construct a new argument
			* Courts are very attuned to the issue of undue delay as an access to justice issue
* Therefore, appeal dismissed, Maggie’s denied intervenor status

# Discovery

## Purposes

* Encourage settlement
* Further define the issues
* Pin the witness down

## General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

## Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

### Proportionality in Discovery

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

* + 1. **the time required** for the party or other person to answer the question or produce the document would be unreasonable;
		2. **the expense** associated with answering the question or producing the document would be unjustified;
		3. requiring the party or other person to answer the question or produce the document would cause him or her **undue prejudice**;
		4. requiring the party or other person to answer the question or produce the document would **unduly interfere with the orderly progress of the action**; and
		5. the information or the document is **readily available** to the party requesting it **from another source**.

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

## Rule 30: Discovery of Documents

### Interpretation

30.01 (1) In rules 30.02 to 30.11,

* + 1. “document” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and
		2. a document shall be deemed to be in a party’s power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

### Scope of Documentary Discovery

#### Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

#### Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

### Affidavit of Documents

#### Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party’s knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control or power.

#### Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

* + 1. that are in the party’s possession, control or power and that the party does not object to producing;
		2. that are or were in the party’s possession, control or power and for which the party claims privilege, and the grounds for the claim; and
		3. that were formerly in the party’s possession, control or power, but are no longer in the party’s possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party’s possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.

#### Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

* + 1. the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and
		2. what kinds of documents are likely to be relevant to the allegations made in the pleadings.

### Inspection of Documents

#### Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party’s affidavit of documents as being in that party’s possession, control or power.

#### Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

#### Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

#### Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party’s own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

### Disclosure or Production Not Admission of Relevance

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

### Where Affidavit Incomplete or Privilege Improperly Claimed

30.06 Where the court is satisfied by any evidence that a relevant document in a party’s possession, control or power may have been omitted from the party’s affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

* + 1. order cross-examination on the affidavit of documents;
		2. order service of a further and better affidavit of documents;
		3. order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
		4. inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

#### Use of Rules 30.06(d), 30.02, 30.03

##### *Stewart v Kempster et al.* (2012, ONSC)

* Regards a suit from a motor vehicle accident
	+ Plaintiff claims significant injuries/damages
* Under examination for discovery, plaintiff talked about vacations she had taken, including to Mexico
* Another person examined attested that the plaintiff kept photos behind a private section of her FB
* Plaintiff filed an affidavit that said the photos don’t have any evidence that would help the defence—they don’t show her participating in activities she claims she cannot do
* A motion by the defence to force the plaintiff to produce all vacation photos since the accident, and produce content from the private portion of her FB page
* The plaintiff claims these documents aren’t relevant
	+ The Court reviews the documents **as per 30.06(d)** of the Rules of Civil Procedure
1. **The test for relevance is whether the document is “relevant to any matter in issue” from rules 30.02 and 30.03**
2. The Court finds these photographs are NOT relevant

### Documents or Errors Subsequently Discovered

30.07 Where a party, after serving an affidavit of documents,

* + 1. comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or
		2. discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

### Effect of Failure to Disclose or Produce for Inspection

#### Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

* + 1. if the document is favourable to the party’s case, the party may not use the document at the trial, except with leave of the trial judge; or
		2. if the document is not favourable to the party’s case, the court may make such order as is just.

#### Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

* + 1. revoke or suspend the party’s right, if any, to initiate or continue an examination for discovery;
		2. dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and
		3. make such other order as is just.

## Privileged Document Not to be Used Without Leave

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

### Production from Non-Parties With Leave

#### Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

* + 1. the document is relevant to a material issue in the action; and
		2. it would be unfair to require the moving party to proceed to trial without having discovery of the document.

#### Court may Inspect Document

(3) Where **privilege is claimed for a document referred to in subrule (1),** or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

#### Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise.

## Rule 31 Examination For Discovery

### **Reading in Examination of Party**

31.11 (1) At the trial of an action, a party may read into evidence as part of the party’s own case against an adverse party any part of the evidence given on the examination for discovery of,

* + - the adverse party; or
		- a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

if the evidence is otherwise admissible, whether the party or other person has already given evidence or not.

#### Impeachment

(2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

### Form of Examination

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court.

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise.

### Who May Examine and Be Examined

#### Generally

31.03 (1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8).

#### On Behalf of Corporation

(2) Where a corporation may be examined for discovery,

* + 1. the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and
		2. the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court.

### Time Limit

#### Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court.

#### Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

* + 1. the amount of money in issue;
		2. the complexity of the issues of fact or law;
		3. the amount of time that ought reasonably to be required in the action for oral examinations;
		4. the financial position of each party;
		5. the conduct of any party, including a party’s unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;
		6. a party’s denial or refusal to admit anything that should have been admitted; and
		7. any other reason that should be considered in the interest of justice.

### Scope of Examination

#### General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

* + 1. the information sought is evidence;
		2. the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
		3. the question constitutes cross-examination on the affidavit of documents of the party being examined.

#### Identity of Persons Having Knowledge

(2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.

#### Expert Opinions

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert’s name and address, but the party being examined need not disclose the information or the name and address of the expert where,

* + 1. the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
		2. the party being examined undertakes not to call the expert as a witness at the trial.

### Failure to Answer on Discovery

#### Failure to Answer Questions

31.07 (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,

* + 1. the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;
		2. the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within **60 days** after the response; or
		3. the party or other person undertakes to answer the question, but no answer is provided within **60 days** after the response.

#### Effect of Failure to Answer

(2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may not introduce at the trial the information that was not provided, except with leave of the trial judge.

#### Additional Sanction

(3) The sanction provided by subrule (2) is in addition to the sanctions provided by rule 34.15 (sanctions for default in examination).

#### Obligatory Status of Undertakings

(4) For greater certainty, nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking.

### Sanctions for Default or Misconduct by Person to be Examined

34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

* + 1. where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;
		2. where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party’s proceeding or strike out the party’s defence;
		3. strike out all or part of the person’s evidence, including any affidavit made by the person; and(d) make such other order as is just.

Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person.

### Rules of Professional Conduct

#### Undertakings

5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.

#### Undertakings and Trust Conditions

7.2-11 A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted

### Duty to Correct Answers

31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,

* + 1. was incorrect or incomplete when made; or
		2. is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party.

#### Sanction for Failing to Correct Answers

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2) (b), and the information subsequently discovered is,

* + 1. favourable to the party’s case, the party may not introduce the information at the trial, except with leave of the trial judge; or
		2. not favourable to the party’s case, the court may make such order as is just.

### Discovery of Non-Parties With Leave

31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

#### Test for Granting Leave

(2) An order under subrule (1) shall not be made unless the court is satisfied that,

* the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
* it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
* the examination will not,
	+ unduly delay the commencement of the trial of the action,
	+ entail unreasonable expense for other parties, or
	+ result in unfairness to the person the moving party seeks to examine.

## Rule 33 Medical Examination of Parties

### Motion for Medical Examination

33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.

### Provision of Information to Party Obtaining Order

#### Interpretation

33.04 (1) Subrule 30.01 (1) (meaning of “document”, “power”) applies to subrule (2).

#### Party to be Examined must Provide Information

(2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

* + 1. any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and
		2. any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

### Medical Reports

#### Preparation of Report

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

#### Service of Report

(2) The party who obtained the order shall forthwith serve the report on every other party.

## Law Society of Ontario Rules of Professional Conduct

#### Medical Reports

3.2-9.2 A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client **shall attempt to dissuade the client from seeing the report**, but if the client insists, the lawyer shall produce the report.

3.2-9.3 Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in rule 3.2-9.2, the lawyer shall **suggest that the client attend at the office of the physician or health professional to see the report** in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

### Discovery Obligations

5.1-3.1 Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

* a) shall explain to their client
	+ (i) the necessity of making full disclosure of all documents relating to any matter in issue, and
	+ (ii) the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;
* b) shall assist the client in fulfilling their obligations to make full disclosure; and
* c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

#### Importance of Producing Material for Discovery:

##### *Grossman et al. v. Toronto General Hospital et al.* (1983, ONHCJ)

* RATIO: Affidavit must include enough information about privileged AND non privileged documents so that the court can make a determination about whether privilege is established
* A patient went missing in the hospital, found dead in an air duct 12 days later
* Hospital sued, on discovery produced only one document: the patient’s hospital record
	+ Claimed all other documents were privileged due to their hiring of lawyers early in the process
* Judge dressed them down
	+ Failure to act ethically is a serious matter
	+ Only producing for discovery what you’re forced to advantages parties with lots of money unfairly
	+ Lawyers have a duty to make full, fair and prompt discovery
	+ sufficient information must be given of documents for which privilege is claimed to enable a party opposed in interest to be able to identify them. It is not, however, necessary to go so far as to give an indirect discovery.
	+ most, if not all, of the relevant information is within the scope of defendants' knowledge, not plaintiffs'. That is what makes fair compliance with discovery obligations so acutely necessary.
	+ a party must candidly describe in an affidavit on production not only documents for which no privilege is claimed but also those for which a privilege is claimed.
	+ Plaintiffs asked for their real costs in the matter
		- The judge calls this punitive, BUT grants it in that spirit
* Affidavits are ordered to be produced forthwith

### Discovery Plan

29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan in accordance with this rule:

* + - 1. Rule 30 (Discovery of Documents).
			2. Rule 31 (Examination for Discovery).
			3. Rule 32 (Inspection of Property).
			4. Rule 33 (Medical Examination).
			5. Rule 35 (Examination for Discovery by Written Questions).

#### Timing

(2) The discovery plan shall be agreed to before the earlier of,

* + - 60 days after the close of pleadings or such longer period as the parties may agree to; and
		- attempting to obtain the evidence.

#### Contents

**(3) The discovery plan shall be in writing, and shall include,**

* + 1. the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
		2. dates for the service of each party’s affidavit of documents (Form 30A or 30B) under rule 30.03;
		3. information respecting the timing, costs and manner of the production of documents by the parties and any other persons;
		4. the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
		5. any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled **“The Sedona Canada Principles Addressing Electronic Discovery”** developed by and available from The Sedona Conference.

### The Sedona Canada Principles Addressing Electronic Discovery

**Principle 2**

In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account:

1. the nature and scope of the litigation;
2. the importance and complexity of the issues and interests at stake and the amounts in controversy;
3. the relevance of the available electronically stored information;
4. the importance of the electronically stored information to the Court's adjudication in a given case; and
5. the costs, burden and delay that the discovery of the electronically stored information may impose on the parties.

### Failure to Agree to Plan – Court has Discretion

29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.

# Privilege

## Class Privilege:

* Solicitor-client
* Litigation
* Settlement
* Police-informant

Class privilege is *prima facie* privilege. All other privileges must be proven on a case-by-case basis using the Wigmore Test, below.

## TEST: Wigmore Criteria For Privilege

The Wigmore test for determining if a communication is privileged was adopted in *R v Fosty*

**The presumption is against privilege: Onus is on the person claiming privilege to show why a communication should be privileged**

Test:

* The communications must originate in a confidence that they will not be disclosed.
* This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
* The relation must be one which in the opinion of the community ought to be sedulously [deliberately and conscientiously] fostered.
* The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation [balancing test]
	1. Factors in balancing test (from *National Post v R*) (not exhaustive)
		+ nature and seriousness of the offence under investigation
		+ the probative value of the evidence sought to be obtained
		+ measured against the public interest in respecting the journalist’s promise of confidentiality.
		+ Underlying purpose of the investigation
		+ Public interest in free expression

### Solicitor-Client Privilege

1. Test (from *Solosky v Queen*, 1980, SCC)
2. The information must be:
	1. a communication between solicitor and client;
	2. which entails the seeking of legal advice; and,
	3. which is intended to be confidential.
3. Exceptions (from *Smith v Jones*, 1999, SCC)
	1. public safety
	2. innocence of the accused
	3. criminal communications

### Litigation Privilege

All the elements of litigation privilege are outlined in:

##### *Lizotte v. Aviva Insurance Company of Canada* (2016, SCC)

* Facts
	+ The syndic of the Chambre de l’assurance de dommages has the responsibility to oversee the conduct of insurers in Quebec
	+ A syndic asked Aviva for documents related to an inquiry, Aviva provided some documents, but withheld others claiming litigation privilege
	+ Syndic applies to SCC for declaratory judgement as to whether or not the documents held back should be forward
* Analysis
	+ What is litigation privilege?
		- Protects documents and articles prepared for litigation
		- Not the same as solicitor-client privilege
			* Solicitor client privilege protects a relationship, while litigation privilege protects the efficacy of the adversarial process
			* Solicitor client privilege is permanent, litigation privilege lapses when the trial ends
			* Litigation privilege applies even to unrepresented parties, and to non-confidential documents
			* Not directed at communications between solicitors and clients, as such, but at things that are prepared for the trial
			* Only documents whose “dominant purpose” is litigation are covered
	+ Litigation Privilege is a Class Privilege:
		- Not a case-by-case analysis
		- **Any document created whose “dominant purpose” is litigation is under a prima facie assumption that it is covered by litigation privilege**
	+ Litigation Privilege is Subject to Clearly Defined Exceptions, not a Case-by-Case Balancing Exercise
		- As a class privilege, certainty of being protected by the privilege is important
		- That’s why a case-by-case analysis is not appropriate
		- **Established exceptions to litigation privilege:**
			* **Public safety (*Smith v Jones*)**
			* **Innocence of the accused (*Smith v Jones*)**
			* **Criminal communications (*Smith v Jones*)**
			* **Evidence of the claimant party’s abuse of process or similar blameworthy conduct (*Blank*)**
		- According to this case, urgency alone does not create an exception
	+ Litigation Privilege Can Be Asserted Against Third Parties
		- Nothing to prevent a third party from disclosing the document
		- Even if the third party has the duty of confidentiality, there’s no guarantee that the principle of open court might not bring those documents covered by litigation privilege into public view
		- Privilege protects the way parties prepare—if the chance that their preparations could be disclosed to third parties alters the way they prepare for litigation, then that undermines the reason for the privilege: to protect the adversarial process: a chilling effect
	+ Litigation privilege is a common law rule that cannot be abrogated by statute unless the statute is clear in its intention to abrogate the rule
		- In this case, the Synidic argued that its statute, which said that “any document” must be turned over on request, abrogated the rule: the Court disagreed
			* The provision doesn’t make specific reference to documents over which privilege is claimed
* Appeal dismissed

### Settlement Privilege

The elements of Settlement Privilege are outlined in:

##### *Union Carbide Canada Inc. v. Bombardier Inc* (2014, SCC)

* Facts:
	+ Complex litigation between Dow (Union Carbide) and Bombardier over Ski-Doo fuel tanks
	+ As part of a confidential mediation, Dow offered to settle for 7M, Bombardier accepted after 20 days
	+ Dow wanted Bombardier to sign a global release, absolving Dow of responsibility for any other fuel tank issues in other jurisdictions
	+ Bombardier would not, and filed a motion for payment of the settlement, saying agreement had been made—it included documents from the mediation
	+ Dow argued that the mediation was confidential, Bombardier couldn’t rely on those documents
	+ The common law says that confidential documents can be used to provide evidence of the existence and scope of a settlement, but a waiver was signed that says otherwise
* Does the waiver override the common law?
	+ Court decides that a waiver CAN override the common law, but that THIS waiver doesn’t do so
* Settlement Privilege:
	+ **Common law rule of evidence that protects the communications of parties as they try to settle a dispute—those communications cannot be used against them in litigation**
	+ Promotes honest, frank discussion
	+ Promotes settlements in an overcrowded justice system
	+ Privilege continues even after settlement is reached
	+ Class privilege
	+ Exceptions:
		- Competing public interest outweighs public interest in encouraging settlement: misrepresentation, undue influence, etc
		- Exception exists if the communications resulted in the acceptance of a settlement that one party wishes to prove
* Mediation is settlement, but also a “creature of contract” [para 39]
	+ Mediation contracts can create confidentiality provisions stronger than common law’s settlement privilege
	+ Court rules that interpretation must start with the contract: parties have the right to contract for greater confidentiality than provided for by common law
	+ HOWEVER: to contract out of the common law rules, the intention must be clear, especially when it comes to the common law rule that settlement privilege can be broken to prove the existence of a settlement
	+ In this case, that intention was NOT made clear, therefore Bombardier is free to produce evidence that Dow settled

### Journalistic Privilege

NOT A CLASS PRIVILEGE

The elements of Journalistic Privilege are outlined in:

##### *R v National Post* (2010, SCC)

Facts:

* Journalist received documents regarding a loan the PM helped authorize that may have been unethical (Shawinigate)
* Source demanded confidentiality, journalist assured them of it
* Document’s authenticity couldn’t be confirmed—there was worry it was a defamatory forgery
* Police wanted document to check for fingerprints—got a search warrant
* National Post is applying to quash the search warrant

Analysis:

* Journalistic privilege is not recognized as a “class” privilege
	+ Degrees of professionalism amongst journalists makes it tough to agree on who is covered by such a privilege (no formal accreditation)
	+ It’s uncertain who the privilege belongs to: the source or the journalist (who can decide to break the privilege?)
	+ No rules about how an agreement of confidentiality is made, if conditions attach
	+ Class privileges cannot be tailored to fit the circumstances
* Other common law jurisdictions do not interpret journalistic privilege as class privilege
* Other jurisdictions protect journalistic privilege by statute, but Canada, for now, does not
* When it comes to case by case privilege, Wigmore’s rules must be applied:
	+ Privilege only inheres if the communication is *explicitly* in exchange for confidentiality
	+ Can apply to content provided, OR to the identity of informant
	+ The nature and professionalism of the journalist can become a factor under factor 3; whether society wants to protect the relationship
		- Society wants to protect confidential sources of *professional* and *legitimate* journalists
	+ The onus to prove the balancing test rests with the person asserting privilege (not with the Crown in this case) because all four factors have to be proven to create the privilege—the privilege doesn’t yet exist prior to the balancing
* **In this case, the application of the Wigmore criteria fails at step four, the balancing test, because the nature of the confidentiality offered by the journalist is outweighed by the public interest in solving a criminal matter (possible defamatory forgery)**
* The application of the Wigmore test to confidential journalistic sources does not contravene freedom of the press as guaranteed by s 2b of the Charter

# Deemed Undertakings

## Rules of Professional Conduct:

### Section 3.3 Confidentiality

#### Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

* 1. expressly or impliedly authorized by the client;
	2. required by law or by order of a tribunal of competent jurisdiction to do so;
	3. required to provide the information to the Law Society; or
	4. otherwise permitted by rules 3.3-2 to 3.3-6.

#### Justified or Permitted Disclosure

**3.3-3** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an **imminent risk of death or serious bodily harm**, and disclosure is necessary to prevent the death or harm.

**3.3-4** If it is alleged that a lawyer or the lawyer's associates or employees

* 1. have committed a criminal offence involving a client's affairs;
	2. are civilly liable with respect to a matter involving a client's affairs;
	3. have committed acts of professional negligence; or
	4. have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information **in order to defend against the allegations**, but shall not disclose more information than is required.

**3.3-5** A lawyer may disclose confidential **information in order to establish or collect the lawyer's fees**, but the lawyer shall not disclose more information than is required.

## Rules of Civil Procedure

### Rule 30.1 Deemed Undertaking

#### Application

1. This Rule applies to,

1. evidence obtained under,
	* + 1. Rule 30 (documentary discovery),
			2. Rule 31 (examination for discovery),
			3. Rule 32 (inspection of property),
			4. Rule 33 (medical examination),
			5. Rule 35 (examination for discovery by written questions); and
2. information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

#### Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

#### Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

* 1. evidence that is filed with the court;
	2. evidence that is given or referred to during a hearing;
	3. information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to **impeach the testimony of a witness** in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action). SEE BELOW

#### Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

31.11 (8) Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, **the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action** as if it had been taken in the subsequent action.

#### TEST for Relief of Deemed Undertaking

##### *Juman v Doucette* (2008, SCC)

* Juman was a childcare worker and Jade Doucette was injured in her care
* In the course of discovery as part of negligence litigation, evidence of potentially criminal acts may have come out
* The authorities wanted to access this material, as Juman refused to answer their questions as part of a criminal investigation
* Discovery is protected by a deemed undertaking to keep it confidential except within that civil trial, and not use it in other proceedings
	+ The case settled, so the material was never used in open court
* The only way to modify a deemed undertaking is to apply to the court for a modification of the deemed undertaking, which will be granted if:
	+ **On the civil standard, evidence exists that the public interest in disclosure outweighs the interests the deemed undertaking is meant to protect**
* Here the values at issue were privacy, efficient conduct of civil litigation and the right against self incrimination
* Authorities cannot get through civil discovery what they cannot obtain through criminal investigation: court finds in favour of Juman.

# Default

## Rule 19 Default Proceedings

### Noting Default

#### Where no Defence Delivered

19.01 (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default.

#### Where Defence Struck Out

(2) Where the statement of defence of a defendant has been struck out,

(a) without leave to deliver another; or

(b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,

the plaintiff may, on filing a copy of the order striking out the statement of defence, require the registrar to note the defendant in default.

#### Late Delivery of Defence

(5) A defendant may deliver a statement of defence at any time before being noted in default under this rule.

### Consequences of Noting Default

19.02 (1) A defendant who has been noted in default,

* + 1. is deemed to admit the truth of all allegations of fact made in the statement of claim; and
		2. shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff.

(2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default.

(3) Despite any other rule, a defendant who has been noted in default **is not entitled to notice of any step in the action** and need not be served with any document in the action, except where the court orders otherwise or where a party requires the personal attendance of the defendant, and except as provided in,

* 1. subrule 26.04 (3) (amended pleading);
	2. subrule 27.04 (3) (counterclaim);
	3. subrule 28.04 (2) (crossclaim);
	4. subrule 29.11 (2) (fourth or subsequent party claim);
	5. subrule 54.08 (1) (motion for confirmation of report on reference);
	6. subrule 54.09 (1) (report on reference);
	7. subrule 54.09 (3) (motion to oppose confirmation of report on reference);
	8. subrule 55.02 (2) (notice of hearing for directions on reference);
	9. clause 64.03 (8) (a) (notice of taking of account in foreclosure action);
	10. subrule 64.03 (24) (notice of reference in action converted from foreclosure to sale);
	11. subrule 64.04 (7) (notice of taking of account in sale action);
	12. subrule 64.06 (8) (notice of reference in mortgage action);
	13. subrule 64.06 (17) (report on reference in mortgage action); and
	14. subrule 64.06 (21) (notice of change of account);

### Setting Aside The Noting Of Default

19.03 (1) The noting of default may be set aside by the court on such terms as are just.

(2) Where a defendant delivers a statement of defence with the consent of the plaintiff under clause 19.02 (1) (b), the noting of default against the defendant shall be deemed to have been set aside.

### By Signing Default Judgment

#### Where Available

19.04 (1) Where a defendant has been noted in default, the plaintiff may require the registrar to sign judgment against the defendant in respect of a claim for,

* + 1. a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19A);
		2. the recovery of possession of land (Form 19B);
		3. the recovery of possession of personal property (Form 19C); or
		4. foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K and 64M).

#### Requisition for Default Judgment

(2) Before the signing of default judgment, the plaintiff shall file with the registrar a requisition for default judgment (Form 19D),

* + 1. stating that the claim comes within the class of cases for which default judgment may properly be signed;
		2. stating whether there has been any partial payment of the claim and setting out the date and amount of any partial payment;
		3. where the plaintiff has claimed prejudgment interest in the statement of claim, setting out how the interest is calculated;
		4. where the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in section 129 of the Courts of Justice Act, setting out the rate; and
		5. stating whether the plaintiff wishes costs to be fixed by the registrar or assessed.

#### Registrar may Decline to Sign Default Judgment

(3) The registrar may decline to sign default judgment if uncertain,

* + 1. whether the claim comes within the class of cases for which default judgment may properly be signed; or
		2. of the amount or rate that is properly recoverable for prejudgment or postjudgment interest.

(3.1) If the registrar declines to sign default judgment, the plaintiff may,

1. move before **a judge** for judgment under rule 19.05; or
2. in the case of a claim referred to in subrule (1), make a motion to **the court** for default judgment.

##### Liquidated vs Unliquidated Claims (as per 19.04(1)(a))

1. **Liquidated claims:** for a known, specific amount of money.
2. **Unliquidated claims:** for amounts that must be judged or calculated.

### By Motion For Judgment

19.05 (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.

(2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages.

(3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.

### Facts Must Entitle Plaintiff To Judgment

19.06 A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

### Setting Aside Default Judgment

19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just. **(SEE TEST UNDER MARTOSH v HORTON)**

(3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

#### TEST to Set Aside a Default Judgment

##### *Martosh v Horton* (2005, ONSC)

* A motion to set aside default judgment against defendant
* Defendant had refused to be served, forged a “return to sender” type situation with the envelope that was sent to his work as a substituted service
* After default judgment of $41K was made against him, he tried to have it set aside
* Judge lays out the **test for setting aside default judgment under 19.08(2)—defendant must show:**
	+ **1) the default was unintentional and that he has a valid explanation for the default;**
	+ **2) the motion was launched forthwith after the judgment came to his attention; and**
	+ **3) he has a good defence on the merits**
* In this case, because the default was *not* unintentional, and the judge ruled his defence was not good on the merits, the default judgment stood

# Delay

## Rule 24 Dismissal Of Action For Delay

### Where Available

24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

* + 1. to serve the statement of claim on all the defendants within the prescribed time;
		2. to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;
		3. to set the action down for trial within six months after the close of pleadings; or
		4. Revoked:
		5. to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off.

(2) The court shall, subject to subrule 24.02 (2), dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14 (1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust.

### Dismissal of Action For Delay

48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action.
2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off.

#### Timetable

(4) Subrule (1) does not apply if, at least 30 days before the expiry of the applicable period referred to in that subrule, a party files the following documents:

1. A timetable, signed by all the parties, that,
2. identifies the steps to be completed before the action may be set down for trial or restored to a trial list, as the case may be,
3. shows the date or dates by which the steps will be completed, and
4. shows a date, which shall be no more than two years after the day the applicable period referred to in subrule (1) expires, before which the action shall be set down for trial or restored to a trial list.
5. A draft order establishing the timetable.

#### Status Hearing

(5) If the parties do not consent to a timetable under subrule (4), any party may, before the expiry of the applicable period referred to in subrule (1), bring a motion for a status hearing.

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,

* + 1. dismiss the action for delay; or
		2. if the court is satisfied that the action should proceed,
		3. set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,
		4. adjourn the status hearing on such terms as are just,
		5. if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or
		6. make such other order as is just.

#### Setting Aside

(10) The dismissal of an action under subrule (1) may be set aside under rule 37.14.

### Motion to Set Aside or Vary

37.14 (1) A party or other person who,

* + 1. is affected by an order obtained on motion without notice;
		2. fails to appear on a motion through accident, mistake or insufficient notice; or
		3. is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person’s attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

### Effect On Subsequent Action

24.05 (1) The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise.

(2) Where a plaintiff’s action has been dismissed for delay with costs, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed action, the court may order a stay of the subsequent action until the costs of the dismissed action have been paid.

#### TEST: Onus on the plaintiff to show why an action shouldn’t be dismissed for delay under 48.14

##### *1196158 Ontario Inc. v. 6274013 Canada Limited* (2012, ONCA)

* Plaintiff purchased property that he alleged wasn’t hooked up to electricity properly, which breached the sale contract, sued the seller, real estate agents (breach of contract), Toronto Hydro (negligence)
* From statement of claim on Sept 6, 2006 to a Jan 19 2010 status hearing the plaintiff had not moved the action beyond the pleading stage
* At the status hearing, a timetable was decided by the judge, the defendants followed it, but the plaintiff did not
* Prior to the status hearing scheduled for Sept 13, 2011, defendants indicated they would move to dismiss for delay under 48.14 of the Rules of Civil Procedure. At the status hearing, the plaintiff filed a new timetable and evidence that showed why the defendants’ request should be denied
	+ Money problems and personal problems related to the death of his father and brother, as well as elder care for his mother
* The status hearing judge dismissed the action, this is an appeal of that decision
* **The onus is on the plaintiff to show why a case shouldn’t be struck under 48.14**
	+ **The balance is that a case should be decided on its merits, not dismissed through trickery, but that the rules are there to ensure orderliness and confidence in the system (*Riggitano*)**
	+ **Further, it is more and more difficult to defend a claim as time passes, because the events become remote—“memories fade and even if documents are not lost, their significance becomes shrouded” [43]**
	+ **Fairness also requires that litigants be able to plan their lives without the threat of a suit weighing on their heads [44]**
* The appeal was dismissed

# Applications

## Two main routes under the *Rules of Civil Procedure*:

* Action
* Application

### Proceedings By Action As General Rule

14.02 Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise.

### Applications — By Notice Of Application

#### Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30).

#### Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

### Applications — To Whom To Be Made

38.02 An application shall be made to a judge.

### Place And Date Of Hearing

#### Hearing date where no practice direction

38.03(2) At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications.

#### Exception, lengthy hearing

(3) If a lawyer estimates that the hearing of the application will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of application is served.

#### Urgent application

(3.1) An urgent application may be set down for hearing on any day on which a judge is scheduled to hear applications, even if a lawyer estimates that the hearing is likely to be more than two hours long.

### Service Of Notice

#### Generally

38.06 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

#### Minimum Notice Period

(3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date.

### Dismissal For Delay

#### Motion by Respondent

* 1. 6(1) Where the applicant has not,
		1. delivered an application record and factum within the time prescribed by subrule 68.04 (1); or
		2. filed a certificate of perfection as required by subrule 68.05 (1),

the respondent may make a motion to the registrar at the place of hearing, on ten days notice to the applicant, to have the application dismissed for delay.

(2) Where the applicant has not delivered an application record and factum and filed a certificate of perfection **within one year after the application was commenced**, the registrar may serve notice on the applicant that the application will be dismissed for delay unless the applicant delivers an application record and factum and files a certificate of perfection **within ten days after service of notice**.

(3) Where the applicant does not cure the default within ten days after service of a notice under subrule (1) or (2) or such longer period as a judge of the Divisional Court allows**, the registrar shall make an order** in Form 68C **dismissing the application for delay**, with costs fixed at $750, despite rule 58.13.

#### TEST: to set aside registrar’s order dismissing an application for delay

##### *Singh v Toronto Police Services Board* (2016, ONSC)

* Singh was carded (as part of the TPS policy of carding, sued over it (June 10, 2015)
* TPS submitted notice of intent to defend
* Ministry of Community Safety announced it was reviewing the policy, so Singh decided to delay the action—but did not inform TPS
* Govt released regulations March 22 2016
* April 8 2016, TPS inquires as to whether suit is going forward
* Singh had a trial in May, informs that he intends to file soon after
* He doesn’t—registrar moves to strike the Application under 68.06(2) because the application was not perfected within a year of being commenced
* **The test to set aside a registrar’s order for dismissing an application for delay is the applicant demonstrating three factors (from *Iaonnidis v Amalgamated Transit Union*):**
	+ **A *bona fide* intention to perfect the appeal within the time limit**
	+ **A reasonable explanation for the delay**
	+ **The justice of the case requires the extension**
* Bona fide Intention: Due to the many missed self-imposed deadlines, the court does not believe there is a bonafide intention to perfect the application
* Explanation: Mr Singh submitted that his counsel was too busy to proceed, the court rejects this: if such an excuse were accepted, “the time limit would be meaningless” (*Chiu v Universal Water Technology*)
* Justice: the case is of public interest, but nothing has been filed to allow the judge to consider the merits of the application
* Therefore, the motion is dismissed

# Summary Judgment

## Rule 20 Summary Judgment

### Where Available

#### To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

#### To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

### Evidence On Motion

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party’s pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

#### Referred to in 20.02 – Evidence by Affidavit

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

(4) An affidavit for use on a motion may contain statements of the **deponent’s information and belief**, **if the source of the information and the fact of the belief are specified in the affidavit.**

### Disposition Of Motion

#### General

20.04

(2) The court shall grant summary judgment if,

1. the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
2. the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

#### Powers

(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose**, unless it is in the interest of justice for such powers to be exercised only at a trial:**

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

#### Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

#### Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

#### Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

## Roadmap for assessing summary judgment motions:

**Step 1.** Is there a genuine issue requiring trial based only on the submitted evidence (the written record, e.g., affidavits, written records available)?

Use test from para 49 of *Hryniak v Mauldin*:

1. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment.
	1. This will be the case when the process:
		1. (1) allows the judge to make the necessary findings of fact,
		2. (2) allows the judge to apply the law to the facts, and
		3. (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

**Step 2.** If there is a genuine issue requiring trial, can the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2)?

1. Test for rules 20.04 (2.1) & (2.2)
	1. 20.04(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
		1. 1. Weighing the evidence.
		2. 2. Evaluating the credibility of a deponent.
		3. 3. Drawing any reasonable inference from the evidence.
2. 20.04(2.1) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

**Step 3.** If the court cannot grant judgment on the motion, the court should:

* Decide the issues that can be decided pursuant to #2.
* Identify the additional steps required to complete the record to allow the court to decide remaining issues.
* In the absence of compelling reasons to the contrary, the court should seize itself of the further steps.

If the judge already knows the issues, it should be the same judge who assesses the full case.

#### TEST: No issue requiring trial under 20.04(2)(a)

#### TEST: Interests of Justice under 20.04(2.1)

##### *Hryniak v. Mauldin* (2014, SCC)

* Investors the Mauldin group gave money to Topos Capital to be invested
* Topos wired 10 million to an offshore account and it disappeared
* The trial judge ordered a summary judgment in favour of Mauldin
* This is an appeal of that order, on the grounds that a summary judgement was inappropriate

Analysis

* Summary Judgement procedures are an access to justice issue: they provide a faster, more efficient way to decide cases without a full trial, when no or few facts are at issue
* Summary judgement may be more appropriate in cases that are:
	+ document driven,
	+ with few witnesses and limited contentious factual issues, or
	+ when the record could be supplemented by oral evidence on discrete points.
* **The test for no issue requiring a trial (20.04(2)(a))**
	+ **If a judge is able to reach a fair and just determination on the merits on a motion for summary judgement, then there is no genuine issue requiring a trial**
* **The test for the “interests of justice” under 20.04(2.1)**
	+ **“can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?” (quoting appeals court, at para 53)**
* **When should a motion judge hear evidence? (20.04(2.2))**
	+ “The Court of Appeal suggested the motion judge should only exercise this power when
		- (1) oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time;
		- (2) any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and
		- (3) any such issue is narrow and discrete — i.e., the issue can be separately decided and is not enmeshed with other issues on the motion.” [62]
* **How should a judge approach a motion for Summary Judgement?**
	+ **First, determine if there is a genuine issue requiring a trial *without* using fact finding powers**
	+ **If there is an issue requiring trial, ask if the new powers will suffice or if it genuinely needs to be decided at trial—interests of justice issue**
	+ **Summary judgement MUST be granted if there is no genuine issue, but if there is a genuine issue, the use of the new powers is discretionary**
* If a motion for summary judgment only succeeds in part, the judge can still make use of trial management powers in 20.05 to attempt to control costs and offer greater access to justice (below)
* Appeal dismissed

### Where Trial Is Necessary

#### Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

#### Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

* + 1. that each party deliver, within a specified time, an affidavit of documents in accordance with the court’s directions;
		2. that any motions be brought within a specified time;
		3. that a statement setting out what material facts are not in dispute be filed within a specified time;
		4. that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
		5. that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
		6. that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
		7. that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
		8. that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
		9. that any oral examination of a witness at trial be subject to a time limit;
		10. that the evidence of a witness be given in whole or in part by affidavit;
		11. that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
			1. there is a reasonable prospect for agreement on some or all of the issues, or
			2. the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
		12. that each of the parties deliver a concise summary of his or her opening statement;
		13. that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
		14. that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
		15. for payment into court of all or part of the claim; and
		16. for security for costs.

### Costs Sanctions For Improper Use Of Rule

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

# Costs, Court Fees, and Access to Justice

## Rules of Professional Conduct

### Section 3.6 Fees and Disbursements

#### Reasonable Fees and Disbursements

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

Commentary

1. [1] What is a fair and reasonable fee will depend upon such factors as
	1. (a) the time and effort required and spent,
	2. (b) the difficulty of the matter and the importance of the matter to the client,
	3. (c) whether special skill or service has been required and provided,
	4. (c.1) the amount involved or the value of the subject-matter,
	5. (d) the results obtained,
	6. (e) fees authorized by statute or regulation,
	7. (f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
	8. (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,
	9. (h) any relevant agreement between the lawyer and the client,
	10. (i) the experience and ability of the lawyer,
	11. (j) any estimate or range of fees given by the lawyer, and
	12. (k) the client's prior consent to the fee.
2. [2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.
3. [3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.
4. [4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.
5. [4.1] A lawyer should inform a client about their rights to have an account assessed under the Solicitors Act.

#### Contingency Fees and Contingency Fee Agreements

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the Solicitors Act and the regulations there under, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

## *Courts of Justice Act*

#### Costs

**131**(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

## *Rules of Civil Procedure*

### Costs Consequences Of Failure To Accept

#### Plaintiff’s Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

#### Defendant’s Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

#### Burden of Proof

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).

### Discretion of Court

**49**.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

### Rule 57 Costs Of Proceedings

### General Principles

#### Factors in Discretion

**57**.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

* (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
* (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
* (a) the amount claimed and the amount recovered in the proceeding;
* (b) the apportionment of liability;
* (c) the complexity of the proceeding;
* (d) the importance of the issues;
* (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
* (f) whether any step in the proceeding was,
	1. (i) improper, vexatious or unnecessary, or
	2. (ii) taken through negligence, mistake or excessive caution;
* (g) a party’s denial of or refusal to admit anything that should have been admitted;
* (h) whether it is appropriate to award any costs or more than one set of costs where a party,
	1. (i) commenced separate proceedings for claims that should have been made in one proceeding, or
	2. (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
* (i) any other matter relevant to the question of costs.

#### Costs Against Successful Party

57.01 (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

#### Authority of Court

57.01 (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

* + 1. to award or refuse costs in respect of a particular issue or part of a proceeding;
		2. to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
		3. to award all or part of the costs on a substantial indemnity basis;
		4. to award costs in an amount that represents full indemnity; or
		5. to award costs to a party acting in person.

#### TEST: Application of Rule 49.10

##### *Elbakhiet v. Palmer* (2014 ONCA)

* Stems from a motor vehicle accident
* Defendant offered to settle, plaintiff didn’t accept
* Plaintiff received a much smaller settlement than they asked for ($145K instead of $2M), and costs of $580K
* This is an appeal regarding the costs, under rule 49.10(2):
* The issues are:
	+ Was the offer made at least seven days prior to the commencement of the hearing?
	+ Did the plaintiff receive a judgement less favourable than the offer to settle?
* Time of offer:
	+ **The court says that the rule for when a trial commences for the purposes of Rule 49 is when evidence has been heard—so on the first day that evidence is heard** (*Capela v Rush*)
	+ Therefore, the offer was made at least seven days prior to the commencement of the hearing
* Offer exceeding judgement:
	+ **To qualify under 49.10, the offer must be sufficiently clear**
	+ The offer and the final judgement were very close to each other—the problem stems from the confusion over how interest should be applied, and whether that interest puts the judgment over top of the settlement offer
	+ The Court says the judge erred by not considering rule 49.13, which gives wide latitude to a judge in making an award for costs
	+ **Rule 49.13 is not about technical compliance with rule 49.10—judges should take a more holistic approach (*Lawson v Viersen)***
	+ She also erred by not considering rule 57.01(1)(a), which tells judges to consider the difference between what was claimed and what was awarded
	+ It was not “fair and reasonable” to award costs of $580K on an award of $145K
	+ The Appeals judge reduces the costs to $100K, which better takes into consideration Rules 49 and 57

### Costs Where Action Brought In Wrong Court

#### Recovery within Monetary Jurisdiction of Small Claims Court

57.05 (1) If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs.

### Liability Of Lawyer For Costs

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

* + 1. disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
		2. directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
		3. requiring the lawyer personally to pay the costs of any party.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.

(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

### Rule 56 Security For Costs

#### Where Available

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

* 1. the plaintiff or applicant is ordinarily resident outside Ontario;
	2. the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
	3. the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
	4. the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
	5. there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
	6. a statute entitles the defendant or respondent to security for costs.

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs.

#### TEST: Applying Rule 56.01

##### *V. Vinokur Foundation in Support of Culture and Arts v. Lathem* (2013, ONSC)

1. Arises out of a dispute over fraud
2. The plaintiff is a Russian corporation, with no assets in Canada
3. For that reason, the defendant moves to have security for costs as per Rule 56.01(1)
4. **The test for determining a motion under Rule 56.01(1) comes from *Websports Technologies v Cryptologic Inc*. It is a two step process:**
	* **The initial onus is on the moving party to demonstrate the responding party fits one of the subrules of 56.01(1)**
		1. **They don’t have to prove it, only demonstrate there is good reason to believe that they do**
	* **If that is accomplished, the onus shifts to the responding party: they can either show they have little or no money and ask the court to make a just ruling in the circumstances, or they can prove they have sufficient assets to respond to a cost order, or they can show that asking for costs would be unjust. This onus only arises if the first part of the test is met.**
5. Demonstrating lack of funds:
	* Individuals: file their latest tax return, banking records, records of income and expenses
	* Corporations: demonstrate its shareholders and associates have insufficient assets
6. In this case, the first part of the test is met: the defendant lives in Russia, so they fit Rule 56.01(1)(a)
7. It’s unclear whether the responding party even undertook to show they had no money or had enough money, but the judge ordered them to provide security for costs.

## Public Interest Litigation and Costs

### Rules of Professional Conduct

4.1-1 A lawyer shall make legal services available to the public in an efficient and convenient way.

**Commentary**

…

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession **to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty** or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

#### TEST: Advanced Costs in Public Interest Litigation

From *Little Sisters*

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial.

2. The claim to be adjudicated is prima facie meritorious.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

* Final Step: Exercise of court’s discretion.

##### *Little Sisters Book and Art Emporium v Canada* (2007, SCC)

* Little Sisters asked for its costs as an exceptional circumstance
* The store argued that because it had gotten a favourable judgement in 2002 but no relief under s 24(1) of the Charter, and because Customs continued to impound its material, the government should pay for its litigation
* **The rules for advanced costs come from *British Columbia (Minister of Forests) v Okanagan Indian Band* [*Okanagan*]. A litigant must convince the court that three absolute requirements are met:**
	+ **1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.**
		1. **Not a substitute for Legal Aid**
		2. **Litigant must show an attempt to fund in some other way, by raising money or otherwise**
		3. **If a litigant cannot afford the full cost, but is not impecunious, they must commit to paying for some of the costs**
		4. **Fulfilling this element does not give rise to a right to costs: in fact, it is the *least* important element of the test, and will not even arise if litigants cannot fulfill the other two**
	+ **2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.**
	+ **3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.**
* It is only a rare and exceptional case that will warrant advance costs (*Okanagan*)
* When advance costs *are* awarded, the use of the public purse to fund litigation demands increased scrutiny by the court as to how those costs are used
* The court chose to consider the merits and the public importance issues first, as impecuniosity is the least important factor
* The Little Sisters case failed on the second and third requirements, before failing on the first, as they had tried no other way to get the money
* Therefore, the case was dismissed

# Simplified Procedure

## Rule 76 Simplified Procedure

### Application Of Rule

76.01 (1) The simplified procedure set out in this Rule does not apply to,

(a) actions under the Class Proceedings Act, 1992;

(b) actions under the Construction Lien Act, except trust claims;

(c) Rule 77.

#### Application of Other Rules

(2) The rules that apply to an action apply to an action that is proceeding under this Rule, unless this Rule provides otherwise

### Availability Of Simplified Procedure

#### When Mandatory

76.02 (1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff’s claim is exclusively for one or more of the following:

i. Money.

ii. Real property.

iii. Personal property.

2. The total of the following amounts is $100,000 or less exclusive of interest and costs:

i. The amount of money claimed, if any.

ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.

(2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff’s claim, considered separately, meets the requirements of subrule (1).

(2.1) If there are two or more defendants, the procedure set out in this Rule shall be used if the plaintiff’s claim against each defendant, considered separately, meets the requirements of subrule (1).

#### When Optional

(3) The procedure set out in this Rule may be used in any other action at the option of the plaintiff, subject to subrules (4) to (9).

#### Originating Process

(4) The statement of claim (Form 14A, 14B or 14D) or notice of action (Form 14C) shall indicate that the action is being brought under this Rule.

#### Action Continues to Proceed Under Rule

(5) An action commenced under this Rule continues to proceed under this Rule unless,

* + - the defendant objects in the statement of defence to the action proceeding under this Rule because the plaintiff’s claim does not comply with subrule (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply;
		- a defendant by counterclaim, crossclaim or third party claim objects in the statement of defence to the counterclaim, crossclaim or third party claim proceeding under this Rule because the counterclaim, crossclaim or third party claim does not comply with subrule (1), and the defendant does not abandon in the reply to the counterclaim, crossclaim or third party claim the claims or parts of claims that do not comply; or
		- the defendant makes a counterclaim, crossclaim or third party claim that does not comply with subrule (1) and states in the defendant’s pleading that the counterclaim, crossclaim or third party claim is to proceed under the ordinary procedure.

#### Continuance Under Ordinary Procedure — Where Notice Required

(6) If an action commenced under this Rule may no longer proceed under this Rule because of an amendment to the pleadings under Rule 26 or as a result of the operation of subrule (5),

* + 1. the action is continued under the ordinary procedure; and
		2. the plaintiff shall deliver, after all the pleadings have been delivered or at the time of amending the pleadings, as the case may be, a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action.

#### Continuance Under Simplified Procedure — Where Notice Required

(7) An action that was not commenced under this Rule, or that was commenced under this Rule but continued under the ordinary procedure, is continued under this Rule if,

(a) the consent of all the parties is filed; or

(b) no consent is filed but,

(i) the plaintiff’s pleading is amended under Rule 26 to comply with subrule (1), and

(ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule.

#### Effect of Abandonment

(9) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, crossclaim or third party claim complies with subrule (1) may not bring the claim or part in any other proceeding.

### Costs Consequences

#### Opting In

76.13 (1) Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 76.02(7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise.

#### Plaintiff Denied Costs

(2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

1. The judgment awards exclusively one or more of the following:

i. Money.

ii. Real property.

iii. Personal property.

2. The total of the following amounts is $100,000 or less, exclusive of interest and costs:

i. The amount of money awarded, if any.

ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced.

(3) The plaintiff shall not recover any costs unless,

(a) the action was proceeding under this Rule at the commencement of the trial; or

(b) the court is satisfied that it was reasonable for the plaintiff,

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with subrule 76.02 (1), (2) or (2.1).

(4) Subrule (3) applies despite subrule 49.10 (1) (plaintiff’s offer to settle).

#### Plaintiff may be Ordered to Pay Defendant’s Costs

(6) The plaintiff may, in the trial judge’s discretion, be ordered to pay all or part of the defendant’s costs, including substantial indemnity costs, in addition to any costs the plaintiff is required to pay under subrule 49.10 (2) (defendant’s offer to settle).

#### Defendant Objecting to Simplified Procedure

(7) In an action that includes a claim for real or personal property, if the defendant objected to proceeding under this Rule on the ground that the property’s fair market value exceeded $100,000 at the date the action was commenced and the court finds the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise.

### Affidavit Of Documents

#### Copies of Documents

76.03 (1) A party to an action under this Rule shall, within 10 days after the close of pleadings and at the party’s own expense, serve on every other party,

* + - an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party’s knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control or power; and
		- copies of the documents referred to in Schedule A of the affidavit of documents.

#### List of Potential Witnesses

(2) The affidavit of documents shall include a list of the names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action, unless the court orders otherwise.

#### Effect of Failure to Disclose

(3) At the trial of the action, a party may not call as a witness a person whose name has not been disclosed in the party’s affidavit of documents or any supplementary affidavit of documents, unless the court orders otherwise.

#### Lawyer’s Certificate

(4) The lawyer’s certificate under subrule 30.03 (4) (full disclosure in affidavit) shall include a statement that the lawyer has explained to the deponent the necessity of complying with subrules (1) and (2).

### No Written Discovery, Cross-Examination on an Affidavit Or Examination Of A Witness

#### Limitation on Oral Discovery

76.04 (2) Despite rule 31.05.1 (time limit on discovery), no party shall, in conducting oral examinations for discovery in relation to an action proceeding under this Rule, exceed a total of **two hours** of examination, regardless of the number of parties or other persons to be examined.

### Summary Trial

#### Procedure

76.12 (1) At a summary trial, the evidence and argument shall be presented as follows, subject to any direction under subrule 76.10 (7):

1. The plaintiff shall adduce evidence by affidavit.

1.1 The plaintiff may examine the deponent of any affidavit served by the plaintiff for not more than 10 minutes.

2. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.

3. The plaintiff may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.

4. When any cross-examinations and re-examinations of the plaintiff’s deponents are concluded, the defendant shall adduce evidence by affidavit.

4.1 The defendant may examine the deponent of any affidavit served by the defendant for not more than 10 minutes.

5. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.

6. A party shall complete all of the party’s cross-examinations within 50 minutes.

7. A defendant may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.

8. When any cross-examinations and re-examinations of the defendant’s deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.

9. After the presentation of evidence, each party may make oral argument for not more than 45 minutes.

(2) The trial judge may extend a time provided in subrule (1).

# Class Proceedings

## Advantages of Class Proceedings

* **Judicial economy:** avoid unnecessary duplication in fact-finding and legal analysis.
* **Access to justice:** make the prosecution of claims economical that any one class member would find too costly to prosecute on his or her own.
* **Efficiency and justice (behaviour modification):** ensure that actual and potential wrongdoers modify their behaviour.

## *Class Proceedings Act*, 1992

### Plaintiff’s class proceeding

2 (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

#### Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

### Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

* + 1. the pleadings or the notice of application discloses a cause of action; **(AS PER RULE 21.01(b))**
		2. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; **(OBJECTIVE CRITERIA – AS PER *HOLLICK)***
		3. the claims or defences of the class members raise common issues; **(TEST FOR COMMON ISSUES FROM *HOLLICK*:** an issue will be common “only where its resolution is necessary to the resolution of each class member’s claim.” Further, an issue will not be “common” in the requisite sense unless the issue is a “substantial . . . ingredient” of each of the class members’ claims.)
		4. a class proceeding would be the preferable procedure for the resolution of the common issues **(TEST FROM *HOLLICK*:** this inquiry should be conducted “through the lens of the three principal advantages of class actions — judicial economy, access to justice and behaviour modification.”); and
		5. there is a representative plaintiff or defendant who,
	1. would fairly and adequately represent the interests of the class,
	2. 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
	3. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

#### Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

#### Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

### Opting out

**9**Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

#### TEST: Creating a Class Action

##### *Hollick v Toronto* (2001, SCC) – Class Action NOT Certified

* Hollick wishes to sue the City of Toronto over smells and noises from a garbage dump near his home
* Wants to lead a class action on behalf of 30,000 residents
* City contests whether this can be a class action
* **Court lays down the test for creating a class action, s 5 of the *Class Proceedings Act*, where if ALL are satisfied, the judge is required to certify the class:**
	+ 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
		1. (a) the pleadings or the notice of application discloses a cause of action;
		2. (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
		3. (c) the claims or defences of the class members raise common issues;
		4. (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
		5. (e) there is a representative plaintiff or defendant who,
			1. (i) would fairly and adequately represent the interests of the class,
			2. (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
			3. (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
* After analyzing the reasons for the existence of class action proceedings, McLachlin decides that this proceeding falls down on 5(1)(d): a class action is not the “preferable” procedure, because other procedures would get to a resolution more efficiently: the distribution of the pollutants wasn’t uniform, so people have different claims in respect to the effect of these pollutants, so a class proceeding won’t work
* Therefore, appeal dismissed.

##### *AIC Limited v Fischer* (2013, SCC) – Class Action Certified

* Investors wronged by two fund companies sued as a class action
* The fund companies argue that the OSC compensation and jurisdiction means that a class action is not the preferable procedure, as per s 5(1)(d) of the *Class Proceedings Act*
* Respondents argue that a lack of due process in the OSC’s proceedings and lack of participation by the investors means that access to civil justice is an access to justice issue.
* The appeal turns on the access to justice issue and the preferability requirement of s 5(1)(d)
	+ Preferability must take into account non-court procedures (*Hollick*)
	+ In assessing preferability, the court looks at common issues in the context of the action as a whole (*Hollick*)
	+ The preferability analysis considers the extent to which a proposed class action serves the goals of class proceedings (*Hollick*):
		- Judicial economy
		- Behaviour modification
		- Access to justice
	+ **The ultimate question is whether another type of proceeding is preferable, not if a class action fully achieves these three goals**
* Access to justice is about both process and outcome, and the two are connected
	+ **A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered (*Hollick*)**
* To determine if these elements are present, the court asks a series of questions:
	+ What are the barriers to justice?
		- Most likely economic, but could be psychological or social
	+ What is the potential of the class proceedings to address those barriers?
		- Does it allow members to overcome economic or other barriers?
		- Class actions are a procedural tool, the do not guarantee results (*Hollick*)
		- However, they are a procedural means to a substantive end: they are meant to achieve redress
	+ What are the alternatives to class proceedings?
		- The court must identify and consider court and non-court proceedings
	+ To what extent do the alternatives address the relevant barriers?
		- Does it address the barriers, give potential redress and accord with suitable procedural rights?
	+ How do the two proceedings compare?
		- Cost benefit analysis of the potential proceedings
* There must be some basis in fact within the answer to all of these questions, and it is the applicant’s burden to show that basis in fact
* Two access to justice issues were identified in this case:
	+ Economic
		- The nature of the claims meant that each individual claim may not be big enough to be worth pursuing
	+ Process
		- Because the claims are so small, not pursuing them means that applicants do not have access to a fair procedure
	+ The proposed class action addresses these concerns
* Is another process better?
	+ The only alternative is the OSC process, already undertaken
	+ The OSC is a regulatory procedure—it isn’t remedial or punative
	+ Investors do not get to participate heavily in OSC proceedings, and there is no record of HOW the OSC arrives at its conclusions
		- These are two procedural access to justice issues, that can be addressed by a class action
	+ As for substantive access to justice: there is evidence that the proceedings of the OSC, even though favourable to the investors, left them undercompensated, therefore, a civil suit is a way to address that that is preferable to leaving it at having had the OSC judgement
* **The regulatory function of the OSC cannot displace the private remedial function of a class action proceeding**
* Appeal dismissed, the class action can go ahead

# Arbitration and Mediation

## Negotiation

### Rules of Professional Conduct

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

## Rules of Civil Procedure

76.08 Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether,

* + 1. all documents relevant to any matter in issue have been disclosed; and
		2. **settlement of any or all issues is possible.**

### Mandatory Mediation

#### Purpose

24.1.01 This Rule provides for **mandatory mediation** in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.

## Nature of Mediation

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.

#### Scope

24.1.04 (1) This Rule applies to the following actions:

1. Actions that were governed by this Rule immediately before January 1, 2010.
2. Actions that are commenced in one of the following counties on or after January 1, 2010:
	* 1. The City of Ottawa.
		2. The City of Toronto.
		3. The County of Essex.
3. Actions that are transferred to a county listed in paragraph 2 on or after January 1, 2014, unless the court orders otherwise.

### EXEMPTION FROM MEDIATION

24.1.05 The court may make an order on a party’s motion exempting the action from this Rule.

#### List of Mediators

24.1.08 (1) The mediation co-ordinator for a county shall maintain a list of mediators for the county, as compiled and kept current by the local mediation committee.

(2) A mediation under this Rule shall be conducted by,

* + 1. a person chosen by the agreement of the parties from the list for a county;
		2. a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or
		3. a person who is not named on a list, if the parties consent.

### MEDIATION SESSION

#### Time Limit

24.1.09 (1) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise.

### Procedure Before a Mediation Session

#### Statement of Issues

24.1.10 (1) At least seven days before the mediation session, every party shall prepare **a statement in Form 24.1C** and provide a copy to every other party and to the mediator.

(2) The statement shall **identify the factual and legal issues in dispute** and briefly set out **the position and interests of the party** making the statement.

(3) The party making the statement shall attach to it any **documents** that the party considers of central importance in the action.

### ATTENDANCE AT MEDIATION SESSION

#### Who is Required to Attend

24.1.11 (1) **The parties, and their lawyers** if the parties are represented, are **required to attend** the mediation session unless the court orders otherwise.

#### Authority to Settle

(2) **A party who requires another person’s approval** before agreeing to a settlement shall, before the mediation session, **arrange to have ready telephone access** to the other person throughout the session, whether it takes place during or after regular business hours.

### CONFIDENTIALITY

24.1.14 All communications at a mediation session and the mediator’s notes and records shall be deemed to be without prejudice settlement discussions

### RULE 50 – Pre Trial Conferences

#### Purpose

50.01 The purpose of this Rule is to **provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing** and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner.

### Pre Trial Conferences for Actions

50.02 (1) Unless the court orders otherwise, **within 180 days after an action is set down for trial**, the parties shall schedule with the registrar a date and time acceptable to all parties to appear before a judge or case management master for a **pre-trial conference**.

(2) If the parties do not schedule a pre-trial conference within 180 days after the action is set down for trial, **the registrar shall**, subject to any previous order,

* + 1. **schedule a date and time** for the parties to appear before a judge or case management master for a pre-trial conference; and
		2. give notice to the parties to appear at the scheduled date and time.

### Materials to be Filed

50.04 At least five days before a pre-trial conference, each party shall file with proof of service **a pre-trial conference brief** containing concise statements, without argument, of the following matters:

**1. The nature of the proceeding.**

**2. The issues raised and the party’s position.**

3. In the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take.

4. The steps that need to be completed before the action is ready for trial or the application is ready to be heard, and the length of time that it is estimated that the completion of those steps will take.

### Attendance

50.05 (1) The lawyers for the parties shall appear at the pre-trial conference and, unless the presiding judge or case management master orders otherwise, **the parties shall participate**,

* + 1. by **personal attendance**; or
		2. under rule 1.08 (telephone and video conferences), **if personal attendance would require undue amounts of travel time or expense**.

#### Authority to Settle

(2) A party who requires another person’s approval before agreeing to a settlement shall, before the pre-trial conference, **arrange to have ready telephone access to the other person throughout the conference**, whether it takes place during or after regular business hours.

#### Duty of Lawyers

(3) Every lawyer attending the pre-trial conference **shall ensure that he or she has the authority to deal with the matters** referred to in rule 50.06 and that he or she is **fully acquainted with the facts and legal issues** in the proceeding.

### Matters to be Considered

50.06 **The following matters shall be considered at a pre-trial conference:**

**1. The possibility of settlement of any or all of the issues in the proceeding.**

2. Simplification of the issues.

3. The possibility of obtaining admissions that may facilitate the hearing.

4. The question of liability.

5. The amount of damages, if damages are claimed.

6. The estimated duration of the trial or hearing.

7. The advisability of having the court appoint an expert.

8. In the case of an action, the number of expert witnesses and other witnesses that may be called by each party, and dates for the service of any outstanding or supplementary experts’ reports.

9. The advisability of fixing a date for the trial or hearing.

10. The advisability of directing a reference.

11. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

### No Disclosure

50.09 **No communication shall be made to the judge or officer presiding at the hearing of the proceeding** or a motion or reference in the proceeding **with respect to any statement made at a pre-trial conference**, except as disclosed in an order under rule 50.07 or in a pre-trial conference report under rule 50.08.

### Pre Trial Judge Not To Preside at Hearing

50.10 (1) **A judge who conducts a pre-trial conference shall not preside at the trial of the action** or the hearing of the application, except with the written consent of all parties.

### *Arbitration Act*, 1991

35. The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal’s ability to decide the dispute impartially

## Arbitration Act

### Definitions

**1**In this Act,

in sections 6 and 7, means the Family Court or the Superior Court of Justice; (“tribunal judiciaire”)

“family arbitration” means an arbitration that,

(a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the *Family Law Act*, and

(b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; (“arbitrage familial”)

“family arbitration agreement” and “family arbitration award” have meanings that correspond to the meaning of “family arbitration”. (“convention d’arbitrage familial”, “sentence d’arbitrage familial

### Application of Act

#### Arbitrations conducted under agreements

**2**(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration.

#### Arbitrations conducted under statutes

(3) This Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail.

### Other third-party decision-making processes in family matters

**2.2**(1) When a decision about a matter described in clause (a) of the definition of “family arbitration” in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

(a) the process is not a family arbitration; and

(b) the decision is not a family arbitration award and has no legal effect.

### Arbitration agreements

**5**(1) An arbitration agreement may be an independent agreement or part of another agreement

#### Further agreements

(2) If the parties to an arbitration agreement make a further agreement in connection with the arbitration, it shall be deemed to form part of the arbitration agreement.

#### Oral agreements

(3) An arbitration agreement need not be in writing.

#### “Scott v. Avery” clauses

(4) An agreement requiring or having the effect of requiring that a matter be adjudicated by arbitration before it may be dealt with by a court has the same effect as an arbitration agreement.

#### Revocation

(5) An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

### Court Intervention

#### Court intervention limited

**6**No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.

2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. **To prevent unequal or unfair treatment of parties to arbitration agreements.**

4. To enforce awards.

#### APPLICATION of Arbitration agreement in commercial context – finds unfairness

##### *Seidel v Telus* (2011, SCC)

* A contractual clause in a Telus contract mandated confidential binding arbitration for disputes
* Seidel felt she was being overbilled for the services she was getting
* Seidel brought a cause of action to certify a class action proceeding despite the arbitration clause, Telus sought to dismiss it under the terms of the contract
* The court called it an access to justice issue
	+ Telus claims freedom of contract and autonomy of individuals, as well as the lower cost of arbitration
	+ The *Business Practices and Consumer Protection Act* of BC recognizes, however, that contractual arbitration can be simply a guise to avoid liability, and that arbitration bodies can often be biased toward corporate clients, who arbitrate a lot and pay the bills
* The BPCPA voids binding arbitration clauses in BC contracts because of this (s 172)
* Allowing a binding arbitration clause takes away from the remedies available to a consumer, and doesn’t work in the public interest: there is no publicity of judgements, no reason for a company to change its behaviour overall (no power of declarations or enforcement)
* Seidel is awarded the appeal, she can pursue certification of her class action

### Conduct of Arbitration

#### Equality and fairness

**19**(1) In an arbitration, the parties shall be treated equally and fairly.  **SEE TEST FOR BIAS BELOW**

##### Idem

(2) Each party shall be given an opportunity to present a case and to respond to the other parties’ cases.

### Removal of arbitrator by court

15 (1) **The court may remove an arbitrator** on a party’s application under subsection 13 (6) (challenge), or may do so on a party’s application if the arbitrator becomes unable to perform his or her functions, commits a corrupt or fraudulent act, delays unduly in conducting the arbitration **or does not conduct it in accordance with section 19 (equality and fairness)**.

#### TEST: Reasonable Apprehension of Bias – Family Mediation / Arbitration

##### *McClintock v Karam* (2015 ONSC)

* Mediation in the context of a divorce
* Both parties had agreed to a mediation/arbitration as part of the separation agreement
* Disputes arose about visitation, and the mediator took the position that the child was being alienated from her father
* He sent a letter that he intended to *arbitrate* on this aspect of the divorce, and send the child from the mother to the father, with no access for the mother
* The mother took the position that the mediator did not have the authority to *arbitrate* on this point
* The mediator nonetheless scheduled an arbitration, the mother objected to the date because her lawyer couldn’t make it due to a pre-scheduled trip
* The matter went to the Superior Court
* The Mother submitted that:
	+ The mediator had no jurisdiction to arbitrate this aspect of the dispute
	+ The dispute should be resolved by a court
	+ In the alternative, the mediator should be dismissed for reasonable apprehension of bias, because his conduct and words showed he had prejudged the issue he was set to arbitrate
		- This issue is compounded, she alleged, by his refusal to change the date to accommodate her lawyer, and statements he made that showed his mind was already made up
	+ In the further alternative, she asked for clear directions to the mediator if indeed he should be allowed to arbitrate this matter
* The father submitted that:
	+ The mediator did have jurisdiction
	+ The mediator had not acted unfairly or with reasonable apprehension of bias
	+ The mediator had acted reasonably, setting the date as he had and concluding the mother was only delaying
* The *Arbitration Act* says that if mediation AND arbitration are to take place, a different person should do it, but this section can be waived as it was here
* It was decided the mediator had jurisdiction
* **The test for reasonable apprehension of bias:**
	+ **What would an informed person viewing the matter realistically and practically—and having thought the matter through—conclude? Would they conclude that X could decide fairly?**
* When a mediator and arbitrator are one in the same, it isn’t realistic to think that they could forget what happened in mediation when they get to arbitration, however, they are entitled to think that the arbitrator could be persuaded and decide fairly, not that they had made up their mind
* The actions and words of the arbitrator in this dispute point toward him having made up his mind prior to the scheduled arbitration—that means there is reasonable apprehension of bias, because an informed person would conclude he couldn’t decide fairly
* As per 19(1) or the *Arbitration Act*, the mediator/arbitrator must treat the parties fairly
* As per 19(2) he must allow them the opportunity to present their cases
	+ He didn’t allow this, due to inflexibility on the date
* As per 15(1) of the *Arbitration Act* an arbitrator can be removed when they do not comply with s 19
* The court removes the arbitrator from all aspects of the mediation/arbitration, saying that when bias is reasonably apprehended it would be inappropriate to leave him in place

## Privatization of Civil Courts

### Trevor Farrow

Types of Alternative Dispute Resolution (ADR)

#### Negotiation

* Direct discussions between the parties
* Totally voluntary, private
* No outside authority or assistance
* Parties can walk away

#### Mediation

* Assisted negotiation
* Voluntary and private
* Neutral third party, chosen by the parties
* No binding authority
* Parties can walk away

#### Court-Annexed Mediation

* Pre-trial mediation that is available to—or sometimes mandatory for—parties in a civil dispute
* Typically mediated by non judges

#### Judicial Dispute Resolution

* Origins in court-annexed mediation, but separate now
* Parties seek voluntary assistance from judges who act as neutral third parties
* The presence of a judge can be particularly persuasive to parties

#### Arbitration

* Basically a private trial
* Agreement is required, but the agreement can be made at the time the dispute arises or at the beginning of the parties’ relationship, in a dispute resolution clause in a contract
* Private judge serves as arbitrator
* By agreement, the arbitrator’s decision is binding

#### All forms share:

* Designed to resolve disputes
* Don’t involve the public trial process
* Premised on an agreement to engage the process
* Typically confidential

# Case Management

## Rules of Civil Procedure

### INTERPRETATION

#### General Principle

**1**.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

#### Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

1. Case management is the ability for the justice system to take control of a dispute and order steps be taken to resolve it—whether through ADR or otherwise—in an effort to create better efficiency, or reduce costs

## RULE 77 CIVIL CASE MANAGEMENT

### PURPOSE AND GENERAL PRINCIPLES

#### Purpose

**77**.01 (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court’s intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.

#### General Principles

(2) This Rule shall be construed in accordance with the following principles:

1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.

2. The nature and extent of the case management provided by a judge or case management master under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred.

###

### APPLICATION

#### Scope

**77**.02 (1) This Rule applies to actions and applications commenced in or transferred to one of the following counties on or after January 1, 2010 and assigned to case management by an order under these rules:

1. The City of Ottawa.

2. The City of Toronto.

3. The County of Essex.

### CASE MANAGEMENT POWERS

**77**.04 (1) A judge or case management master may,

1. extend or abridge a time prescribed by an order or the rules;
2. adjourn a case conference;
3. set aside an order made by the registrar;
4. establish or amend a timetable; and
5. make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule.

(2) A judge or case management master may, on his or her own initiative, require the parties to appear before him or her or to participate in a conference call to deal with any matter arising in connection with the case management of the proceeding, including a failure to comply with an order or the rules.

(3) For greater certainty, the powers set out in subrules (1) and (2) are in addition to any other powers set out in this Rule.

### ASSIGNMENT FOR CASE MANAGEMENT

#### On Consent of Parties

**77**.05 (1) A regional senior judge or, subject to the direction of a regional senior judge, any judge or case management master may, with the consent of all parties, assign a proceeding to which this Rule may apply for case management under this Rule.

#### No Consent

(2) At any time on or after the filing of the first defence in a proceeding to which this Rule may apply, a regional senior judge or, subject to the direction of a regional senior judge, any judge or case management master may assign the proceeding for case management under this Rule,

1. on his or her own initiative; or
2. on the request of a party or on motion if the court requires it.

#### Criteria

(4) In considering whether to assign a proceeding for case management, the regional senior judge, other judge or case management master shall have regard to all the relevant circumstances, including any or all of the following:

1. The purpose set out in subrule 77.01 (1).
2. The complexity of the issues of fact or law.
3. The importance to the public of the issues of fact or law.
4. The number and type of parties or prospective parties, and whether they are represented.
5. The number of proceedings involving the same or similar parties or causes of action.
6. The amount of intervention by the court that the proceeding is likely to require.
7. The time required for discovery, if applicable, and for preparation for trial or hearing.
8. In the case of an action, the number of expert witnesses and other witnesses.
9. The time required for the trial or hearing.
10. Whether there has been substantial delay in the conduct of the proceeding.

### ASSIGNMENT TO INDIVIDUAL MANAGEMENT BY A JUDGE

#### Assignment to Particular Judge

**77**.06 (1) The Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge, or a judge designated by any of them may direct that all steps in a proceeding that is assigned for case management under this Rule be heard and conducted by a particular judge.

#### Limitation

(2) A judge who is directed under subrule (1) to hear all steps in a proceeding shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties.

###

### CASE CONFERENCE

**77**.08A judge or case management master may at any time, on his or her own initiative or at a party’s request, convene a case conference under [rule 50.13](https://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/latest/rro-1990-reg-194.html?searchUrlHash=AAAAAQAFNzcuMDIAAAAAAQ&offset=97156#sec50.13_smooth).

50.13 (1) A judge may at any time, on his or her own initiative or at a party’s request, direct that a case conference be held before a judge or case management master.

## Case Management Alternative: MOTIONS IN A COMPLICATED PROCEEDING OR SERIES OF PROCEEDINGS

**37**.15 (1) Where a proceeding involves **complicated issues** or where there are **two or more proceedings** that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions.

## Rules of Professional Conduct

### Encouraging Compromise or Settlement

**3.2-4** A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

#### Commentary

1. [1] It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.
2. [1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. See also rule 7.2-6.
3. [1.2] When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

# Administrative Tribunals

## Notes on Procedural Fairness

* Common law and statutory duty
* 2 Aspects:
	+ Right to be heard
	+ Right to independent and impartial hearing
* This applies to admin tribunals

## Statutory Powers Procedure Act

### Application of Act

3. (1) Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision

#### Where Act does not apply

(2) This Act does not apply to a proceeding,

(a) before the Assembly or any committee of the Assembly;

(b) in or before,

(i) the Court of Appeal,

(ii) the Superior Court of Justice,

(iii) the Ontario Court of Justice,

(iv) the Family Court of the Superior Court of Justice,

(v) the Small Claims Court, or

(vi) a justice of the peace;

(c) to which the Rules of Civil Procedure apply;

(d) before an arbitrator to which the *Arbitrations Act* or the *Labour Relations Act* applies;

(e) at a coroner’s inquest;

(f) of a commission appointed under the *Public Inquiries Act, 2009*;

(g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he or she may have power to make; or

(h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned.

### Waiver

#### Waiver of procedural requirement

4. (1) Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.

### Disposition without hearing

4.1 If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise.

### Dismissal of proceeding without hearing

4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

#### Notice

(2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,

(a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or

(b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.

#### Same

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

#### Right to make submissions

(4) A party who receives a notice under subsection (2) may make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

#### Dismissal

(5) A tribunal shall not dismiss a proceeding under this section until it has given notice under subsection (2) and considered any submissions made under subsection (4).

#### Rules

(6) A tribunal shall not dismiss a proceeding under this section unless it has made rules under section 25.1 respecting the early dismissal of proceedings and those rules shall include,

(a) any of the grounds referred to in subsection (1) upon which a proceeding may be dismissed;

(b) the right of the parties who are entitled to receive notice under subsection (2) to make submissions with respect to the dismissal; and

(c) the time within which the submissions must be made.

#### Continuance of provisions in other statutes

(7) Despite section 32, nothing in this section shall prevent a tribunal from dismissing a proceeding on grounds other than those referred to in subsection (1) or without complying with subsections (2) to (6) if the tribunal dismisses the proceeding in accordance with the provisions of an Act that are in force on the day this section comes into force.

### Alternative dispute resolution

4.8 (1) A tribunal may direct the parties to a proceeding to participate in an alternative dispute resolution mechanism for the purposes of resolving the proceeding or an issue arising in the proceeding if,

(a) it has made rules under section 25.1 respecting the use of alternative dispute resolution mechanisms; and

(b) all parties consent to participating in the alternative dispute resolution mechanism.

#### Definition

(2) In this section,

“alternative dispute resolution mechanism” includes mediation, conciliation, negotiation or any other means of facilitating the resolution of issues in dispute.

#### Mandatory alternative dispute resolution

(4) A rule under subsection (3) may provide that participation in an alternative dispute resolution mechanism is mandatory or that it is mandatory in certain specified circumstances.

#### Continuance of provisions in other statutes

(6) Despite section 32, nothing in this section shall prevent a tribunal from directing parties to a proceeding to participate in an alternative dispute resolution mechanism even though the requirements of subsections (1) to (5) have not been met if the tribunal does so in accordance with the provisions of an Act that are in force on the day this section comes into force.

### Notice of hearing

6. (1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal.

#### Oral hearing

(3) A notice of an oral hearing shall include,

(a) a statement of the time, place and purpose of the hearing; and

(b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party’s absence and the party will not be entitled to any further notice in the proceeding.

#### Written hearing

(4) A notice of a written hearing shall include,

(a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;

(c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party’s participation and the party will not be entitled to any further notice in the proceeding.

### Right to representation

10.A party to a proceeding may be represented by a representative.

### Examination of witnesses

10.1 A party to a proceeding may, at an oral or electronic hearing,

(a) call and examine witnesses and present evidence and submissions; and

(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

### Rights of witnesses to representation

11. (1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal.

#### Idem

(2) Where an oral hearing is closed to the public, the witness’s representative is not entitled to be present except when that witness is giving evidence.

### Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1.

### Rules

25.1(1) A tribunal may make rules governing the practice and procedure before it.  1994, c. 27, s. 56 (38).

#### Consistency with Acts

(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

#### Administrative Tribunals – Duty of Fairness – Test for Bias – Finds Bias

##### *Baker v Canada* (1999, SCC)

* A woman came to Canada in 1981 on a visitor’s visa and remained, working as a domestic
* Had four children in Canada, after the last one developed post-partum psychosis
* Through diagnosis of schizophrenia she was discovered to have overstayed, a hearing was held where she asked to stay on humanitarian and compassionate grounds
* The hearing went against her, she was ordered deported
* The notes taken by the tribunal were somewhat damning—appealed on these issues:
	+ Procedural fairness
	+ Discretion and the interests of the woman’s children
* The duty of fairness
	+ The duty is context-specific
	+ But there must be a chance for those affected by the decision to put forward their views and evidence and have them considered by the decision maker
	+ **How do we determine what’s fair? (Baker Factors)**
		- **One factor to determine the nature and extent of the duty of fairness: The closer an administrative tribunal is to a judicial process, the higher the duty of having a fair procedure**
		- **Another aspect is the statutory scheme: if no appeals are allowed, then the duty of fairness is higher**
		- **A third aspect is the importance of the decision to the individuals affected—the greater the impact, the higher the duty**
		- **Fourth, the legitimate expectations of the person challenging the decision: if a person is led to believe they will get a certain type of procedure, they should get that procedure**
		- **Fifth, the determination of what is a fair procedure must give some weight to the decision maker’s ideas of what constitutes a fair procedure**
		- **This list is not exhaustive**
* The court applied these factors to the case:
	+ The procedure for an H+C hearing are not that close to a judicial hearing: there is a lot of discretion
	+ However, there is an appeals process
	+ The results of a decision will have a significantly important effect on those involved
	+ The minister and the individual officers have a lot of discretion, and decided against an oral hearing in this case, which must be considered
* The appellant contends that a lack of oral hearing and a lack of written reasons mean the duty of fairness were breached
	+ The court says that an oral hearing is not a fairness requirement in H+C hearings
	+ Getting the notes of one of the officers counts as written reasons
* The appellant also contends, based on the notes, that there was a reasonable apprehension of bias in this case
	+ **The test for reasonable apprehension of bias comes from Grandpré J, in dissent, in *Committee for Justice and Liberty v. National Energy Board* [1978]:**
		- **“what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”**
	+ The court concludes that a well-informed member of the public WOULD perceive bias, therefore the duty of procedural fairness was violated, and the appeal is allowed

#### TEST: Sufficient Disclosure – Administrative Tribunals – Procedural Fairness – deference to legislature

##### *Canada (Citizenship and Immigration) v Harkat* (2014, SCC)

* Harkat declared inadmissible to Canada for ties to terrorism
* The *Immigration and Refugee Protection Act* prevents defendants from seeing evidence against them, as to make the evidence public would harm national security
* Harkat argued that this breaches fundamental fairness, by not letting him mount a full defense
* The question is: is this procedure fair?
	+ Court goes through history of the scheme
		- It has been found unfair previously, and changes have been made, including the addition of “special advocates” to work on behalf of the accused
	+ The procedure makes use of “Security Certificates” that are issued by CSIS. These certificates go to a federal judge who can quash them if they are unreasonable
	+ If they are found to be reasonable, they go into effect: the person named can be arrested and a proceeding starts
	+ The person gets a summary of the allegations and evidence so they can be reasonably informed, but they don’t include anything that would “endanger the safety of any person if disclosed”
	+ A special advocate is appointed: these are security-cleared lawyers who act on the person’s behalf, get all the information, but do not share it with their “client”—there is no lawyer-client relationship
	+ Hearings are in camera and ex parte
	+ The usual rules of evidence do not apply: judges can admit anything they deem relevant, and evidence need not be disclosed to the named defendant
	+ Because these tribunals affect s 7 (life, liberty, security of the person) they must conform to the principles of fundamental justice.
	+ However, as per *Charkaoui I*, there must be a balance between the government’s objective and the interests of the person affected
	+ The judge plays a gatekeeper role: they are to press the govt to make its case more vigorously than normally
	+ The special advocate plays a near approximation to defense counsel
* The court makes two findings:
* The scheme provides defendants with sufficient disclosure:
	+ IRPA defendants are entitled to a minimum amount of disclosure of allegations and evidence
		- Enough to meet the case against them
		- **The test for sufficient disclosure: A person must be informed enough that they can instruct their public and special advocates, which allows the advocates to challenge the Minister’s evidence**
		- If enough of the allegations and evidence cannot be disclosed for security reasons, the minister MAY need to drop the case
	+ Only information or evidence that raises a serious risk must be withheld
		- The scheme provides for closed hearings whenever disclosure of info *could* be injurious, but withholding info from public summaries requires a higher standard: only info that, in the judge’s opinion, WOULD be injurious can be withheld
		- Judges should be skeptical of the govt in this regard, as they have a tendency to overestimate the risk of harm
	+ The absence of a balancing approach does not make the scheme unconstitutional
		- The court rejects Harkat’s contention that the public interest in disclosure outweighs the public interest in non-disclosure
		- Rather, the disclosure mechanism requires a fair process in order to be constitutional (under s 7)
* Special advocates are a “substantial substitute” to participation by the accused
	+ Restrictions on communications between special advocates and the accused are not absolute—can be lifted by the judge
	+ Accused and their public counsel can communicate—one way—an unlimited number of times with the special advocate
		- This informs the defense and can give rise to reasons for the judge to lift communications restrictions
	+ Harkat contended that the special advocate must breach solicitor-client confidentiality to obtain permission to communicate, but steps can be taken to mitigate this risk, such as communicating without the Ministry’s lawyer present
* The court concludes the scheme is constitutional, though remarks that it is an imperfect substitute for full disclosure

## Ontario Human Rights Code

### Disposition of applications

**40**The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.

### Interpretation of Part and rules

**41**This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.

### Tribunal rules

**43**(1) The Tribunal may make rules governing the practice and procedure before it.

#### Required practices and procedures

(2) The rules shall ensure that the following requirements are met with respect to any proceeding before the Tribunal:

1. An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules.

2. An application may not be finally disposed of without written reasons.

#### Same

(3) Without limiting the generality of subsection (1), the Tribunal rules may,

(a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;

(b) authorize the Tribunal to,

(i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, and

(ii) determine the order in which the issues and evidence in a proceeding will be presented;

(c) authorize the Tribunal to conduct examinations in chief or cross-examinations of a witness;

(d) prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;

(e) authorize the Tribunal to make or cause to be made such examinations of records and such other inquiries as it considers necessary in the circumstances;

(f) authorize the Tribunal to require a party to a proceeding or another person to,

(i) produce any document, information or thing and provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form,

(ii) provide a statement or oral or affidavit evidence, or

(iii) in the case of a party to the proceeding, adduce evidence or produce witnesses who are reasonably within the party’s control; and

(g) govern any matter prescribed by the regulations.

## Human Rights Tribunal of Ontario – Rules of Procedure

### Powers of the Tribunal

1.7

In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:

* lengthen or shorten any time limit in these Rules;
* add or remove a party;
* allow any filing to be amended;
* consolidate or hear Applications together;
* direct that Applications be heard separately;
* direct that notice of a proceeding be given to any person or organization, including the Commission;
* determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;
* define and narrow the issues in order to decide an Application;
* make or cause to be made an examination of records or other inquiries, as it considers necessary;
* determine and direct the order in which evidence will be presented;
* on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party's control;
* permit a party to give a narrative before questioning commences;
* question a witness;
* limit the evidence or submissions on any issue;
* advise when additional evidence or witnesses may assist the Tribunal;
* require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;
* on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;
* direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;
* make such further orders as are necessary to give effect to an order or direction under these Rules;
* attach terms or conditions to any order or direction;
* consider public interest remedies, at the request of a party or on its own initiative, after providing the parties an opportunity to make submissions;
* notify parties of policies approved by the Commission under s. 30 of the Code, and receive submissions on the policies; and
* take any other action that the Tribunal determines is appropriate.

## Ontario Human Rights Code – Class notes

### Provides protection from discrimination in the following five social areas:

* + Employment
	+ Goods, Services and Facilities
	+ Accommodation
	+ Membership in a vocational association
	+ Contracts
* Human rights code applies to all: not just govt

#### 17 prohibited grounds:

* + Race
	+ Ancestry
	+ Place of origin
	+ Colour
	+ Ethnic origin
	+ Citizenship
	+ Creed
	+ Sex
	+ Sexual orientation
	+ Gender identity
	+ Gender expression
	+ Disability
	+ Age
	+ Marital status
	+ Receipt of public assistance (accommodation only)
	+ Record of offences (employment only)
* Considered “quasi-constitutional” as the human rights code is above all legislation BUT the *Charter*

### Ontario Human Rights System Pre-2008

* Not direct access
* The commission heard complaints and decided whether they would go forward
* Commission had a neutral role, mediating between parties
* Once a decision was made that a complaint could go forward, the commission became an advocate before the tribunal representing the public interest
* Right of judicial review over whether a case went forward
* Only a small percentage of cases made it to tribunal (9.4%)
	+ Either the commission dismissed the complaint, or it was dismissed for delay, or there was another available process
* Tribunal’s function is similar to a court
	+ Mediation process if that fails, a court process
* Right of appeal to tribunal decision
* People are free to retain legal counsel
	+ Vast majority of claimants relied on commission, however
* Problems:
	+ Delay (27 months to get a decision to GO to tribunal)
	+ Conflict of roles (commission has too many jobs, perceived as favourable to complainants, or in conflict
	+ Duplication of efforts: parties have to present complaint over and over
	+ Gate keeping: commission made decisions w/o enough input from parties, behind closed doors, questions about reasons
	+ Inability to tackle systemic discrimination

### Ontario Human Rights System Post-2008

* Direct access to Human Rights Tribunal
* New Role For Commission
	+ Develops policy around human rights
	+ Education
	+ Promoting compliance with the code
	+ Can still initiate or intervene in applications
* Human Rights Legal Support Centre
	+ Provides lawyers to applicants
		- Intake
		- Drafting application
		- Representation at mediations and hearings
* This is a more adversarial approach
* Critiques of amendments
	+ Complainant-oriented stakeholders felt that removing the commission privatized the human rights system
	+ Respondent-oriented stakeholders liked that the commission vetted complaints, and that the new approach was a free for all
		- Cost consequences don’t exist at the tribunal

### Evaluating the Post-2008 Human Rights System

* Report in 2012 by Andrew Pinto
* Generally more efficient
* Representation at Tribunal
	+ Applicants: 53 – 70% self reps
	+ Respondants: 82 – 90% represented by a lawyer
* When the Centre offers legal representation they do a great job, but clearly they don’t often do that
	+ Turns the centre into the new gatekeeper
* Centre too Toronto focused?
	+ Located in Toronto
	+ Not a lot of visibility outside TO
	+ Not a lot of visibility in Indigenous communities
* Recommendation to bring back larger role for commission
* Tribunal needs to deal with unmeritorious complaints more efficiently

### Active Adjudication

* This is the approach at Human Rights Tribunal
* Mid way between inquisitorial and adversarial
* Sec 40 and 41 of the code allows the Tribunal to take on procedures that are alternatives to traditional procedures
* Sec 43(3) lets the tribunal control the evidence, conduct examinations
* Rules of Procedure 1.7 (Human Rights Tribunal) gives sweeping powers that are a departure from the adversarial approach
* It’s still up to parties to bring forward the evidence

### Evaluation of Active adjudication

* Pinto report:
	+ Little evidence that hearings were unfair to self reps
	+ Need for more explicit procedures
	+ There hasn’t been judicial review on the basis of the tribunal overstepping its neutral role
		- In fact, the only complaints have been that the chairs have only reproduced court room procedures and aren’t actively adjudicating enough
	+ Recommends:
		- Training in active adjudication
		- Training in when active adjudication is appropriate
		- Promotion of active adjudication
* Flaherty article on Active Adjudication “Self-represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law”
	+ Many solutions to A2J is to give people lawyers
	+ But self reps are here to stay, and the disparity between them and represented people is vast
	+ Recommendations:
		- Assume self rep as the norm and design around that
		- Get out of the approach of just replicating court procedures in admin tribunals
	+ Self reps often think the process is unfair
		- They arrive at the tribunal with evidence that the respondent has done something wrong before, or that the respondent is a bad person, and think it’s their smoking gun
			* But this evidence is inadmissible—it doesn’t apply to their case
		- This puts the self rep in a difficult position, and that the process is unfair from the outset
		- They also feel embarrassed
	+ What can adjudicators do to level the playing field?
		- Adjudicative assistance:
			* Giving information, direction
			* Explain the rules of evidence
			* Apply rules with flexibility
			* Alert a party to something they haven’t considered
			* Appellate decisions have encouraged adjudicative assistance as long as it doesn’t cross the line
		- Active Adjudication
			* Adjudicator takes more control without fully taking over fact finding process
			* She doesn’t use opening statements w/ self reps
				+ Self reps don’t understand the diff between an opening statement and giving evidence (they’re not under oath during opening statement)
				+ She undertakes an equivalent to opening statements by summarizing the case and offering a chance to correct her
			* She allows round tables on issues with witnesses, rather than one witness at a time
				+ This allows the adjudicator to pose the questions, but parties have a chance to do so as well

#### Why are judges against inquisitorial approach?

* Culture: raised in law school environment, practiced litigation
* Requires diff skills from judges
* More active role for judges
* Diff mindset
* Requires more time/investment

# Other Processes

## Online Dispute Resolution, Artificial Intelligence, Access to Justice

### “The Internet as a Site of Legal Education and Collaboration Across Continents and Time Zones: Using Online Dispute Resolution as a Tool For Student Learning”

#### By Martha Simmons and Darin Thompson

* Technology ubiquitous in the law
* Law schools do not teach ODR (Online Dispute Resolution) preferring to focus on cases or hypotheticals
* What is ODR?
	+ “ODR refers to a wide range of processes that use information communication technologies to facilitate dispute resolution. It can encompass a variety of methods and media, with a common feature being that parties are not required to share the same physical space to arrive at resolution. Consistent with the “online” aspect of ODR, most of its processes are facilitated through the Internet. Some forms of ODR rely on human intervention, while others are automated. ODR can range from the simple day-to-day negotiations via e-mail to complex multi-party video mediations.”
* History of ODR
	+ Emerged in the 90s, to resolve disputes around e-commerce
	+ Ebay a major pioneer
	+ Considered well-suited for international dispute resolutions—no need for face-to-face—adopted by EU and UN
	+ Adopted for domestic disputes
		- BC codified it in its *Civil Resolution Tribunal Act* in 2012
		- Other jurisdictions in Canada, as well as US and England have an interest
	+ Well suited to consumer disputes, but can be used for civil and family disputes as well
	+ More than just automation: can help provide access to justice
* Examples of ODR Processes
	+ Can be as simple as negotiations over email or video conferencing, to purpose-built platforms
	+ Automated negotiations
		- Some platforms allow negotiators to submit offers and demands without knowing the other’s (called blind bidding)
		- The platform seeks out points of overlap and can suggest settlement terms
		- If not enough overlap, extra rounds can be added
		- The computer functions as a neutral third party
		- Economical in both time and money
	+ Asynchronus text-based negotiation
		- Essentially, the platform functions as email, but all of the communications may be kept in the same place, and parameters of the negotiation, or agreed upon terms might be close at hand
		- Facilitates communication and is economical timewise and money wise
		- The platform itself doesn’t play a role, however
	+ Online facilitation and mediation
		- Real person is involved in the negotiations, but everything takes place online
		- They can interject, facilitate communications
			* Set up the live stream, run the mediation, etc
		- May occur in real time, or not
* Benefits and Drawbacks of ODR
	+ Benefits:
		- Makes time and space less significant
			* People don’t have to be in the same place at the same time
			* No need to take time off from a job or responsibilities
			* Asycnchronous ODRs don’t even need to be scheduled
		- Economical
			* No need for a lot of lawyers or people
			* Computer runs the show
	+ Drawbacks
		- The Internet isn’t easy for everyone to understand
			* Particularly for marginalized groups
		- Lack of non-verbal communication in text-based ODR
			* Could lead to misunderstandings
			1. There is some evidence, however, that this concern is not justified

### “Artificial Intelligence in the Practice of Law”

#### By Daniel Wittenberg

* Artificial Intelligence is the ability to teach a machine to solve a problem the way a human would
* Machine learning is the science of getting machines to learn to do things without being programmed
* AI is already being used by law firms for
	+ Legal research
	+ Due diligence in mergers and acquisitions
	+ Contract analysis
	+ Lease abstraction
	+ Bankruptcy
* Some programs can save 20 – 90% of time spent on contract review without sacrificing accuracy
* There is fear that lawyers—especially junior associates—will be replaced by robots
	+ Firms don’t believe this, saying that they don’t intend to cut numbers or hours, but think tht junior associates will be able to concentrate on work that requires higher cognition
* The use of AI raises ethical concerns:
	+ Is the advice given to the client the lawyer’s advice, or the robot’s?
	+ Can we blindly trust what the robot gives us?
	+ The inner workings of the programming are not visible, and may be proprietary
	+ Lawyers cannot abdicate their duties to machines
* CONCLUSION: Human involvement still required to interpret data, render legal advice and fulfill ethical obligations. AI should help improve service delivery to clients, not eradicate lawyers

# Anishinaabe Constitutional Special Lecture

* It’s important to avoid pan-Indigenousness—we’re talking about ONE group’s legal systems
* We’re learning a northwestern Anishinaabe tradition
* We’re going to contrast this tradition with the liberal tradition—liberal values underlie our laws, and especially our civil procedure system
	1. This isn’t a value judgement, however—one is not necessarily better than the other
* The point is not to accept Anishinaabe traditions or take them as your own or believe them—you just need to understand them
	1. You don’t have to *believe* in the primacy of the individual to understand liberalism, either
* We read stories to prepare for this—children learn the law from before birth, and they learn it through stories
	1. Some Anishinaabe story traditions
		1. Some communities believe stories can only be told in the winter
		2. Some communities restrict who stories can be shared with
* Every legal system exists within and is constrained by a worldview—assumptions about reality
	1. We take our world view for granted—but it’s just one worldview among many
	2. Precondition for our social political and legal system
	3. Some Indigenous nations have a worldview that is very different than Westerners
	4. To learn about Anishinaabe legal traditions, we need to step outside of our worldview
		1. If we don’t, we’ll misconstrue what we’re seeing
* Aaron Mills: a legal system as a tree
	1. Roots: worldview
		1. Epistemology
			1. What counts as knowledge
		2. Cosmology
			1. How the world came to be
	2. Trunk: norms and values
		1. Constitutional order
			1. The way in which a political community constitutes itself
			2. Not necessarily documents
		2. Stems from our worldview
	3. Branches: legal traditions
		1. Informed by the trunk
		2. Ways in which we make law, practice law and unmake law
	4. Leave: the actual law
* Each level influences the next, but doesn’t determine it
	1. To understand the law (the leaves) you need to start at the roots (the worldview)

Roots

* Western epistemology (one of them):
	1. the truth is objective
	2. Students are empty vessels who lack knowledge, and they receive knowledge passively by hearing true facts
	3. Reflected in teaching methods
		1. Lecture
			1. Students receive info passively from an authority
* Anishinaabe epistemology
	1. Nanabush: a trickster, a hero (but not in western conception), someone who means well but doesn’t always live up to his intentions because he succumbs to desire
		1. Nanabush and the syrup story (Nanabush adds water to the syrup)
		2. Kwazens makes a lovely discovery story (Kwazens finds the sap, cannot make it work again, eventually she can when the sun comes out)
	2. Syrup is knowledge, making it into the syrup is learning
	3. Sharing of knowledge is good
	4. We can learn from anyone, not just an authority
	5. An obligation to apply and work with knowledge instead of just receiving it
		1. Necessity to actively engage
			1. Kwazens use agency to acquire knowledge
			2. The sap has to be WORKED to become syrup
	6. Communal learning, and the encouragement of others
		1. The reason Kwazen can succeed is because she exists in a community with others
		2. True learning only exists within the interconnected web of kinship relationships
* This Anishinaabe epistemology is reflected in Anishinaabe conceptions of truth
	1. When Anishinaabe say “truth” that doesn’t mean objective truth, it bmeans that the person is saying what they know based on their experiences
	2. Once someone tells you a teaching, that doesn’t mean you now have knowledge of that teaching
		1. To truly have knowledge of something—like a law—you have to live it
		2. For the Anishinaabe, “the law is written in their hearts”

Trunk

* Liberal Constitutional Framework
	1. Autonomous individuals
		1. In the state of nature, individuals have radical autonomy
		2. We agree to give up some autonomy for the protection of a state
			1. Social contract
		3. This means the state is legitimately able to exercise force over individuals to protect the safety of everyone
		4. In exchange for our autonomy, we get rights and obligations
			1. Many of these rights are designed to uphold autonomy, as much as feasible
			2. This is often characterized as negative freedom: freedom from intrusion
				1. The state also has obligations to citizens: positive freedoms
		5. The end goal of liberal orders is justice
			1. A state that exists when rights are upheld and obligations met
* Anishinaabe Constitutional Framework
	1. Interdependent
		1. Mutual aid
			1. Characterized by gifts and need
				1. If you are in a relationship then you have a responsibility to offer your gifts to the others with whom you have a relationship
				2. Obligations exist in Anishinaabe framework, but RIGHTS don’t exist
			2. See the Flood story
				1. the animals take turns to stay on the log
				2. humans don’t dominate the natural world—they are the most dependent on it, in fact
				3. Interesting contrast to Noah: man has dominion over the animals and is responsible for saving them, in this story Nanabush is not in control, he’s one of many animals, he leads by example (tries to find the mud first) and others are persuaded by it
				4. Gifts and need: muskrat keeps going in the pursuit of meeting the needs of others, at the expense of his life
				5. Our gifts are not for our own benefit, our responsibility is to give our gifts away
	2. The end goal of Anishinaabe order is harmony
		1. Although, it’s NOT an end goal in the same way as a western conception, it’s a circle—harmony allows for interdependence and interdependence allows for harmony
		2. The state in which each person is open to receiving gifts and giving their gifts away
		3. A state of interconnection that binds us into a cohesive community
	3. Responsibility to share gifts when you’re in a relationship
		1. Woodpecker story:
			1. We don’t have the same gifts to give (woodpecker can peck into the tree, but Nanabush can’t)
		2. Fox and Snake story (man kills the fox who saved him after promising he wouldn’t):
			1. We intend what’s best but don’t always live up to our responsibilities
			2. In a contractual arrangement we make obligations clear up front, but mutual aid allows for a less binary relationship and a more interconnected community—A gives a gift to B, and B gives a gift to C or D, and all benefit
			3. Over time, gifts change and needs change, the relationship can change as well

In the Circle

* The goal is to build consensus
* The way to agree is to repeat what was said
* To disagree, you just don’t repeat it: once enough people disagree, the point falls by the wayside

January 25

Recap of Anishinaabe dispute resolution

* One insight: collective vs the individual
	1. Conflict in the stories about how Anishinaabe treat the collective
		1. Beaver gives a fest: collective denies otter the chance to come to the feast
		2. Beaver is a leader, but not in the way Westerners understand
			1. He leads by example and by connecting the community
			2. Decision making happens by the community
			3. The community decides that Otter shouldn’t come
			4. Beaver, the leader, who wanted Otter to come, doesn’t overrule the decision—he cannot, because power is diffuse and is spread through the community
			5. Persuasive compliance vs coercive authority
				1. There’s no mechanism the animals can use to keep Otter away, he has to agree—and he does
				2. Why does persuasive compliance work?

The logic of gifts and need: if Otter doesn’t comply with the community’s decision, the community will take away its gifts, and Otter’s needs won’t be fulfilled

Is this coercion? Not the same—there isn’t a higher power, a state, that can enforce such a ruling

Beaver, the leader, exercises humility

Internalizing the teachings—having the laws imposed from within, not from without—is another reason why persuasive compliance works

The notion of punishment rises from our rights and obligations—if rights are violated, there must be some punishment

* + - * 1. However, it’s possible to use force in Anishinaabe law: see the Windigo story

This wasn’t about punishment

The community had a need to be safe from him, it waited a long time to see if he would get better, then they took steps to keep the community safe

Restorative justice: the community replaced the father’s son, and provided gifts

See the logic of gifts and need

Is what happened in the Windigo story uncivilized?

We need to step back and ask: what drives this concern?

The death penalty was legal until the 1970s (last imposed 1962)

Is the reason we might consider it uncivilized the assumption that a state legal system is more legitimate than this non-state society legal system?

Positivistic conception of law: in order for there to be a legal system there needs to be an entity with the legitimate right to enforce the law

If we apply this to the Anishinaabe, we don’t necessarily see this operating

This is an error: Anishinaabe have a legal system, even if it doesn’t meet the requirements of positivism

You can’t apply the legal values of one system onto another

* 1. The crane and the loon
		1. The loon privileges the collective, and things don’t go well
			1. But doesn’t Anishinaabe culture privilege the collective?
		2. The liberal framework privileges the individual over the collective
		3. When we look at other frameworks, we interpret them as a dichotomy (like we interpret it) and apply it to others
		4. But this is wrong: Anishinaabe don’t make this dichotomy
		5. The individual’s needs should be fulfilled through gifts, and they should give gifts as well
		6. If every individual’s needs are fulfilled, the collective is in harmony and all needs are fulfilled
		7. What the loon didn’t understand was that he needed to fulfill the needs of each individual, instead of trying to fulfill the needs of an overarching good
		8. It’s possible that this is only applicable to small communities that don’t have anonymity as a feature
	2. Windigo
		1. Takes procedural principles from it – John Burrows
			1. Waiting
				1. The community waits to see what will happen
				2. Delay is an access to justice failure in our system
* Next week Indigenous Legal Services will come to discuss Aboriginal Dispute Resolution
	1. Think of the principles we’ve discussed

# Is case management effective?

* The Honourable Colin L Campbell, “Managing the civil process” (Spring, 2013)
	+ based on rules, one would assume ON has great cases management process and have addressed access to justice problem. WRONG. In Ottawa, is effective - accepted by parties and judicial resources are there. Toronto - parties not opting into it, and even when parties ordered to proceed under case management, judge’s are taking hands off approach; waiting time is 9 months for a master’s motion. Motion for summary judgment is 14 months. In Thunder Bay its 10 days, motions are heard every Thursday.
	+ Campbell: we need more resources for more case management - hire more judges or case masters (but they costs $$$). So add resources by hiring third parties as private judges; contracted officials empowered to case manage. Like pool of mediators in Mand. Med. program.
* David E Gruber, “Addressing the Vanishing Trial: A Historical Perspective”
	+ disagrees with Campbell - adding more hwy infrastructure creates more demand for more hwy’s. Instead, go back to 1883 - get rid of all pre-trial civil litigation process - no preliminary motions, discovery; client has issue, walks into lawyer’s office, and in a couple weeks you go to trial. People would rather have trial by fire/surprise than no trial at all. Irony: purpose of pre-trail (ie motion for summary judgement) is to promote early disposition of the litigation by knowing the case they have to meet at the outset and know what the case is worth, and settle early, but actually contribute to access to justice crisis.
* middle ground?: proportionality - zealous advocacy “no stone left unturned” has to give way. Problem: simply saying you need proportionality does not change the cultural lawyer norm.